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THE

MONTANA DIGEST

BY

THOMAS A. MAPES

A MEMBER OF THE BAR

A Brief Digest of all the Decisions of the Supreme Court of the Territory and State of Montana Reported in Volumes 1 to 32, inclusive, of the Montana Reports.

HELENA
STATE PUBLISHING CO
1907

THIS VOLUME IS PRESENTED TO THE MEMBERS OF THE BAR OF MONTANA AS THE RESULT OF TWO YEARS OF THE BEST AND MOST CONSCIENTIOUS LABOR I HAVE BEEN ABLE TO GIVE IT. THERE MAY BE SOME ERRORS AND OMISSIONS IN THE BOOK, BUT THEY WILL BE VERY FEW, AND THE LAWYER WHO CONSULTS THE DIGEST MAY RELY UPON FINDING PRACTICALLY EVERY DECISION OF THE COURT UNDER THE PROPER SUBJECT AND SUBDIVISION.

THOMAS A. MAPES.

HELENA, MONT.,
JULY 10, 1907.

Table of Montana Cases Reported in the Pacific Reporter

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Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	1	727	87	5	314	217	1	745	299	1	714	370	1	759	464	5	326	527	2	769
8	5	281	100	5	318	223	2	286	309	1	713	400	2	275	468	2	313	536	2	759
35	1	737	115	5	287	226	2	315	318	1	401	412	2	25	475	1	751	550	2	280
38	1	721	141	1	738	234	2	16	342	1	710	421	1	757	489	1	214	560	2	298
46	1	724	143	1	742	280	1	748	356	5	324	433	2	21	499	2	284	596	1	720
52	2	544	149	1	732	292	1	750	364	1	743	457	2	19	513	1	11	597	2	312
80	2	546	174	1	414	295	1	747	367	1	755									

VOL. 5, MONTANA REPORTS.

Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	1	209	103	2	306	242	5	248	300	5	867	438	5	588	512	6	344	562	6	60
15	2	317	107	2	320	246	5	250	303	5	869	458	6	365	518	6	358	566	6	19
26	1	1	111	2	322	248	5	252	324	5	878	463	6	367	523	6	361	568	6	20
53	2	310	146	3	134	251	5	279	325	5	879	478	6	353	535	6	363	577	6	23
59	1	421	202	3	255	253	5	278	336	5	894	485	6	333	538	6	349	579	6	24
68	1	204	214	2	338	255	5	280	344	5	897	498	6	337	549	6	347	600	6	66
89	2	308	226	2	346	257	5	847	352	6	30	502	6	342	554	6	356	605	5	885
92	1	717	234	2	350	274	5	856	378	5	570	505	6	339	556	6	16	618	6	62
96	1	409	237	5	254	295	5	865	427	5	583									

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Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	9	445	76	9	434	147	9	918	226	9	925	288	12	652	373	12	775	473	13	136
5	9	575	112	9	886	153	9	911	237	11	668	295	12	655	379	12	851	482	13	140
10	9	447	114	9	903	161	9	889	240	11	669	297	12	662	397	12	858	485	13	195
12	9	536	119	9	900	167	9	892	242	11	670	300	12	664	409	12	865	491	13	198
14	9	578	121	9	899	169	9	898	243	11	637	303	12	678	416	12	916	492	13	198
19	9	537	122	9	901	172	9	827	246	11	638	306	12	688	442	12	922	498	13	247
29	9	543	125	9	896	180	9	814	247	11	639	318	12	694	448	13	45	502	13	249
30	9	585	129	9	894	187	9	826	251	12	597	319	12	702	453	13	118	566	13	385
31	9	581	131	9	894	190	9	823	271	12	639	323	12	750	457	13	124	580	13	367
39	9	586	132	9	821	194	9	809	275	12	641	340	12	763	460	13	125	596	13	375
53	8	153	135	9	887	203	9	798	285	12	646	345	12	765	464	13	127	601	13	377
65	9	116	138	9	819	215	9	906	287	12	647	351	12	769	467	13	132	609	13	382
72	9	432	142	9	922	223	9	916												

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Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
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1	14	647	89	14	659	171	14	761	288	16	576	365	16	573	440	17	113	530	19	210
4	14	654	100	14	663	179	14	699	299	17	258	373	17	34	443	17	560	541	19	216
12	14	651	102	14	646	185	14	701	307	16	588	384	17	557	449	17	728	545	19	249
19	14	648	103	14	663	195	14	758	313	17	260	385	16	846	464	17	551	550	19	218
30	14	643	107	14	865	206	14	717	320	17	451	394	16	726	473	17	548	559	19	209
31	14	669	108	14	697	225	14	705	326	16	589	402	16	850	479	17	561	562	19	217
38	14	631	114	14	665	238	14	703	329	16	590	407	17	627	486	17	563	566	19	213
42	14	768	121	14	707	245	14	671	330	16	931	417	16	569			564	573	19	221
61	14	656	146	14	667	251	15	145	346	17	108	429	17	557	489	17	718	581	19	215
70	14	633	150	14	763	264	17	74	356	17	547	434	17	554	514	12	204	585	19	281
82	14	658	162	14	637	266	16	580	360	17	114									

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Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
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1	19	293	135	19	386	196	19	394	265	21	23	322	20	652	371	20	654	440	20	669
20	19	251	140	19	286	201	19	307	271	20	314	328	21	301	380	20	820	451	20	658
31	19	553	146	19	594	208	19	574	279	21	25	333	20	637	389	21	22	467	20	823
32	19	403	151	19	595	214	19	589	283	20	693	336	20	691	396	20	809	482	20	664
57	19	558	157	19	593	225	19	571	291	20	641	341	20	638	416	20	642	493	20	807
85	19	288	163	19	594	233	19	414	298	20	807	347	21	26	419	20	646	494	20	806
95	19	387	168	19	395	242	19	384	305	21	25	353	20	643	431	20	650	495	20	806
110	19	595	174	19	553	248	19	302	310	21	663	361	20	650	432	20	688	499	20	817
124	19	396	186	19	585	259	19	310	312	21	126	365	20	687		21	19	508	21	20
131	19	398																		

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Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	22	495	63	22	151	108	22	448	201	23	515	288	23	510	398	24	22	468	23	1022
5	22	121	66	22	152	113	22	454	223	23	733	308	23	469	399	24	22	477	24	266
6	22	496	67	22	760	126	22	386	243	23	470	315	23	713	405	24	263	490	24	23
12	22	132	75	22	498	145	22	383	251	23	244	323	23	718	408	24	18	497	24	93
16	22	121	81	22	453	154	22	492	254	23	333	341	23	726	418	24	22	508	24	213
21	22	346	85	22	500	167	23	76	265	23	337	349	23	423	419	24	209	526	24	14
32	22	147	88	22	501	174	22	1088	267	23	715	354	23	729	435	24	206	537	24	17
46	22	134	97	22	503	179	23	335	276	23	723	370	23	740	445	24	265	543	24	200
52	22	450	99	22	499	182	22	1148	279	23	723	381	23	933	452	23	1018	577	24	217
61	22	120	101	22	763	191	23	74	286	23	723	389	24	96						

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1	24	627	90	24	704	168	25	120	283	25	1037	369	25	1045	445	26	185	515	26	1002
5	24	695	107	24	692	186	25	102	296	25	1024	370	25	1046	456	26	182	524	26	1000
17	24	698	115	25	97	201	25	438	298	225	1030	381	25	1049	462	26	184	528	26	1001
21	24	628	124	25	30	210	25	288	304	25	1039	390	25	1056	467	26	202	533	26	999
24	24	626	134	25	94	212	25	289	311	25	1032	398	25	1052	473	26	198	537	26	1066
	25	278	146	25	442	213	25	289	325	25	1041	401	25	1053	485	26	197	549	27	349
57	24	699	147	25	442	222	25	101	330	25	1042	407	25	1055	488	26	383	563	27	404
61	24	749	149	25	29	223	25	99	340	25	953	410	25	1022	496	26	388	571	27	399
73	24	701	154	25	92	228	25	105	362	25	960	414	25	1058	497	26	386	586	27	389
81	24	702	162	25	440	280	25	438	367	25	961	422	25	1025	500	26	388	590	27	379
87	24	700	166	25	100	281	25	438	368	25	962	426	25	1026	509	26	1005			

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1	27	342	84	27	396	155	27	511	225	28	259	303	28	289	429	28	643	513	29	280
27	27	339	86	27	407	159	27	513	227	28	260	309	28	315	434	28	644	523	29	15
34	27	347	88	27	393	160	27	408	229	28	305	351	28	312	435	28	450	533	29	90
38	27	386	91	27	397	164	27	681	236	28	307	365	28	650	438	28	551	541	29	92
51	27	391	99	27	384	171	27	725	245	28	258	370	28	732	439	28	741	553	29	89
53	27	381	109	27	446	185	27	791	247	28	260	385	28	451	451	28	872	556	29	340
63	27	384	115	27	403	196	28	645	251	28	296	390	28	736	473	29	190	568	29	343
67	27	352	122	27	334	216	28	650	265	28	301	408	28	453	483	28	729	571	29	282
74	27	392	126	27	336	219	27	790	281	28	310	416	28	456	490	28	1116	577	29	337
77	27	394	138	27	442	222	27	919	285	28	291	422	28	457	498	28	969			

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1	29	277	119	29	720	226	29	732	282	29	1121	354	30	386	503	31	78	545	31	550
11	29	534	122	29	966	230	29	819	292	30	140	378	30	679	509	31	75	551	31	537
23	29	658	149	30	25	235	29	824	297	30	78	395	30	676	519	31	74	563	31	544
44	29	721	163	30	268	239	29	882	300	30	79	404	31	371	523	31	78	566	31	592
66	29	425	197	29	424	242	29	1044			140	456	31	63	524	31	72	577	31	639
82	29	729	203	29	532	246	29	1120	301	30	266	458	31	66	531	31	64	586	31	542
92	29	654	212	29	545	248	29	1124	309	30	393	474	31	87	537	31	536	590	31	533
102	29	883	218	29	821	279	29	966	316	30	280	489	31	92	539	31	543	598	31	541

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Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	31	723	112	32	413	184	33	132	246	33	688	368	34	184	416	34	609	471	34	846
10	31	721	116	32	415	190	33	5	248	33	690	370	34	298	423	34	613	476	34	1017
15	31	999	123	32	491	195	33	1	250	34	360	377	34	180	424	34	608	487	34	1020
23	31	879	125	32	492	204	33	6	269	34	30	384	34	182	425	34	847	497	34	1015
58	31	1017	127	32	651	209	33	134	288	34	37	387	34	185	428	34	728	500	34	844
64	32	1	136	32	648	215	33	1012	293	34	313	394	34	488	432	34	848	504	34	1092
70	32	163	143	32	653	222	33	192	300	34	36	398	34	490	435	34	880	508	35	111
76	32	282	152	32	675	223	33	817	302	34	28	399	34	179	438	34	726	522	35	228
83	32	283	160	32	647	226	33	938	306	34	301	401	34	189	444	34	876	551	35	243
87	32	285	164	32	854	229	33	689	347	34	39	403	34	315	458	34	957	552	35	240
96	32	287	170	32	753	235	33	937	351	34	24	406	34	607	465	34	770	559	35	2
108	32	291	181	33	3	239	33	1010	363	34	187	411	34	611	469	34	1016			

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Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	34	1090	81	35	515	201	36	44	301	36	178	354	36	452	405	36	828	480	36	1042
8	35	1	85	35	667	203	36	193	311	36	185	355	36	452	423	36	814	484	37	5
12	35	108	88	35	668	208	36	38	315	36	191	359	36	453	426	36	957	498	37	10
20	35	227	96	35	722	227	36	43	320	36	194	361	36	454	451	36	1077	506	37	12
23	35	243	104	35	724	228	36	44	325	36	312	366	36	455	452	37	9	508	37	366
31	35	460	121	35	878	243	36	48	332	36	177	375	36	450	455	36	1043	520	37	95
62	35	226	124	35	904	245	36	185	334	36	318	381	36	458	458	36	1044	541	37	1
64	35	458	131	35	958	261	36	81	335	36	317	383	36	449	462	36	1046	553	37	13
70	35	455	138	35	906	269	36	84	338	36	877	386	36	759	462	36	1076	558	37	607
76	35	226	143	35	908	274	36	182	341	36	354	396	40	66	467	36	1077	567	37	363
78	35	227	153	35	960	292	36	313	343	36	355	399	36	815	476	37	7	577	37	969
79	35	514	197	35	1064	300	36	81	352	36	357									

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Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	37	838	101	38	224	162	38	829	224	38	1079	301	39	83	424	39	322	506	39	739
6	37	839	106	38	226	176	38	834	228	38	1077	309	39	285	429	39	456	611	39	738
8	37	840	116	41	1077	177	38	833	236	38	1072	314	39	82			852	515	39	740
20	37	897	117	38	547	181	38	827	244	38	1072	317	39	314	433	39	457	522	39	742
29	37	845	121	38	459	189	38	940	245	38	1075	324	39	316	439	39	520	539	39	850
47	38	223	133	38	462	194	39	93	253	39	88	340	39	313	446	39	459	544	39	914
49	38	115	137	38	464	201	38	1067	260	38	1063	343	39	312	452	39	571	552	39	906
74	38	222	143	38	674	212	38	939	267	39	90	345	39	291	460	39	575	554	39	849
79	38	228	153	38	713	214	38	1065	274	39	286	347	39	292	464	39	573	556	39	848
100	38	228	159	38	711	219	38	1070	290	39	85	403	39	461			851	558	39	1054
												417	39	517	474	39	506	582	39	906

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Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	39	912	87	40	77	180	40	292	274	40	600	333	40	789	389	41	137	504	41	232
8	39	909	90	40	71	189	40	294	278	40	698	335	40	863	390	41	77	550	41	248
14	39	911	93	40	146	198	40	410	294	40	596	342	40	788	393	41	443	555	41	710
16	39	916	97	40	217	205	40	377	297	40	762	343	40	861	395	41	250	559	41	712
21	39	905	103	40	171	211	40	290	302	40	589	349	40	787			851	561	41	709
24	40	67	110	40	182	217	40	303	303	40	599	351	40	786	463	41	431	564	41	710
33	40	63	117	40	145	221	40	590	307	40	597	356	40	865	465	41	271	565	41	708
40	40	80	119	40	176	234	40	602	308	40	597	360	40	873	467	41	75	570	41	706
63	40	63	135	40	175	243	40	866	309	40	600	372	40	877	472	41	231	574	41	852
65	40	78	138	40	173	265	40	873	312	40	696	376	41	76	474	41	230	580	41	855
70	40	73	143	40	171	266	40	605	318	40	597	379	41	137	479	41	271	581	41	855
81	40	70	145	40	210	267	40	589	322	40	606			102	484	41	273	582	41	1002
85	40	72	164	40	298	271	40	595	331	42	74	384	41	135						

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Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	41	849	88	42	105	187	42	767	334	42	860	433	43	499	487	43	627	542	43	921
17	41	998	90	42	108	189	42	767		43	713	440	43	504	490	43	713	545	43	923
32	41	995	94	42	105	213	42	772	353	42	1057	445	43	497	491	43	716	547	43	923
41	41	1004	100	42	273	220	42	775		43	714	448	43	501	493	43	713	548	44	83
53	41	1003	140	42	285	295	42	757	369	42	1015	455	43	505	494	43	706	553	44	81
54	41	1078	150	42	289	299	42	853	372	43	81	461	43	494	502	43	714	558	44	87
61	42	109	156	42	758	311	42	856	389	43	180	465	43	500	510	43	709	563	44	88
67	42	100	164	42	760	315	42	857	394	43	185	469	43	631	518	43	712	565	44	89
77	42	103	167	42	761	322	42	851	411	43	385	473	43	628	519	43	924	575	44	75
80	42	104	176	42	763	327	42	849	413	43	180	476	43	626	529	43	928	581	44	77
83	42	98	177	42	763	329	42	850	417	43	182	479	43	633	537	43	922	586	44	86
87	42	100	184	42	766	333	42	852	426	43	496	481	43	629	541	43	924			

VOL. 18, MONTANA REPORTS.

Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	43	1091	94	44	394	199	44	966	293	45	210	372	45	560	459	45	1081	548	46	533
	44	399		45	661	208	44	979		46	1116	385	45	548	468	45	1087	554	46	1116
13	44	79	110	44	407	216	44	959	303	45	210	389	45	553	473	46	266	556	46	440
19	44	85	119	44	440	224	44	973	305	45	221	392	45	549	481	46	259	557	46	438
22	43	1094	125	44	406	246	44	979	311	45	222	398	45	559	487	46	261	560	46	1117
28	44	80	126	44	522	247	44	969	317	45	278	402	45	572	493	46	264	561	46	442
31	44	279	128	44	516	259	44	821	326	45	213	410	45	552	499	46	258	562	46	1117
32	44	280	152	44	528	263	44	983	335	45	218	413	45	555	502	46	370	563	46	808
35	44	401	164	44	514	265	44	962	342	45	217	418	45	634	512	46	535	568	46	809
43	44	406	167	44	525	279	44	982	348	45	216	432	45	632	525	46	439		47	4
45	44	403	174	44	523	282	45	207	350	45	204	440	45	662	528	46	443	591	46	816
51	44	411	177	44	523	290	45	215	362	45	557	444	45	632	533	46	441	593	47	209
87	44	409	183	44	954	292	46	1116	367	45	551	446	45	1084	537	46	437	595	46	806
92	44	407	198	44	959			1117	370	45	554	453	45	1089	540	46	530			

VOL. 19, MONTANA REPORTS.

Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	47	102	87	47	635	177	47	803	249	47	999	364	48	553	421	48	743	512	49	441			
6	47	103	95	47	650	184	47	809	263	48	8	368	48	552	422	48	765	518	49	15			
11	47	203	104	47	640	188	47	805	273	48	1	372	48	549	444	48	773	541	48	1106			
22	47	5	110	47	639	191	47	810	294	48	234	374	48	549	450	48	745	545	48	1111			
23	47	5	113	47	634	200	47	995	300	48	232	377	48	545	454	48	778	548	48	1112			
30	47	327	115	47	642	206	47	900	306	48	303	385	48	548	462	48	757	554	48	1108			
48	47	207	123	47	638	209	47	898	313	48	305	389	48	743	467	48	775	557	49	395			
53	47	206	128	47	645	215	47	953	323	48	391	393	48	1118	474	48	753	562	48	1103			
		958	135	47	795	223	47	952	329	48	390	394	48	747			1118	564	49	145			
56	47	212	141	47	793	228	47	901	333	48	390	397	48	746	483	48	898	571	49	148			
61	47	209	147	47	795	231	47	956	335	48	626	401	48	1118	488	48	988	575	49	400			
69	47	1101	149	47	798	236	47	998	341	48	394	402	48	762	501	48	1104	582	49	147			
70	47	334	163	47	791	239	47	1004	355	48	550	411	48	758	508	48	1109	586	49	149			
78	47	648	169	47	806	245	47	997	359	48	624												

VOL. 20, MONTANA REPORTS.

Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	49	382	80	49	381	181	50	416	234	50	716	327	51	265	407	51	827	488	52	264			
13	49	398	84	49	390			1101	238	50	719	336	51	159	413	51	975	495	52	199			
20	49	446	91	49	437	191	50	412	249	50	713	343	50	1101	419	51	1103	498	52	267			
42	49	393	103	49	591	192	50	419	260	50	723		51	161	420	51	1033	503	52	206			
		1118	115	49	590	197	50	412	270	50	793	347	51	263	424	51	1034	510	52	268			
44	49	445	118	49	658	198	50	420	273	50	794	354	51	155	438	52	55	523	52	263			
47	49	393	124	49	651	203	50	559	279	50	791	361	51	739	444	52	53	528	52	273			
		1117	139	49	656	208	50	556	284	50	852	364	51	738	450	52	83	533	52	375			
54	49	443	143	49	740	214	50	554	289	50	936	367	51	820	453	52	208	544	52	372			
60	49	591	153	50	421	219	50	558	293	50	854	371	51	823	457	52	84	554	52	375			
61	49	386	158	50	413	222	50	556	299	51	267	374	51	821	462	52	204	555	52	558			
64	50	129	163	50	414	223	50	553	315	50	1017	379	51	829	468	52	200	560	52	553			
67	49	387	168	50	423	225	50	553	318	50	1018	394	51	824	477	52	196	574	52	611			
77	49	397	173	50	410	230	50	718	322	51	157												

VOL. 21, MONTANA REPORTS.

Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	52	563	59	52	780	143	53	97	188	53	540	344	53	1133	466	54	1134	534	55	108			
7	52	560	71	52	782	146	53	272	192	53	538	345	53	1064	469	54	939	539	52	375			
9	53	101	83	52	785	148	53	183	199	53	541	367	54	43	478	54	816	544	55	229			
13	52	561	93	52	981	151	53	184	200	53	621	374	54	46	482	54	942			353			
18	52	617	102	52	1098	155	53	272	205	53	738	440	54	563	487	54	963	572	55	110			
26	52	645	109	53	94	160	53	310	216	53	536	448	53	1114	507	54	943	578	55	107			
36	52	642	117	53	96	165	53	314	221	53	623	456	54	562	515	55	29	582	55	523			
46	52	641	120	53	99	170	53	312	251	53	742	458	54	566	523	55	32	591	55	359			
49	52	779	130	53	103	176	53	315	277	53	749	464	54	562	532	55	29	595	55	539			
50	52	733	133	53	179	184	53	493	291	53	959												

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Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	55	360	110	55	1037	245	56	227	323	56	361	398	56	827	462	56	1079	519	57	94			
4	55	355	140	55	1051	249	56	216	327	56	362	403	56	824	470	56	961	525	57	140			
14	55	361			1097	254	56	218	331	56	590	418	56	822	484	56	965	534	57	143			
17	55	526	147	55	1049	256	56	280	340	56	592	425	56	820	491	56	967	539	57	146			
25	55	916	151	55	1047	258	56	278	352	56	1134	430	56	868	501	57	88	541	57	279			
33	55	1026	159	56	120	262	56	279	354	56	354	438	56	865	502	57	95	547	57	183			
68	55	919	169	56	106	266	56	316			582	445	56	867	511	57	92	553	57	181			
92	55	927	184	56	20	290	56	315	373	56	589	449	57	89	516	57	94	559	57	281			
100	55	915	190	56	111	293	56	364	376	56	687			145	517	57	88	577	57	278			
103	55	913	220	56	219	305	56	356	384	56	818	460	56	1081	518	57	1102	580	57	274			
107	55	918	241	56	281	312	56	358	391	56	685												

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Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	57	440	65	57	557	131	57	1092	229	58	551	311	58	870	375	59	154	498	59	854			
16	57	405	70	57	648	140	58	45			811	319	58	866	382	59	856	504	59	903			
23	57	407	79	57	647	146	57	1038	250	58	439	323	58	868	387	59	153	523	59	927			
27	57	447	82	57	650	165	57	1037	259	58	711	329	58	867	390	59	364	530	59	910			
33	57	445	94	57	726	171	57	1095	260	58	709	334	58	865	401	59	439	532	59	924			
41	57	408	95	57	869	177	58	111	273	58	718	337	59	1	425	59	367	540	59	919			
43	57	439	113	57	727	205	58	42	285	58	712	338	59	1	450	59	445	557	59	919			
44	57	449	118	57	725	213	58	47	305	58	722	351	59	167	473	59	721	558	59	916			
52	57	452	122	58	40				310	58	810	358	59	169	484	59	911	564	59	917			

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Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	60	489	113	60	817	178	61	1	255	61	650	340	61	861	403	62	588	487	62	820
13	60	396	117	60	807	184	61	3	268	61	653	346	61	878	411	65	1003	487	63	41
20	60	398	121	60	1038	198	61	8	281	61	647	348	61	990	413	62	591	494	62	820
31	60	488	122	60	991	202	61	1	287	61	649	352	61	883	425	62	688	501	62	920
33	60	493	123	60	989	207	61	131	292	61	648	359	61	987	428	62	497	506	62	922
37	60	495	125	60	1039	218	61	1134	293	61	658	367	62	413	433	63	390	515	63	98
45	60	589	140	60	989	219	61	250	295	61	994	369	62	495	447	63	401	521	63	99
58	60	587	142	60	990	234	61	129	306	61	991	369	62	685	450	62	686	539	63	395
65	60	594	145	60	1087	237	61	129	316	61	863	376	62	414	457	62	780	566	63	389
65	60	991	148	60	1088	238	61	309	327	61	880	379	62	493	470	62	783	569	63	831
81	60	809	148	61	309	241	61	1134	330	61	882	383	62	583	483	62	819	575	63	375
90	60	813	154	60	1086	242	61	1134	335	61	879	397	62	683	485	62	818	591	63	380
108	60	811	159	61	9	243	61	468												

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Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	63	402	87	63	830	156	64	324	258	64	669	355	65	120	456	65	896	567	69	1130
4	63	624	89	63	927	163	64	222	268	64	664	367	65	106	497	65	919	567	69	1132
11	63	627	107	63	926	164	64	330	272	64	665	379	65	111	504	65	1020	568	69	1130
14	63	719	111	63	1036	188	64	351	283	64	768	385	65	5	525	65	1004	568	69	1132
24	63	715	112	63	1030	194	64	347	286	64	765	391	65	114	543	65	912	569	69	1130
30	63	686	122	63	1033	202	64	352	296	64	884	410	65	425	563	69	1131	569	69	1131
31	63	686	131	69	836	214	64	502	306	64	876	417	65	424	563	69	1132	570	69	1132
33	63	717	132	63	1042	218	64	511	315	64	879	421	65	428	564	69	1130	571	69	1131
38	63	798	135	63	1043	218	69	835	330	64	873	427	65	420	564	69	1131	571	69	1132
41	63	825	139	64	326	226	64	503	330	65	113	432	65	422	565	69	1132	572	65	1020
81	63	799	149	63	1043	242	64	506	343	65	5	439	65	718	566	69	1130	572	69	1130
85	63	799	151	64	219	256	64	668	344	65	1	444	65	714	566	69	1131	572	69	1131

VOL. 26, MONTANA REPORTS.

Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.	Mont. Rep.		Pac. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	66	293	121	66	754	241	67	308	358	67	1121	416	68	946	524	69	54	553	71	1130
3	66	291	128	66	756	253	67	312	360	68	17	426	68	859	533	69	103	553	71	1132
9	66	290	140	66	759	262	67	1133	365	68	409	433	68	797	537	69	1130	554	71	1130
11	66	463	146	66	752	264	67	114	365	68	471	434	68	852	539	69	1130	554	71	1131
22	66	496	153	66	838	265	67	1134	369	68	856	452	68	798	540	69	101	555	71	1130
37	66	502	157	66	836	268	67	625	372	68	465	478	68	857	544	71	1130	555	71	1131
44	66	1087	163	66	843	269	67	626	378	68	411	483	68	861	545	71	1131	556	71	1129
45	66	496	170	66	839	274	67	625	379	68	408	487	68	1012	546	71	1131	556	71	1130
45	66	761	170	67	67	275	67	943	379	71	672	492	68	1014	547	71	1131	557	71	1131
50	66	463	190	66	942	279	67	941	384	68	410	494	68	851	547	71	1132	557	71	1132
52	66	508	193	66	943	285	67	1005	387	68	411	495	68	851	548	71	1131	560	71	1129
62	66	504	209	66	940	305	67	938	391	68	468	496	68	945	549	71	1130	560	71	1131
71	66	565	212	66	939	314	67	937	396	68	570	500	68	1113	550	71	1131	561	71	1130
76	66	597	212	68	467	316	67	934	396	69	103	503	68	1134	551	71	1129	561	71	1131
85	66	700	219	66	941	332	67	1001	412	68	1134	504	68	1114	551	71	1130	562	71	1129
92	66	600	224	67	114	339	67	1004	414	68	1133	507	68	1115	552	71	1130	562	71	1132
93	66	702	224	68	470	348	67	1118	416	68	794	517	69	56	552	71	1131	563	71	1129
107	66	748	227	67	114															

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1	69	102	107	69	829	182	70	982	327	71	3	415	71	401	506	71	761	551	73	1134
13	69	115	107	70	517	185	70	519	342	71	1	419	71	404	511	71	763	552	73	1133
22	69	118	128	69	988	185	70	1134	349	71	159	428	71	469	515	71	764	553	73	1133
27	69	237	134	69	671	197	70	511	355	71	161	431	71	471	516	71	755	553	73	1134
37	69	114	135	69	709	205	70	513	358	71	162	437	71	470	519	71	756	554	73	1133
40	69	244	138	69	714	212	70	717	364	71	155	441	71	602	522	71	754	554	73	1134
44	69	241	143	69	715	227	70	715	369	71	156	451	71	668	526	71	1003	555	73	1133
63	69	323	152	69	714	230	70	724	378	71	308	463	71	674	529	71	1004	555	73	1134
66	69	323	154	69	711	235	70	721	388	71	407	469	71	675	536	71	1005	556	73	1132
68	69	557	161	69	909	245	70	805	392	71	1129	473	71	665	547	73	1134	556	73	1133
70	69	672	174	70	321	264	70	975	394	71	311	480	71	672	548	73	1133	557	73	1134
79	69	557	178	70	1134	280	70	981	405	71	307	486	71	664	549	73	1133	558	73	1134
94	69	560	179	70	516	282	70	982	407	71	409	490	71	757	550	73	1133	559	73	1134
99	69	555	182	70	510	288	70	1114	410	71	403	500	71	764	551	73	1133	560	73	1133
103	69	710																		

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1	72	42	74	72	309	177	72	428	266	72	656	380	72	751	503	73	119	587	76	1133			
11	72	45	99	72	307	183	72	417	278	72	659	387	72	761	507	73	118	587	76	1134			
18	72	39	104	72	295	198	72	432	286	72	662	413	72	746	509	73	131	588	76	1132			
27	72	140	111	72	301	201	72	509	288	72	655	421	72	756	523	73	120	588	76	1133			
34	72	1103	123	72	412	202	72	641	295	72	654	435	72	821	525	73	118	589	76	1132			
35	72	1103	128	72	423	207	72	512	297	72	642	442	72	820	526	73	121	589	76	1133			
36	72	1103	129	72	416	221	72	1103	331	72	662	445	72	867	528	73	230	590	76	1133			
37	72	308	129	72	755	222	72	617	336	72	676	451	72	865	548	73	123	592	76	1133			
38	72	303	132	72	414	227	72	613	340	72	678	457	72	875	578	73	121	593	76	1131			
41	72	304	134	72	423	237	72	621	357	72	663	460	72	972	583	76	1132	593	76	1132			
42	72	304	147	72	415	255	72	618	360	72	755	462	72	972	584	76	1132	594	76	1132			
45	72	291	150	72	414	267	72	658	366	72	753	468	72	978	585	76	1132	594	76	1134			
51	72	297	153	72	420	268	72	657	378	72	748	482	72	988	585	76	1134	595	76	1134			
64	72	293	159	72	429	268	72	620	379	72	750	484	72	982	586	76	1132	583	76	1134			
69	72	305	170	72	510	264	72	653															

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1	73	965	96	74	406	228	74	406	321	74	871	428	75	89	562	75	1184	570	78	1116			
5	73	1107	105	74	132	230	74	412	336	74	869	463	75	1135	563	78	1117	571	78	1115			
11	73	1109	111	74	135	234	74	410	342	74	942	464	75	1134	563	78	1117	571	78	1117			
17	73	1111	116	74	130	240	74	448	347	74	938	466	75	82	564	78	1116	572	78	1115			
28	73	1106	125	74	415	246	74	450	363	74	1078	470	75	84	564	78	1117	572	78	1116			
31	74	64	132	74	197	253	74	452	370	74	1080	478	75	359	565	78	1116	573	78	1115			
38	74	72	139	74	201	263	74	456	373	74	1083	486	75	81	565	78	1117	573	78	1117			
45	74	69	153	74	200	265	74	498	375	74	1095	490	75	87	566	78	1115	575	78	1116			
55	74	81	157	74	413	273	74	725	390	74	1081	496	75	357	567	78	1116	575	78	1117			
61	74	82	161	74	421	283	74	735	395	74	1135	504	75	355	567	78	1117	576	78	1115			
71	74	80	176	74	414	288	74	740	396	74	1134	508	75	362	568	78	1116	576	78	1116			
74	74	77	179	74	866	292	74	728	397	74	1088	523	75	201	569	78	1115	576	78	1117			
80	74	75	210	74	407	308	74	737	397	76	211	530	75	196	569	78	1117	577	78	1117			
88	74	67	218	74	418	317	74	734	415	74	1084	548	75	191	570	78	1115	578	78	1115			

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1	75	518	76	75	688	181	76	2	267	76	290	338	76	758	414	76	939	507	77	55			
8	75	516	83	75	860	185	75	1109	269	76	289	348	76	757	421	76	1040	518	77	50			
13	75	515	87	75	859	189	76	1	273	76	563	351	76	751	433	76	943	529	77	312			
18	75	521	93	75	862	193	76	10	275	76	563	363	76	755	442	76	1005	547	77	318			
25	75	523	96	75	956	281	81	349	289	76	691	367	76	756	446	76	1007	550	77	413			
30	75	513	111	75	953	206	76	306	297	76	698	370	76	998	456	77	50	562	77	58			
36	75	524	117	75	963	220	76	203	299	76	694	384	76	805	458	76	1003	576	81	1134			
48	75	681	144	75	969	229	76	211	306	76	699	390	76	805	466	76	1039	577	81	1134			
61	75	685	148	75	950	238	76	1132	314	76	696	393	76	808	472	76	1044	578	81	1134			
69	75	680	158	76	4	239	76	194	314	77	319	406	76	941	484	77	421	579	78	1117			
73	75	690	172	75	1109	264	76	291	323	76	701	410	76	942	490	77	47	579	81	1134			

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1	77	293	85	77	431	177	77	527	266	78	500	356	79	244	448	78	774	526	79	1			
9	77	309	91	77	419	184	77	689	276	78	483	359	78	595	452	78	768	563	79	248			
15	77	307	100	77	512	184	81	3	279	78	493	365	78	760	454	78	1116	577	79	254			
21	77	302	107	77	519	195	78	215	294	78	484	386	78	597	455	78	965	595	79	242			
34	77	311	115	77	428	218	78	487	298	78	519	408	78	591	461	78	971	602	79	253			
37	77	299	120	77	418	227	78	301	314	78	579	421	78	704	461	80	248	606	79	244			
45	77	305	122	77	430	233	78	486	324	78	517	426	78	703	488	78	967	618	79	240			
45	84	73	129	77	509	238	78	303	328	78	583	428	78	769	502	78	1036	625	79	317			
57	77	296	138	77	515	243	78	220	343	78	588	438	78	702	511	79	13	631	79	320			
68	77	427	154	77	507	249	78	491	346	78	589	441	78	772	513	79	14	642	83	1118			
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4	79	403	56	79	549	143	79	698	226	79	1063	298	80	252	416	80	1027	541	81	334			
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20	79	410	102	79	693	172	80	1	251	80	251	329	80	609	442	80	1095	575	81	338			
25	79	406	110	79	695	172	80	373	254	80	239	329	80	1092	456	81	4	579	81	345			
34	79	401	119	79	702	195	79	1059	256	80	244	349	80	613	480	81	13	581	81	345			
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ACCOUNT, ACTION ON.

1. In an action on account, refusal of the court to strike out certain items which were disputed was not error.—Stagg v. St. Jean, 29 Mont. 288; 74 Pac. 740.

ACCOUNT STATED.

1. A complaint which alleges that plaintiff and defendant accounted together concerning certain work and labor, the wages due therefor, and the amount paid thereon, and that it was found that there was due plaintiff a certain sum, which defendant then and there agreed to pay, sufficiently sets forth an account stated.—McFarland v. Cutter, 1 Mont. 383.

2. From an account stated the law implies a promise to pay the balance thus acknowledged to be due, and an express promise need not be alleged.—Voight v. Brooks, 19 Mont. 374; 48 Pac. 549.

3. Code Civ. Proc., § 743, applies to actions on open unsettled accounts, and not to actions on accounts stated.—Martin v. Heinze, 31 Mont. 68; 77 Pac. 427.

4. An instrument which is the result of an agreement relating to past transactions, acknowledging an indebtedness and promising to pay it, is, in effect, an account stated, on which an action may be based, and, in the absence of fraud, error or mistake in its execution, is conclusive between the parties.—Noyes v. Young, 32 Mont. 226; 79 Pac. 1063.

ACKNOWLEDGMENT.

I. Nature and Necessity, 1.
II. Taking Acknowledgment, 2-3.
III. Contents of Certificate, 4
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I. NATURE AND NECESSITY, 1.

1. An acknowledgment is not essential to give effect to a deed as between the parties.—Taylor v. Holter, 1 Mont. 688.

II. TAKING ACKNOWLEDGEMENT, 2-3.

2. A declaration under the sole trader's act need not be acknowledged in the manner provided for the acknowledgment of conveyances.—Shed v. Blakely, 6 Mont. 247; 11 Pac. 639.

3. Acknowledgment of a deed may be taken by a notary who is the nephew and attorney of a person interested in its procurement, though such relationship would disqualify him to act as judge, under Comp. Stat., p. 203, § 547, especially where such interest merely consists in being president of a bank, the real party in interest, and surety on an official bond of the grantor against loss, as to which the bank has agreed to indemnify him.—First National Bank v. Roberts, 9 Mont. 323; 23 Pac. 718.

III. CONTENTS OF CERTIFICATE, 4.

4. An acknowledgment of a mortgage by an attorney in fact, which recites that, "personally appeared * * * B., by D., one of his attorneys in fact, and who is personally known to me to be the person described in and who executed the foregoing mortgage," is sufficient.—McAdow v. Black, 6 Mont. 601; 13 Pac. 377.

IV. LIABILITY OF OFFICER FOR DEFECTIVE CERTIFICATE, 5-8.

5. In an action against a notary for falsely certifying to an acknowledgment of a mortgage, on the security represented by which plaintiff advanced a loan, the burden was on plaintiff to show the value of the security which he would have received had the mortgage been valid.—Mahoney v. Dixon, 31 Mont. 107; 77 Pac. 519.

6. In such action the measure of damages was the value of the security which plaintiff would have received, had the mortgage been valid, not exceeding the amount loaned by defendant, and not the value of the property described in the mortgage.—Id.

7. And where the question whether plaintiff relied upon the notary's certificate was put in issue by the pleadings, it was necessary that the fact of such reliance should be supported by the proof and submitted to the jury.—Id.

8. There can be no recovery in damages against a notary for falsely certifying to an acknowledgment unless the person seeking such recovery relied on the statements contained in the notary's certificate, so that the damages to him were proximately caused by the notary's wrongful act.—Id.

ACTION.

I. Grounds and Conditions Precedent, 1-2.
II. Nature and Form, 3-12.
III. Joinder, Splitting, Consolidation, and Severance, 13-20.

I. GROUNDS AND CONDITIONS PRECEDENT, 1-2.

1. Demand must be made upon an agent before he will be liable to his principal on a suit for money collected.—Anderson v. Hulme, 5 Mont. 295; 5 Pac. 865.

2. One possessing a right may enforce it, irrespective of his motive in so doing, and his motive is not a subject of inquiry except as ground for impeachment.—MacGinniss v. Mining Co., 29 Mont. 428; 75 Pac. 89.

II. NATURE AND FORM, 3-12.

3. Under Org. Act the courts of this territory are clothed with chancery as well as common law jurisdiction, and in the exercise of the authority thus conferred, the forms of proceedings must conform to the well known and recognized distinctions between such jurisdictions. (See 20 Wall. 670.)—Gallagher v. Basey, 1 Mont. 457.

4. Under Org. Act, declaring that the jurisdiction of courts shall be as limited by law, the legislature is given power to make laws controlling the mode and manner of proceedings, but not to blend together the chancery and common law jurisdictions of courts; these must be kept and preserved inviolate.—Id.

5. It is within the province of a local statute to regulate or limit and control the forms of proceedings in actions at law and suits in equity, but not within the scope of its authority to destroy or blend together, in the same proceeding, the two jurisdictions.—Woolman v. Garringer, 1 Mont. 535.

6. A civil action is an action wherein an issue is presented for trial, formed by the averments of the complaint, the denial of the answer,

and the replication, and the trial takes place by the introduction of legal evidence to support the allegations of the complaint.—Deer Lodge County v. Kohrs, 2 Mont. 66.

7. An action against an administrator for waste and failure to account is a special proceeding, and not a civil action.—Id.

8. An action where the issues are made up in a summary manner without pleadings, or a formal issue, and without definite means of knowing what is to be tried, is not an action, but merely a proceeding.—Id.

9. Civ. Pr. Act, abrogating the common law forms of procedure, including scire facias, renders a complaint necessary in all civil actions, and therefore an action on a forfeited undertaking can not be begun by scire facias. —United States v. Ensign, 2 Mont. 396.

10. Under the reformed system of pleading there is no distinction in allegation and proof between actions ex contractu and ex delicto.—Higley v. Gilmer, 3 Mont. 90.

11. The proceedings for the sale of the real estate of an intestate are in the nature of an action, of which the presentation of the petition is the commencement and the order of sale is the judgment.—Broadwater v. Richards 4 Mont. 80; 2 Pac. 546.

12. Where a complaint is in assumpsit on contract of sale and purchase, and the proof discloses a tortius detention and unwarranted refusal to deliver the property to plaintiff on his demand therefor, there is no variance.—Galvin v. Mining Co., 14 Mont. 508; 37 Pac. 366.

III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE, 13-20.

13. A consolidation of actions is only ordered where the parties are the same in each, and the subject matter such as may be joined. (See 12 Wall. 259; 20 Wall. 689.)—Mason v. Germaine, 1 Mont. 263.

14. The rights of all the parties to an action, that claim liens upon the same premises under the act "securing liens to mechanics and others," must be adjudicated in one proceeding. —Id.

15. In an action by the United States for cutting timber on the public lands, the complaint is not demurrable on the ground of joining two causes of action, for charging the cutting of the timber and trees, and also the cutting of trees and timber less than 8 inches in diameter, contrary to the statute, the cause of action in both being the unlawful cutting of timber.—United States v. Williams, 6 Mont. 379; 12 Pac. 851.

16. A cause of action by one partner against another, to dissolve the firm and wind up its affairs, can not be joined with one to set aside an unauthorized sale of firm property by such other partner.—Waite v. Vinson 14 Mont. 405; 36 Pac. 828.

17. A complaint, asking judgment on a note, and the foreclosure of a mortgage given to secure the same, states but one cause of action,—and where the mortgage is void plaintiff is entitled to judgment on the note.—American S. & L. Ass'n v. Burghardt, 19 Mont. 323; 48 Pac. 391.

18. A complaint for the enforcement of an attorney's lien on a judgment in favor of his client, to which the judgment creditor, judgment debtor, and the sureties on the judgment debtor's appeal bond, are defendants, is not demurrable, as stating more than one cause of action.—Coombe v. Knox, 28 Mont. 202; 72 Pac. 641.

19. Where actions are consolidated, as authorized by Code Civ. Proc., § 1894, the court should require the pleadings to be reconstructed as in one suit.—Handley v. Sprinkle, 31 Mont. 57; 77 Pac. 296.

20. Under Code Civ. Proc., § 1894, actions consolidated are merged into one suit and hence only a single judgment should be rendered settling the entire controversy.—Id.

ADULTERY.

1. Unlawful sexual intercourse, and open and unlawful living together, of a married man and married woman, or where either are unmarried, and thus having intercourse or living together, is adultery.—Territory v. Whitcomb, 1 Mont. 359.

2. To constitute the offense one party must have been lawfully married to a third person at the time of the adulterous intercourse.—Id.

ADVERSE POSSESSIONS.

1. The statute of limitations does not affect the right of the public to the use of a street or alley, and an indictment brought in 1876 for obstructing the same by improvements which were erected in 1866 is good.—Territory v. Deegan, 3 Mont. 82.

2. Plaintiff, a foreign corporation, obtained a patent to a millsite in 1869. In 1872 defendant bought of a third party certain improvements located upon said millsite and in the same year enclosed the same with a good and substantial fence, and resided on the land so enclosed until 1876, when the agent of plaintiff asserted its title to the premises and demanded rent therefor. Defendant testified that she always claimed to be the owner of the property, and the agent of plaintiff testified that he did not know that she so claimed it until April, 1876, but did know that she built the fence and occupied the premises from 1872 until October, 1876, when plaintiff commenced its action for ejectment. *Held*, that defendant's possession of the enclosed tract was adverse to plaintiff's claim under Cod. Stat., p. 514 §§ 3, 4, and that an action commenced three years after the erection of such fence was barred by the statute of limitations.—National Min. Co. v. Powers, 3 Mont. 344.

3. For the purpose of constituting adverse possession, by a person claiming under a written instrument, the land is deemed possessed when protected by a substantial enclosure; and only the land actually occupied is deemed to be held adversely.—Lockey v. Horsky, 4 Mont. 457; 1 Pac. 19.

4. An allegation in the complaint of ownership during a period sufficient to make the statute of limitations available, and a denial of the same in the answer, raise the issue of adverse possession under such statute. (See 117 U. S. 346.)—Sullivan v. Dunphy, 4 Mont. 499; 2 Pac. 284.

5. Where one enters on premises under a contract of sale, he can not set up adverse possession until he surrenders the premises or gives notice that he does not hold them in subordination to the title under which he enters. —Alderson v. Marshall, 7 Mont. 288; 16 Pac. 576.

6. Comp. Stat., p. 65, § 29, provides that no action for the recovery of real property, or for the recovery of the possession thereof, can be maintained unless it appear that plaintiff, his ancestor, etc., was seized or possessed of the property in question within five years before

the commencement of the action. Sec. 32 provides that in every action for the recovery of real property, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been in subordination to the legal title, unless it appear that the property has been held adversely to such legal title for five years before the commencement of the action. *Held*, that a complaint in ejectment alleging that plaintiff has been and is lawfully seized and entitled to the possession of certain lands, and that more than five years before, and while he was so seized, defendant unlawfully ousted him therefrom, and has since unlawfully withheld possession of the land, states a ground of action; since the possession, within the statute, which will bar such action, must be under color of title.—Peter v. Stephens, 11 Mont. 115; 27 Pac. 403.

7. The statute of limitations does not begin to run against a mining claim until after issuance of the patent. (See 164 U. S. 325.)—Mayer v. Carothers, 14 Mont. 274; 36 Pac. 182.

8. The mere fact that, while land was held by adverse possession, the United States obtained judgment cancelling the patent because of patentee's fraud, which was afterwards set aside, did not, by revesting title in the United States, destroy the rights acquired by such possession against patentee and his successors, so that the statute of limitations would run against the patented title only from the time of setting aside the judgment, where the possession was uninterrupted while the judgment was in force.—Casey v. Anderson, 17 Mont. 167; 42 Pac. 761.

9. A license by a railroad company to cultivate a portion of its right of way, on condition that the licensee keep the same clear of combustible materials, and maintain lawful fences thereon, is a use of the land by the company.—Burton v. Laughrey, 18 Mont. 43; 44 Pac. 406.

10. The fact that an adverse possession of land is not based on a paper title will not prevent the running of the statute of limitations in its favor.—Minnesota & M. L. & I. Co. v. Brasier, 18 Mont. 444; 45 Pac. 632.

11. A right of prescription is limited by the character and extent of the user during the period requisite to acquire the right.—Chessman v. Hale, 31 Mont. 577; 79 Pac. 254.

12. In order to obtain a right by prescription, it is necessary that during the prescriptive period a right of action should lie by the party against whom the claim is made.—Id.

AFFIDAVITS.

1. The statutes of the territory do not authorize a commissioner of the United States to take affidavits which can be admitted as evidence by the courts upon the trial of an action.—Daniels v. Andes Ins. Co., 2 Mont. 500.

2. Where the affidavit to the location notice is not signed by the locators, and there is no jurat showing it to have been subscribed and verified, the notice is insufficient, under Comp. Stat., p. 1054, § 1477, which provides that any person discovering any mining claim shall, within 20 days thereafter, make and file for record a declaratory statement, in writing, on oath, describing such claim.—Metcalf v. Briscoe, 10 Mont. 283; 25 Pac. 1037.

3. An affidavit made by a locator of a mining claim, to which there is no jurat showing it to have been subscribed and verified as required by statute, can not be cured by evidence aliunde to show that the affidavit was in fact sworn to.—Id.

4. An affidavit signed by affiant is not invalid because affiant's name does not appear in the body thereof.—Davidson v. Bordeaux, 15 Mont. 245; 38 Pac. 1075.

ALIENS.

1. Org. Act does not sanction the principle of common law which prohibits aliens from holding real property.—Territory v. Lee, 2 Mont. 124.

2. Art. 6 of our treaty with China of Feb. 5, 1870 (16 U. S. Stat., 739), does not grant to Chinese immigrants any greater privileges than are guaranteed by the laws of congress to other aliens.—Id.

3. The fact that an alien owns stock in a corporation which has acquired title to real estate, does not affect the title of the corporation to such real estate.—Mining Co. v. First Nat'l Bank, 7 Mont. 530; 19 Pac. 210.

4. Until office found, an alien may exercise ownership over a ditch and water right under a grant thereof.—Quigley v. Birdseye, 11 Mont. 439; 28 Pac. 741.

5. The grant of a ditch and water right to an alien is not an abandonment by the owner, but the alien may hold the same, until forfeited by office found, against collateral attacks by third persons, other than the state, and, in the absence of such forfeiture, may convey the title.—Id.

ALTERATION OF INSTRUMENTS.

1. In an action to foreclose a mortgage, and for a deficiency judgment, an answer alleging that defendant purchased the property subject to the mortgage, and that a covenant to assume such mortgage was fraudulently inserted in the deed by his grantor, is sufficient, without tender of a deed back to his grantor.—Sweetzer v. Diehl, 14 Mont. 498; 37 Pac. 10.

2. An accommodation endorser is not liable on a note where the date is altered, after endorsement, without his knowledge.—McMillan v. Hefferlin, 18 Mont. 385; 45 Pac. 548.

3. Where a chattel mortgage refers to a prior recorded instrument for a more specific description of the property, and the mortgagee's attorney is expressly authorized to add such description, his doing so, before the mortgage is filed, will not invalidate the mortgage, no rights having intervened between its conditional delivery and its filing.—Chicago T. & T. Co. v. O'Marr, 18 Mont. 568; 46 Pac. 809.

ANIMALS.

1. Under Cod. Stat., p. 373, § 1, providing that, if any cattle shall break into ground enclosed by a lawful fence, the owner of the cattle shall be liable for damages caused thereby, lawful fences must entirely surround the ground as a condition precedent to the right to bring an action for damages.—Smith v. Williams, 2 Mont. 195.

2. N. sued D. for damages caused by D.'s cattle, which broke and entered N.'s premises, while they were roaming at large. The complaint alleged that the premises were enclosed by a good and substantial fence "eight and nine rails high," but did not allege that the fence was lawful. *Held*, that an allegation that the fence was lawful would be a legal conclusion, and that under the complaint plaintiff could prove the kind and character of the fence.—Nichols v. Dobbins, 2 Mont. 540.

3. Persons employed to drive cattle are not herders, and entitled to a lien thereon, under Rev. Stat., p. 586, § 848.—Underwood v. Birdsell, 6 Mont. 142; 9 Pac. 922.

4. Under Comp. Stat., p. 1071, § 1550, providing that a mortgagor of chattels may empower the sheriff to execute the power of sale therein granted, and in such case the sheriff may sell the property as provided in the mortgage, the sheriff is not the mere agent of the mortgagee, but is an executive officer, who may contract for the keeping of cattle so seized, and thereby give the agisters a lien, under § 1394, providing that one to whom cattle are entrusted for keeping shall have a lien on them for such keeping.—Vose v. Whitney, 7 Mont. 385; 16 Pac. 846.

5. Under Comp. Stat., p. 1035, § 1394, relating to agisters' liens, it is not essential, in order that the lien should attach, that the cattle should have been entrusted to the agister by the owner.—Id.

6. Where defendant caused his sheep to be herded on what he knew to be plaintiff's pasture, though the same was unfenced, an action will lie for the value of the grass destroyed by the sheep, notwithstanding Pol. Code, § 3258, since such statute, permitting recovery only where the land is fenced, applies to trespass committed by animals running at large without knowledge of the owner, and not to a case where one knowingly and wilfully appropriates the use of another's land.—Monroe v. Cannon, 24 Mont. 316; 61 Pac. 863.

7. Pol. Code, § 3258, and the custom of the state making the maintenance of a legal fence by a landowner a prerequisite to recover for trespass by domestic animals of another, do not charge the landowner with the duty to keep cattle lawfully at large from coming on his land, or make their entry thereupon rightful, so as to make him liable for injuries to such animals caused by the existence of dangerous agencies on the land, but not wantonly or intentionally caused.—Beinhorn v. Griswold, 27 Mont. 79; 69 Pac. 557.

8. Under Pol. Code, § 3034, a proclamation by the governor was issued, providing that certain sheep imported into the state were liable to convey disease known as "scab," and ordering that on arrival in the state they should be quarantined and dipped by a deputy sheep inspector in some recognized and reliable dip known to be efficient in the cure of scab. *Held*, that a deputy sheep inspector, in selecting and using a dip under such proclamation, acted ministerially, and not in a quasi-judicial capacity, and was therefore liable for damages arising from negligence.—Bair v. Struck, 29 Mont. 45; 74 Pac. 69.

9. A pasture, in which a bailee for hire of horses put them, and from which they escaped, is in law not enclosed at all, it not being wholly enclosed by a good and sufficient fence.—Shropshire v. Sidebottom, 30 Mont. 406; 76 Pac. 941.

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I. NATURE AND FORM OF REMEDY, 1-9.

1. Comp. Stat., p. 149, § 439, provides that "the dismissal of an appeal is in effect a confirmation of the judgment or order appealed from, unless the dismissal is made without prejudice to another appeal." *Held*, that where an appeal has been dismissed, and the dismissal is not made "without prejudice to another appeal," a subsequent appeal, involving the same judgment and order, must be dismissed.—Owsley v. Warfield, 7 Mont. 264; 17 Pac. 74.

2. Where an appeal has been dismissed for want of service of notice upon the clerk, as required by law, without prejudice to a new appeal, and the appellant given leave to use the same transcript on the second appeal, merely adding to the old notice the admission of the clerk's acceptance of service, does not constitute a new appeal.—Territory v. Harris, 7 Mont. 384; 17 Pac. 557.

3. Under Rev. Stat., p. 119, § 406, providing that an appeal shall not be dismissed for any informality or defect in the taking thereof, and if corrected within a reasonable time after its dismissal, another appeal may be taken, the court may dismiss the appeal for defect of jurisdiction, but appellant must be allowed another appeal within a reasonable time.—Id.

4. An appeal was dismissed Jan. 14, 1888, for want of service of notice thereof upon the clerk, and a new appeal was taken, and transcript filed containing an admission of service of notice by the clerk, dated Jan. 18, 1888, and a notice of appeal, and an admission of service by the county attorney, dated Dec. 19, 1887. *Held*, that the court would take judicial notice of the fact that the service on the attorney was prior to the dismissal of the former appeal, and that the appeal would be dismissed for want of service of the new appeal on the attorney.—Id.

5. An appeal by an administrator from an order of the district court, on appeal from the probate court, sustaining objections to his final report, and from a decree of distribution subsequently entered, is not objectionable on the ground that two separate actions are united in one appeal.—In re Dewar's Estate, 10 Mont. 422; 25 Pac. 1025.

6. Although Comp. Stat., p. 189, § 444, providing for appeals from final judgments of the district court, "or any part thereof," does not apply to an order denying a change of venue, yet when two appeals are taken from such an order, and each is an appeal from the whole order as well as a part thereof, and the transcript embodies every act of the court and the testimony which was adduced, such appeal will be entertained and treated as one appeal.—In re Davis' Estate, 11 Mont. 1; 27 Pac. 342.

7. Statutory provisions regulating the manner of taking and perfecting appeals must be strictly pursued.—Creek v. Water Co., 22 Mont. 327; 56 Pac. 362.

8. The supreme court has jurisdiction, under Const., art. 8, §§ 2, 3, 15, to entertain appeals or writs of error, only when taken within the limitations of and perfected according to, the regulations prescribed by statute.—Featherman v. Granite, 28 Mont. 462; 72 Pac. 972.

9. Code Civ. Proc., § 1722, as amended by Laws 1899, p. 146, authorizes an appeal from a special order after final judgment. After the affirmance of a judgment on appeal the trial court made an order allowing certain costs that had been allowed previously, but the order did not amend the judgment. *Held*, that certiorari was the proper remedy to review the order, as it was a mere order taxing costs, and not appealable, and no appeal could be taken from the judgment that would review the order, as it

was not included in the judgment, and the judgment had once been appealed from.—State v. District Court, 32 Mont. 20; 79 Pac. 410.

II. NATURE AND GROUNDS OF APPELLATE JURISDICTION, 10-14.

10. The district court can not acquire jurisdiction of an action that has been appealed from the probate court, unless all the papers belonging thereto, and a transcript of all the proceedings in the probate court, are transmitted to the clerk of the district court.—Howard v. Quinn, 2 Mont. 339.

11. Where the probate court has no power to entertain the subject matter of a petition, there can be no appeal from its decision to the district court, nor from the district court to the supreme court.—Chadwick v. Chadwick, 6 Mont. 566; 13 Pac. 385.

12. Where an appeal is taken from an order in an action for a writ of mandamus, and subsequently appellant obeys the order of the district court, the supreme court will not take jurisdiction of the case, and the appeal will be dismissed as fictitious.—State v. Napton, 10 Mont. 369; 25 Pac. 1045.

13. On appeal from a judgment dismissing an action without prejudice, where it is admitted by counsel that, after the dismissal, another suit was commenced and is pending, on the same cause of action, and it appears that the issues between the parties can not be determined on the appeal, the appeal will be dismissed.—Hoskins v. McGirl, 12 Mont. 246; 29 Pac. 1120.

14. Where, after service of an order, made in a suit, restraining defendants from awarding any contracts under a legislative act, defendants awarded contracts in a manner satisfactory to plaintiff in the suit, the appeal by defendants from the order conferred no jurisdiction on the supreme court.—Snell v. Welch, 28 Mont. 468; 72 Pac. 988.

III. DECISIONS REVIEWABLE, 15-87.

A. NATURE OF SUBJECT MATTER AND CHARACTER OF PARTIES, 15-16.
B. AMOUNT OR VALUE IN CONTROVERSY, 17-18.
C. FINALITY OF DETERMINATION, 19-46.
D. NATURE, SCOPE, AND EFFECT OF DECISION, 47-81.
E. MODE OF RENDITION, FORM, AND ENTRY OF JUDGMENT, 82-87.

A. NATURE OF SUBJECT-MATTER AND CHARACTER OF PARTIES, 15-16.

15. An action in the probate court against an administrator, charging waste, is not a civil action, but a special proceeding, in which the probate court can make an order, and no appeal will lie from the probate court to the district court to review such an order, though a civil action may be commenced in the district court after the finding of the probate court, making such findings the basis and foundation of the action.—Deer Lodge County v. Kohrs, 2 Mont. 66.

16. Under Code Civ. Proc., § 1722, as amended by Laws 1899, p. 146, appeals from judgments and orders in probate proceedings are only allowable under subd. 3 of such section, except in the granting or refusing of a new trial, which may be taken under subd. 2 thereof.—Twohy's Estate, 23 Mont. 305; 58 Pac. 722.

B. AMOUNT OR VALUE IN CONTROVERSY, 17-18.

17. Civ. Prac. Act, § 617, providing that the supreme court shall have jurisdiction in civil cases "where the amount in dispute exceeds $100," is inconsistent with Org. Act, § 9, allowing appeals "in all cases from the final decision of the district court.—Payne v. Davis, 2 Mont. 381.

18. On a motion to dismiss an appeal because the amount in controversy is less than $100, where the transcript shows that the value of the property involved in the action is $50, and the costs $80, in determining the question of jurisdiction, the amount of costs forms no part of the matter in dispute.—Id.

C. FINALITY OF DETERMINATION, 19-46.

1. NECESSITY OF DETERMINATION, 19.
2. INTERLOCUTORY AND INTERMEDIATE DECISIONS, 20-28.
3. FINAL JUDGMENTS AND DECREES, 29-35.
4. ORDERS AFTER JUDGMENT, 36-46.

1. Necessity of determination, 19.

19. As a general rule, an appeal will not lie until there is a final disposition of the whole case.—Beattie v. Hoyt, 3 Mont. 140.

2. Interlocutory and intermediate decisions, 20-28.

20. On appeal from a judgment, this court can review the intermediate proceedings and afford relief.—Marden v. Wheelock, 1 Mont. 49.

21. No appeal lies from an order of the district court appointing a receiver.—Wilson v. Davis, 1 Mont. 98.

22. Upon appeal from a judgment this court will review intermediate orders affecting the judgment. (See 12 Wall. 259; 20 Wall. 689.) —Mason v. Germaine, 1 Mont. 263.

23. An order denying a petition to vacate an order appointing an administrator of an estate, and asking for the appointment of another person, is appealable.—In re Davis' Estate, 11 Mont. 196; 28 Pac. 645.

24. An order refusing to quash a former order directing the executors to file an inventory and appraisement, is final and appealable. —In re Higgins' Estate, 15 Mont. 474; 39 Pac. 506.

25. The supreme court has no jurisdiction, under Code Civ. Proc., § 1222, as amended by act Feb. 28, 1899, to grant an order of supersedeas to stay a temporary restraining order pending the hearing of an order to show cause why an injunction should not be issued, as there is no appeal from a temporary restraining order. —Wetstein v. Mining Co., 25 Mont. 135; 63 Pac. 1043.

26. Code Civ. Proc., § 1722, as amended Feb. 28, 1899, does not authorize an appeal from a temporary restraining order pending the hearing of an order to show cause why an injunction pendente lite should not be issued.—Maloney v. King, 25 Mont. 256; 64 Pac. 668.

27. An order, "Demurrer herein * * * sustained, and, plaintiff not desiring to amend complaint, judgment is * * * entered in favor of defendants and against plaintiff for costs of suit," does not distinctly show that the rights of the parties are thereby finally determined, and therefore is not appealable.—Butte & B. C. M. Co. v. M. O. P. Co., 27 Mont. 152; 69 Pac. 714.

28. No appeal lies from an order taxing costs. Exceptions to such order are properly reviewable on appeal from the judgment.—M.

O. P. Co. v. Mining Co., 27 Mont. 288; 70 Pac. 1114.

3. Final judgments and decrees, 29-35.

29. In an action of partition an order was made in May, 1877, adjudicating on the shares of the respective parties, and ordering a sale, from which an appeal was taken and the order affirmed. In June, 1883, a second order of sale was made, ordering execution of the first order, with change of date. In May, 1884, after sale, an order was made which determined the amount due to the respective parties out of the proceeds. On Apr. 5, 1886, an order was made modifying the last mentioned order, and reciting that appellant had received a sum in excess of his share of the proceeds, and directing that execution issue for the excess. *Held*, that the decree made in 1877 was not a final decree, but the last named order is a final judgment, and no bill of exceptions was required to save the appeal.—Fredericks v. Davis, 6 Mont. 457; 13 Pac. 124.

30. A decree of distribution by the district court in a probate proceeding pending before it is a "final judgment," within the meaning of Comp. Stat., p. 174, § 421, subd. 1, which provides that an appeal from a "final judgment" in an action or proceeding commenced in the court in which it is rendered may be taken within one year from the rendition of the judgment. —In re McFarland's Estate, 10 Mont. 445; 26 Pac. 185.

31. In an action in equity for the dissolution of a partnership, and for an accounting, the judgment of the court dissolving the partnership, and adjudging that plaintiff and defendant were each entitled to one-half the assets of the partnership after the debts were paid, and appointing a referee to take charge of and sell the property of the firm to pay the debts, and to divide the surplus between plaintiff and defendant, was final and appealable, and the reference was merely for the purpose of executing the judgment.—Arnold v. Sinclair, 11 Mont. 556; 29 Pac. 340.

32. The dismissal of an action upon an order of nonsuit is a final judgment, from which an appeal will lie.—Holter Lumber Co. v. Firemens Fund, 18 Mont. 282; 45 Pac. 207.

33. A judgment declaring a trust and removing the trustee is a final order, from which an appeal will lie, notwithstanding that it directs the trustee to file an inventory and account of all property received by him as trustee.—Bryant v. Davis, 22 Mont. 534; 57 Pac. 143.

34. Under Laws 1899, p. 146, amending Code Civ. Proc., § 1722, an order substituting a claimant of property, on application of defendant in a claim and delivery action, in lieu of defendant, is not a final determination from which an appeal is allowable.—State v. District Court, 28 Mont. 445; 72 Pac. 867.

35. Under Code Civ. Proc., § 1722, as amended by Laws 1899, p. 146, and § 1004, an entry noting the filing of an agreement to dismiss is not a dismissal from which an appeal can be taken.—Kinman v. Scheuer, 30 Mont. 73; 75 Pac. 690.

4. Orders after judgment, 36-46.

36. An order overruling a motion to quash the execution is a "special order made after final judgment," under Civ. Prac. Act, § 389, from which an appeal can be taken to this court; but the court can not examine the grounds of the motion which are based upon any alleged error in the items of the costs and disbursements.—Orr v. Haskell, 2 Mont. 350.

37. An order made by the judge at chambers refusing to stay until the next term of court an execution upon a judgment, which had been rendered about 18 months prior to the making of said order, is a special order made after final judgment, and is appealable.—Clarke v. Gonu, 2 Mont. 538.

38. Under Comp. Stat., p. 180, § 444, which provides for an appeal from the district to the supreme court from any special order made after final judgment, an appeal will lie from an order adjudging costs against plaintiff, made after judgment dismissing his petition, although made by the judge at chambers.—Mining Co. v. Weinstein, 7 Mont. 346; 17 Pac. 108.

39. An order taxing costs of appeal on remittitur is a special order after final judgment, and therefore appealable.—Ryan v. Maxey, 15 Mont. 100; 38 Pac. 228.

40. Under Code Civ. Proc., § 1722, an appeal lies from an order granting additional time to defendant in which to prepare a statement on motion for new trial and a bill of exceptions. —Beach v. Spokane R. & W. Co., 21 Mont. 7; 52 Pac. 560.

41. Under Code Civ. Proc., § 1722, subd. 2, an order striking out the statement made on motion for new trial is appealable.—Beach v. Water Co., 25 Mont. 367; 65 Pac. 106.

42. An order, after final judgment for defendant, refusing to disallow his costs, is reviewable on appeal from the judgment, and not on an indepenedut appeal; the costs being a part of the judgment.—Spencer v. Mungus, 28 Mont. 357; 72 Pac. 663.

43. Under Code Civ. Proc., § 1722, an order overruling a motion to set aside a pretended judgment of dismissal, which was not in fact a dismissal, within § 1004, authorizing dismissal, is not appealable.—Kinman v. Scheuer, 30 Mont. 73; 75 Pac. 690.

44. Under Code Civ. Proc., § 1722, an appeal from an order denying a motion to adopt a general verdict and special findings, and to set aside the special verdict in a suit in equity, must be dismissed, where the record shows no judgment of dismissal or other final judgment. —Id.

45. An order amending a judgment already entered is appealable as a "special order after final judgment," under Code Civ. Proc., § 1722, as amended by Laws 1899, p. 146.—State v. District Court, 32 Mont. 20; 79 Pac. 410.

46. An order of the district court, overruling a motion to dismiss an appeal to that court from a judgment of a justice of the peace, is not a final order, nor a special order made after final judgment, so as to be appealable under Code Civ. Proc., § 1722, as amended by Laws 1899, p. 146.—Raymond v. Raymond, 32 Mont. 159; 79 Pac. 1056.

D. NATURE, SCOPE, AND EFFECT OF DECISION, 47-81.

1. Discretionary Action, 47.
2. Relating to Provisional Remedies, 48-56a.
3. On Demurrer, 57.
4. On Motion Relating to Pleadings, 58-60.
5. Relating to Place of Trial, 61.
6. Relating to Findings, 62.
7. Relating to Reference of Cause, 63.
8. On Motion for New Trial, 64-65.
9. Opening or Vacating Order, 66-67.
10. Relating to Execution, 68.
11. In Proceedings for Review, 69-70.
12. Relating to Costs, 71-75.
13. Decisions of Intermediate Courts, 76-77.
14. Proceedings for Review of Part of Judgment or Order, 78-81.

1. Discretionary action, 47.

47. The power to grant, or the refusal to grant, a continuance rests in the legal discretion of the trial court, and the action of such court can not be reviewed by this court unless there appears to have been an abuse of discretion.—Wormall v. Reins, 1 Mont. 627.

2. Relating to provisional remedies, 48-56a.

48. An appeal can not be taken from an order appointing a receiver.—Stebbins v. Savage, 5 Mont. 253; 5 Pac. 278.

49. An appeal will lie from an order partially dissolving an injunction.—Blue Bird v. Murray, 9 Mont. 468; 23 Pac. 1022.

50. By Comp. Stat., p. 174, § 421, "an appeal may be taken from an order to grant or dissolve an injunction"; and by § 444, "from an order granting or dissolving an injunction." *Held*, that an appeal was properly taken from an order modifying an injunction.—Id.

51. An order refusing to appoint a receiver is not appealable.—Cotter v. Cotter, 15 Mont. 63; 40 Pac. 63.

52. An order vacating a temporary restraining order is within Code Civ. Proc., § 23, allowing an appeal from an order dissolving an injunction.—Bennett v. Congdon, 20 Mont. 208; 50 Pac. 556.

53. Though an order appointing a receiver be not appealable, yet the court may, on appeal from an order refusing to vacate the appointing order, consider the showing made on the application to vacate, even though it involves a scrutiny of the matters before the lower court when it made the appointing order.—Forrester v. Boston & M. C. C. & S. M. Co., 22 Mont. 430; 56 Pac. 868.

54. Plaintiff, the owner of a non-patented mining claim, obtained an interlocutory injunction restraining defendants from trespassing on its claim, or prosecuting any mining or development work thereon. Defendants asserted in opposition thereto that they had made discovery of a quartz lode within the limits of plaintiff's claim, that they caused a location notice to be placed at the point of discovery, and began a shaft on the vein. It was an existing fact before the court at the hearing when the injunction was granted that defendants had not completed the location of their lode claim, but the order did not preserve the privilege of moving for a modification should defendants decide to do so, and thereafter defendants' assignee moved to modify the order so as to permit it. *Held*, that the motion was based on the same facts on which the previous order was granted, and was, therefore, unauthorized, and hence an order refusing to modify was not appealable.—Butte C. M. Co. v. Frank, 24 Mont. 506; 62 Pac. 922.

55. An order entered on the minutes, granting an injunction, is an appealable order.—MacGinniss v. Mining Co., 29 Mont. 428; 75 Pac. 89.

56. No appeal lies from an order signed by a judge, but intended as process to carry into effect an order, granting an injunction.—Id.

56a. Under the express provisions of Laws 1899, p. 146, an ex parte order appointing a receiver is appealable.—Rumney v. Donovan, 28 Mont. 69; 72 Pac. 305.

3. On demurrer, 57.

57. A judgment sustaining a demurrer and dismissing the complaint as to one of several defendants, is a final judgment, from which an appeal will lie.—Stevenson v. Matteson, 13 Mont. 108; 32 Pac. 291.

4. On motion relating to pleadings, 58-60.

58. No appeal lies from an order striking the complaint from the files.—Owen v. McCormick, 5 Mont. 255; 5 Pac. 280.

59. No appeal lies from an order refusing to allow an amendment to the complaint.—Id.

60. An order granting a motion for judgment on the pleadings is not appealable.—Nelson v. Donovan, 14 Mont. 78; 35 Pac. 227.

5. Relating to place of trial, 61.

61. An order denying a motion for a change of venue is an appealable order.—In re Davis' Estate, 11 Mont. 1; 27 Pac. 342.

6. Relating to findings, 62.

62. An order overruling a motion to reject findings made by the jury is not appealable, not being among the orders enumerated in Code Civ. Proc., § 1722, as amended by Laws 1899, p. 146, from which appeals are allowed.—Johns v. Barnes, 31 Mont. 426; 78 Pac. 703.

7. Relating to reference of cause, 63.

63. An appeal does not lie from a mere order of the district court setting aside a referee's report in a proceeding for a writ of mandamus.—Thomas v. Smith, 1 Mont. 21.

8. On motion for new trial, 64-65.

64. No appeal lies on the refusal of a lower court to sign or settle a statement of the case on motion for new trial, on the ground that it had not been signed in time.—Ayotte v. Thomas, 20 Mont. 223; 50 Pac. 553.

65. Under the express provisions of Code Civ. Proc., § 1722, an appeal lies from an order denying a motion for new trial in proceedings for the distribution of an estate, under § 2835.—In re Davis' Estate, 27 Mont. 235; 70 Pac. 721.

9. Opening or vacating order, 66-67.

66. An order refusing to set aside an order for an examination of a judgment debtor upon proceedings supplementary to execution is an appealable order.—Barber v. Briscoe, 9 Mont. 341; 23 Pac. 726.

67. Where an appeal could have been taken from an original order, which was issued ex parte, and without plaintiff's knowledge or consent, a subsequent order denying a motion to change the first order is appealable because of such irregularity.—Beach v Spokane R. & W. Co., 21 Mont. 7; 52 Pac. 560.

10. Relating to execution, 68.

68. An order overruling a motion to quash an execution is an order from which an appeal can be taken, but in the hearing of an appeal from such order the supreme court will not examine the grounds of the motion which are based upon alleged errors in the items of costs and disbursements.—Orr v. Haskell, 2 Mont. 350.

11. In proceedings for review, 69-70.

69. A judgment of the district court refusing a writ of review against a justice's court is appealable.—State v. Lenahan, 17 Mont. 518; 43 Pac. 712.

70. An appeal will not lie from an order of a district court requiring that appellee, on an appeal from justice court, give the bond required of a plaintiff not a resident of the state, or that the action would be dismissed at his cost, since Code Civ. Proc., §§ 1722, 1723, as amended by Laws 1899, p. 146, enumerating the orders and judgments from which appeals may be taken to the supreme court, is exclusive, and does not designate any such order.—State v. Napton, 24 Mont. 450; 62 Pac. 686.

12. Relating to costs, 71-75.

71. No appeal lies from an order taxing costs.

Rader v. Nottingham, 2 Mont. 157.
Murray v. Northern Pacific, 26 Mont. 268; 67 Pac. 625.
King v. Allen, 29 Mont. 5; 73 Pac. 1107.

72. There is no appeal from an order overruling a motion for judgment for costs.—Hibbard v. Tomlinson, 2 Mont. 220.

73. An appeal will not lie from an order overruling a motion to retax costs.—Orr v. Haskell, 2 Mont. 350.

74. An order overruling a motion, made after final judgment, to retax costs included therein, is not appealable; objections to such costs being reviewable only on direct appeal from the judgment itself.—State v. Millis, 19 Mont. 444; 48 Pac. 773.

75. An appeal does not lie from an order taxing costs, but the error, if any, may be considered on appeal from the judgment.

Mares v. Dillon, 30 Mont. 144; 75 Pac. 969.
Musigbrod v. Hartford, 30 Mont. 273; 76 Pac. 563.

13. Decisions of intermediate courts, 76-77.

76. An order of the district court refusing to dismiss an appeal from a justice's court is not an appealable order, under Comp. Stat., p. 180, § 444, granting an appeal from certain orders pertaining to new trial, injunction, attachment and change of venue, from any judicial order made after final judgment, and from certain interlocutory judgments.—Territory v. Morehouse, 8 Mont. 310; 21 Pac. 663.

77. An order sustaining a motion to dismiss an appeal from a justice is not appealable to the supreme court, under Code Civ. Proc., § 1722, as amended by Laws 1899, p. 146.—Franzman v. Davies, 32 Mont. 251; 80 Pac. 251.

14. Proceedings for review of part of judgment or order, 78-81.

78. An appeal can not be taken to part of a final judgment, but to obtain a review the appellant must bring the whole decree before the appellate court; otherwise it has no jurisdiction and the appeal will be dismissed.—Barkley v. Logan, 2 Mont. 296.

79. An appeal can not be taken from a part of a judgment.—Plaisted v. Nowlan, 2 Mont. 359.

80. Although this court holds that an appeal will not lie from a part of a judgment, a party is entitled to an appeal in an action brought to foreclose a mortgage against the property of other persons, such judgment being adverse to appellant, who claimed an interest in said property.—Largey v. Sedman, 3 Mont. 472.

81. Under Comp. Stat., p. 180, § 444, an appeal may be taken from a portion of an order.

In re Davis' Estate, 11 Mont. 1; 27 Pac. 342.
Bank v. Fuqua, 11 Mont. 285; 28 Pac. 291.

E. MODE OF RENDITION, FORM, AND ENTRY OF JUDGMENT, 82-87.

82. An entry in the record to the effect that a motion dismissing the appeal was granted, does not authorize an appeal, since it does not show a judgment nor an appealable order.—Beattie v. Hoyt, 3 Mont. 140.

83. An entry in the record granting a motion to dismiss an appeal, does not authorize an appeal, since it is not a judgment nor an appealable order.—Murphy v. King, 6 Mont. 30; 9 Pac. 585.

84. Plaintiff sued to set aside an assignment for the benefit of creditors, alleging fraud by the assignor. The assignee demurred, the court sustained the demurrer, and ordered plaintiff to plead over, which he refused to do, and requested the court to render judgment against him for costs. *Held*, that on the neglect of the court to render such judgment, under Comp. Stat., p. 119, § 244, plaintiff might request it to do so, in order to obtain a final judgment, from which he could appeal, and such request did not render the judgment one by consent, from which no appeal lies.—Stevenson v. Matteson, 13 Mont. 108; 32 Pac. 291.

85. A record on appeal showed that defendant's motion for new trial was "by consent submitted to the court without argument," and that defendant said that the court "might pass upon said motion then and there, without taking time to consider the same, and that, so far as defendant was concerned, the motion might then and there be overruled." *Held*, to show only that defendant consented to a formal ruling on his motion to enable him to appeal for the review of the questions involved, and not that he consented to the overruling of the motion so as to prevent a review on appeal.—Wastl v. Montana Union Ry. Co., 13 Mont. 500; 34 Pac. 844.

86. A party in whose favor a judgment is rendered can not, by failing to see that a proper judgment is entered, deprive his adversary of the right of appeal.—Hynes v. Barnes, 30 Mont. 25; 75 Pac. 523.

87. Under Code Civ. Proc., § 1004, a mere order of court that a cause be "dismissed without prejudice as per praecipe filed" by plaintiff, is not a final appealable judgment, though final judgment of dismissal with costs could have been entered thereon.—State v. District Court, 32 Mont. 37; 79 Pac. 546.

IV. RIGHT OF REVIEW, 88-95.

A. Persons Entitled, 88-91.
B. Estoppel, Waiver, or Agreements Affecting Right, 92-95.

A. PERSONS ENTITLED, 88-91.

88. The territory, having the right to make contracts and sue thereon, has the right, in a civil action, to bring appeal to review any judgment by which it is aggrieved.—Territory v. Hildebrand, 2 Mont. 426.

89. Under Code Civ. Proc., §§ 1722, 1736, where the record does not show that any judgment has been entered in the case in the court below, an appeal from the judgment will be dismissed.—Lisker v. O'Rourke, 28 Mont. 129; 72 Pac. 416, 755.

89. A minute entry directing judgment to be entered for defendant is not a judgment.—Id.

90. A defendant, over whom the district court acquired no jurisdiction by service of process, is not aggrieved by an order of such court granting an injunction against him.—MacGinniss v. Mining Co., 29 Mont. 428; 75 Pac. 89.

91. Where a suit is dismissed pursuant to a compromise agreement, and defendants neglect to have a judgment for costs entered in their favor, there is no judgment from which they can appeal.—Musigbrod v. Hartford, 30 Mont. 273; 76 Pac. 563.

B. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT, 92-95.

92. D. recovered a judgment in the probate court against P., who appealed. D. moved for a dismissal of the appeal for certain irregulari-

ties in the taking of such appeal. The motions were overruled and D. proceeded, voluntarily, to trial upon the merits, and P. recovered judgment. *Held*, that D. waived the irregularities in the taking of the appeal.—Payne v. Davis, 2 Mont. 381.

93. One who reserves exceptions to an order directing him to answer an amended complaint within a specified time, and also complies with the order, thereby waives the right of exception.—Barber v. Briscoe, 8 Mont. 214; 19 Pac. 589.

94. Where defendant asked leave to amend his answer, consented to the setting of the case for trial, and demanded a jury after a motion for new trial had been granted, he can not, by a subsequent attempt to appeal from the order granting such motion, deprive the court of its jurisdiction to proceed with the case.—State v. District Court, 17 Mont. 329; 42 Pac. 850.

95. Where a decree has been satisfied, it ceases to be reviewable on appeal.—In re Black's Estate, 32 Mont. 51; 79 Pac. 554.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW, 96-202.

A. Issues and Questions in Lower Court, 96-108.
B. Objections and Motions, and Rulings Thereon, 109-146.
C. Exceptions, 147-169.
D. Motions for New Trial, 170-202.

A. ISSUES AND QUESTIONS IN LOWER COURT, 96-108.

96. Under § 432 of the Code an appeal will lie to the district court from an order of the probate court approving or disapproving the account of an administrator. Such order is in the nature of a judgment, and an appeal therefrom brings the whole case before the district court for review and adjudication.—Broadwater v. Richards, 4 Mont. 52; 2 Pac. 544.

97. Cases appealed from the probate to the district court are tried de novo, and all irregularities in the inferior court become immaterial.—McCormick v. Hubbell, 4 Mont. 87; 5 Pac. 314.

98. Where no point is made in the trial of an action that the entire contract had been reduced to writing, and such contract is ignored in the pleadings, it can not be taken advantage of on appeal as a basis of objections to instructions.—Hogan v. Shuart, 11 Mont. 498; 28 Pac. 969.

99. Where a case has been tried to a jury, upon an issue admitted to have been raised by the answer, the objection that such issue was not sufficiently presented will not be considered when urged for the first time on appeal.—Sweeney v. Railway Co., 11 Mont. 523; 29 Pac. 15.

100. An objection that an executor was, at certain periods of his administration, allowed larger commissions than authorized by law, can not be raised for the first time on appeal.—In re Ricker's Estate, 14 Mont. 153; 35 Pac. 960.

101. On appeal by plaintiff in ejectment, defendant for the first time may, in order to sustain the judgment, raise the question that the description in the complaint is fatally defective.—Tracy v. Harmon, 17 Mont. 465; 43 Pac. 500.

102. A voluntary abandonment, on the trial, by plaintiff, of one ground of recovery, eliminates all questions on appeal touching the grounds thus abandoned.—Hamilton v. Huson, 21 Mont. 9; 53 Pac. 101.

103. The supreme court will not review an error of law not raised in the district court.—Philipsburg v. Weinstein, 21 Mont. 146; 53 Pac. 272.

104. Where plaintiff replied to an answer setting up an estoppel, and the case was tried on the issues thus formed, he can not, on appeal, depart from the lines within which he voluntarily confined himself by his pleadings.—Aikens v. Frank, 21 Mont. 192; 53 Pac. 538.

105. An objection, based on an entirely different theory from the one on which the case was tried by both parties, can not be urged on appeal.—Durfee v. Harper, 22 Mont. 354; 56 Pac. 582.

106. Where a case has been treated, in the trial court, as an equitable action, neither party can, on appeal, assume a position antagonistic to such theory.—Talbott v. Water Co., 29 Mont. 17; 73 Pac. 1111.

107. Where plaintiff relied, in the trial court, on an estoppel arising from defendant's admission in his answer in another suit, and not on the proposition that the judgment in such suit was determinative of such facts, she could not change her position on appeal, and claim that the judgment was conclusive as to the facts on which the estoppel was based.—Flannery v. Campbell, 30 Mont. 172; 75 Pac. 1109.

108. Where a cause was tried in the district court as one at law and a judgment entered for plaintiff, he, on defendant's appeal, can not change his ground in the supreme court, and insist that the cause was one in equity, and that error in instructions is not cause for reversal.—Ayotte v. Nadeau, 32 Mont. 498; 81 Pac. 145.

B. OBJECTIONS AND MOTIONS, AND RULINGS THEREON, 109-146.

1. Objections to Jurisdiction, 109.
2. To Parties, 110.
3. To Proceedings Relating to Injunctions, 111.
4. As to Variance, 112-113.
5. To Pleadings, 114-129.
6. As to Evidence and Examination of Witnesses, 130-138.
7. To Instructions, 139-140.
8. To Findings, 141-142.
9. To Judgment, 143.
10. As to Amount of Recovery, 144.
11. Necessity of Presenting Objection by Motion, 145.
12. Changing Grounds of Objection, 146.

1. Objections to jurisdiction, 109.

109. Under Code Civ. Proc., § 685, the question of jurisdiction may be raised for the first time in the supreme court.—Oppenheimer v. Regan, 32 Mont. 110; 79 Pac. 695.

2. Objections to parties, 110.

110. An objection that there is a defect of parties can not be made for the first time in the appellate court.—Boyd v. Peterson, 5 Mont. 226; 2 Pac. 346.

3. Objections to proceedings relating to injunction, 111.

111. Plaintiff, on the hearing of his application for an injunction, swore a witness whose testimony, in scope and definiteness, exceeded the allegations of the complaint, and in argument on its admissibility the court ruled that the complaint did not state facts sufficient to constitute a cause of action, to which plaintiff excepted, when defendants asked leave to withdraw their affidavits in support of their answer,

and to be allowed to stand on the answer alone, which was granted, and on motion of defendants the court refused to continue the temporary order, and vacated the order to show cause, to which plaintiff excepted. *Held*, that plaintiff, by failing to insist on a ruling as to the admissibility of his evidence, and to object to the withdrawal of defendants' affidavits, and thereby allowing the question as to whether an injunction should issue to be submitted on the complaint and answer, waived his right to review the action of the trial court on appeal.—Express Co. v. Trades Assembly, 24 Mont. 348; 61 Pac. 990.

4. Objections as to variance, 112-113.

112. Where, in an action for injuries to a servant, defendant moved for a nonsuit at the close of plaintiff's evidence, on the ground that the evidence conclusively showed that plaintiff was guilty of contributory negligence or that he assumed the risk, it could not be alleged for the first time on appeal that nonsuit was properly granted by reason of an alleged variance between pleadings and proof.—Nord v. Mining Co., 30 Mont. 48; 75 Pac. 681.

113. On appeal the court will not consider the question of alleged variance between the proof and complaint, not called to the attention of the court below.—Dawes v. Great Falls, 31 Mont. 9; 77 Pac. 309.

5. Objections to pleadings, 114-129.

114. An objection that the complaint does not state facts sufficient to constitute a cause of action may be urged for the first time on appeal.—Territory v. Virginia Road Co., 2 Mont. 96.

115. The sufficiency of an answer can not be attacked for the first time on appeal.—Orr v. Haskell, 2 Mont. 225.

116. An assignment of error that the complaint does not state facts sufficient to constitute a cause of action will be considered by the supreme court, notwithstanding failure to except to the ruling thereon.—Morse v. Swan, 2 Mont. 306.

117. The objection that there was no replication to the answer among the pleadings can not be made for the first time in the appellate court.—Russell v. Hoyt, 4 Mont. 412; 2 Pac. 25.

118. The objection that the complaint does not state facts sufficient to constitute a cause of action is never waived.—Parker v. Bond, 5 Mont. 1; 1 Pac. 209.

119. An objection that a contract sued upon is not pleaded in haec verba, or as to its legal effect, can not be first raised on appeal.—Quirk v. Clark, 7 Mont. 231; 14 Pac. 669.

120. A garnishee's property having been sold under execution in favor of one of his creditors, the garnishment plaintiff sued his debtor, the garnishee, plaintiff in execution, and the sheriff, to have the proceeds of the execution sale applied in payment of his claim. It was stipulated that no claim was made except on account of the attachment of the alleged debt of the garnishee to plaintiff's debtor, and the main issue of fact was as to whether such debt existed. *Held*, that defendants could not, on appeal, take advantage of a defect in the complaint not avering that an attachment was levied on an indebtedness due from the garnishee to plaintiff's debtor.—Montana Nat'l Bank v. Bank, 19 Mont. 586; 49 Pac. 149.

121. An objection that evidence was not admissible under the pleadings can not be first raised on appeal.—Lawlor v. Kemper, 20 Mont. 13; 49 Pac. 398.

122. Where an answer is treated as sufficient by the parties in the trial court, the question of its sufficiency can not be raised on appeal.—Hamilton v. Huson, 21 Mont. 9; 53 Pac. 101.

123. Where defendant's denials of plaintiff's allegations are not objected to at the trial, but are treated by both parties and the court as sufficient, an objection that they were insufficient to justify the admission of evidence can not be taken on appeal.—Missoula Merc. Co. v. O'Donnell, 24 Mont. 65; 60 Pac. 991.

124. The fact that a demurrer to an answer denominates it a "defense," instead of a "counterclaim," will be regarded in the appellate court as immaterial, where both counsel and the trial court have treated it as attacking the pleading as a counterclaim.—Power v. Sla, 24 Mont. 243; 61 Pac. 468.

125. An objection to a replication denying the "material" allegations of the answer, not taken in the trial court, is waived on appeal.—Burke v. Loan Ass'n, 25 Mont. 315; 64 Pac. 879.

126. Where a complaint states a cause of action, it can not be attacked on appeal for defects which would have subjected it to a motion to make more specific, or to a special demurrer, in the absence of any objections to it in the court below.—Hefferlin v. Karlman, 29 Mont. 139; 74 Pac. 201.

127. An objection to a complaint, not made in the lower court, will not be considered on appeal.—McConnell v. Milling Co., 31 Mont. 563; 79 Pac. 248.

128. An objection to the verification of the complaint can not be made for the first time in the reviewing court.—Pryor v. Walkerville, 31 Mont. 618; 79 Pac. 240.

129. Where a complaint blends a plurality of causes of action, in violation of Code Civ. Proc., § 672, providing that causes of action shall be separately stated in the complaint, the failure of defendant to object on that ground renders the defect immaterial on defendant's appeal from an order denying a new trial.—Ayotte v. Nadeau, 32 Mont. 498; 81 Pac. 145.

6. Objections as to evidence and examination of witnesses, 130-138.

130. An objection, made for the first time on appeal, that the evidence was not relevant to the issues will not be considered.—Story v. Black, 5 Mont. 26; 1 Pac. 1.

131. The insufficiency of testimony does not have to do with its competency, and if competent testimony, or such as must be held competent, because not objected to, supports the finding, it will not be disturbed.—Id.

132. If no exception be taken to the action of the trial court in admitting evidence for a limited purpose, such action will not be reviewed by the appellate court.—Rutherford v. Talent, 6 Mont. 132; 9 Pac. 821.

133. Objections to the admission of testimony which are made and raised for the first time in this court will not be considered.

Brand v. Servoss, 11 Mont. 86; 27 Pac. 407.

Merchants Nat'l Bank v. Greenhood, 16 Mont. 395; 41 Pac. 250.

134. Alleged error in admitting evidence in support of a cause of action, to which the defense of limitations has been properly interposed, can not be reviewed in the absence of a request for instructions directing the jury to disregard it.—Wastl v. Montana Union, 24 Mont. 159; 61 Pac. 9.

135. The exclusion of evidence can not be reviewed where no offer to prove the facts sought to be elicited by the excluded interrogatory was made.—Tague v. John Caplice Co., 28 Mont. 51; 72 Pac. 297.

136. Assignments of error in sustaining objections to certain questions can not be con-

sidered where there is no showing as to what the answers would have been, and the questions give no indication of the specific evidence sought to be adduced.—King v. Mining Co., 28 Mont. 74; 72 Pac. 309.

137. Where, in an action tried to the court, the evidence admitted without objection was sufficient to sustain the court's findings, it will be presumed, on appeal, that evidence erroneously admitted was not considered by the court in arriving at its conclusions.—Finlen v. Heinze, 28 Mont. 548; 73 Pac. 123.

138. Where the books and papers of a corporation were admitted in evidence, without objection, it can not be claimed on appeal that the admission of one of such papers constituted error.—Thornton-Thomas Co. v. Bretherton, 32 Mont. 80; 80 Pac. 10.

7. Objections to instructions, 139-140.

139. An instruction, correct in the abstract, but faulty when applied to the particular case, is ground for reversal, though appellant raised no objection on the trial.—Sheehy v. Flaherty, 8 Mont. 365; 20 Pac. 687.

140. Where, on a trial of a suit to determine an adverse claim to a mining location, a jury was not demanded by either party, and the court tried the case as a suit in equity, without objection by defendant, the latter was estopped to object for the first time on appeal that the action was one at law, and that he was entitled to the verdict of a jury as to which, if either, party was entitled to possession of the ground in question.—Mares v. Dillon, 30 Mont. 117; 75 Pac. 963.

8. Objections to findings, 141-142.

141. An appellate court will not sustain an objection to findings of the court below on the ground of variance between the proof and pleadings, raised therein for the first time, and when it does not appear that the complaining party has been actually misled thereby.—Southmayd v. Southmayd, 4 Mont. 100; 5 Pac. 318.

142. Under the express provisions of Code Civ. Proc., § 1114, no judgment can be reversed on appeal for want of a finding, at the instance of a party who has not requested the finding.—Grogan v. Trading Co., 30 Mont. 229; 76 Pac. 211.

9. Objections to judgment, 143.

143. Whether the complaint supports the judgment is a question which may be raised for the first time on appeal.

Gilletts v. Hibbard, 3 Mont. 412.
Parker v. Bond, 5 Mont. 1; 1 Pac. 209.
Foster v. Wilson, 5 Mont. 53; 2 Pac. 310.

10. Objections as to amount of recovery, 144.

144. An assignment of error that the court below erred in the computation of interest on a note will not be considered in the supreme court, where no exception thereto was taken in the court below.—McFarland v. Cutter, 1 Mont. 383.

11. Necessity of presenting objection by motion, 145.

145. In order to have the question of inconsistency between a special finding and a general verdict considered by the appellate court, the party claiming such inconsistency must move the court below for judgment in his favor on the special finding.—Baker v. Water Co., 28 Mont. 222; 72 Pac. 617.

12. Changing grounds of objection, 146.

146. Evidence objected to on one ground in the lower court can not be urged for error on a different ground on appeal.—Thornton-Thomas Co. v. Bretherton, 32 Mont. 80; 80 Pac. 10.

C. EXCEPTIONS, 147-169.

1. Necessity in General, 147-149a.
2. Necessity to Review Rulings as to Pleadings, 150.
3. To Review Proceedings at Trial, 151.
4. To Review Rulings on Evidence, 152.
5. To Review Instructions, 153.
6. Necessity of Exceptions to Verdict or Findings, 154-158.
7. To Review Sufficiency of Evidence, 159-160.
8. Of Timely Exception, 161.
9. Sufficiency, 162-167.
10. Scope and Effect, 168-169.

1. Necessity in general, 147-149a.

147. Appellant did not save properly any exceptions to the instructions of the court, but during the trial the attorneys stipulated that "the said exceptions may be had, used and made available on appeal as if so regularly and properly taken." *Held*, that such exceptions could not be considered.—Daniels v. Andes Ins. Co., 2 Mont. 500.

148. Under Comp. Stat., p. 139, § 296, allowing a new trial for "errors in law occurring at the trial and excepted to by the party making the application," a new trial can not be granted where no such exceptions were taken at the trial.—Froman v. Patterson, 10 Mont. 107; 24 Pac. 692.

149. An appeal will not be dismissed on the ground that appellant failed to except to the findings or to ask for further findings.—Logan v. Rickards, 14 Mont. 334; 36 Pac. 318.

149a. Errors of law need not be set forth as specifically as those of fact.—Collier v. Ervin, 2 Mont. 335.

2. Necessity to review rulings as to pleadings, 150.

150. Rulings on demurrer to a pleading are not reviewable on appeal in the absence of any exception thereto in the court below.—Territory v. Virginia Road Co., 2 Mont. 96.

3. Necessity to review proceedings at trial, 151.

151. Error in allowing plaintiff's attorney to make certain remarks to the jury will not be considered when the matter is not brought before the court by a bill of exceptions.—Littrell v. Wilcox, 11 Mont. 77; 27 Pac. 394.

4. Necessity to review rulings on evidence, 152.

152. Where no exception is noted, admission of evidence can not be reviewed.

Stafford v. Hornbuckle, 3 Mont. 485.
Gregg v. Kommers, 22 Mont. 511; 57 Pac. 92.
May v. Anaconda, 26 Mont. 140; 66 Pac. 759.

5. Necessity to review instructions, 153.

153. Where no exceptions were taken to the instructions of the court on the trial below, and properly saved, they will not be regarded in the appellate court.—McKinney v. Powers, 2 Mont. 466.

6. Necessity of exceptions to verdict or findings, 154-158.

154. Since Code Civ. Proc., §§ 1141, et seq., apply to equity cases, a defective finding that plaintiff had abandoned a water right, in an injunction suit to restrain its diversion, is not ground for reversal, where the defect was not brought to the trial court's attention, and no ex-

ception thereto was preserved.—Haggin v. Saile, 23 Mont. 375; 59 Pac. 154.

155. Under Code Civ. Proc., § 1114, where a party has failed to point out particular defects in the court's findings, and to save his exceptions, the findings can not be reviewed on appeal.—Currie v. Montana Central, 24 Mont. 123; 60 Pac. 989.

156. Code Civ. Proc., § 1114, has to do only with findings which omit matters necessary or proper to be stated, and relates to exceptions for deficiencies or omissions, and not for what is contained in the findings.—Cobban v Hecklen, 27 Mont. 245; 70 Pac. 805.

157. Under the express provisions of Code Civ. Proc., § 1114, no judgment can be reversed on appeal in cases of defects in the findings, unless exceptions have been made in the trial court, as provided in § 1115.—Grogan v. Trading Co., 30 Mont. 229; 76 Pac. 211.

158. Under the express provisions of Code Civ. Proc., § 1114, in a case tried by the court, the judgment is not reversible for defects in the findings, unless exceptions to the defects are made in the trial court.—Bordeaux v. Bordeaux, 32 Mont. 159; 80 Pac. 6.

7. Necessity to review sufficiency of evidence, 159-160.

159. Where no exceptions appear in the record to the findings of fact of the court below, they will be taken as true.—Wilson v. Davis, 1 Mont. 183.

160. A motion to change a previous order for irregularity, in that it was made without notice to or consent of plaintiff, involves a matter of law, within Code Civ. Proc., § 1150, and hence is not open to the objection that an exception does not lie thereto.—Beach v. Spokane R. & W. Co., 21 Mont. 7; 52 Pac. 560.

8. Necessity of timely exception, 161.

161. The appellate court will not regard exceptions unless they are reduced to writing, signed by the judge and filed with the clerk, before the submission of the case to the jury. (See 111 U. S. 775.)—Randall v. Greenhood, 3 Mont. 506.

9. Sufficiency, 162-167.

162. An exception "to the findings of the court herein, and each and every part thereof" is insufficient, as being too general, if there is one good finding by the court.—Collier v. Field, 2 Mont. 320.

163. A general exception to the findings of the court is insufficient. If to findings of fact, it should specifically point out wherein the findings were erroneous.—Collier v. Ervin, 2 Mont. 335.

164 Exceptions of a general nature, which do not particularly state the point of exception, will be disregarded on appeal.—Herman v. Jeffries, 4 Mont. 513; 1 Pac. 11.

165. The point of an objection and exception must be so particularly and specifically stated as to enable the trial court to correct its own errors, and to enable the adverse party to remove the objection if possible.—Story v. Black, 5 Mont. 26; 1 Pac. 1.

166. Under Code Civ. Proc., § 1152, a bill of exceptions containing no specifications whatever, nor pointing out in any manner any insufficiency, will not warrant a review of the evidence.—Robertson v. Longley, 28 Mont. 128; 72 Pac. 423.

167. The supreme court can not review the action of the court below in disregarding one of the special findings of the jury, where the party complaining does not specifically except thereto, but relies entirely on an exception to the entry of judgment in favor of the other party.—Baker v. Water Co., 28 Mont. 222; 72 Pac. 617.

10. Scope and effect, 168-169.

168. A general exception to leave granted to amend a pleading only raises the general question as to the authority of the court to allow amendments during the progress of the trial. (See 111 U. S. 775.)—Randall v. Greenhood, 3 Mont. 506.

169. Appellant can not avail himself of an exception taken on the trial by the adverse party.—Forrester v. Mining Co., 29 Mont. 397; 74 Pac. 1088; 76 Pac. 211.

D. MOTIONS FOR NEW TRIAL, 170-202.

1. Review of Errors and Questions of Law, 170-174.
2. Of Weight and Sufficiency of Evidence, 175-178.
3. Of Exceptions to Referee's Report, 179.
4. Necessity, Sufficiency, and Scope of Statement of Grounds, and Authentication Thereof, 180-199.
5. Necessity of Appeal From Order, 200-202.

1. Review of errors and questions of law, 170-174.

170. If a verdict is tainted with fraud, the proper remedy is by motion for new trial, and an appeal from the action of the court on such order is the only way such question can be reviewed.—McCormick v. Hubbell, 4 Mont. 87; 5 Pac. 314.

171. Where an error is not specified in the motion for new trial, it will not be considered.—Maloy v. Berkin, 11 Mont. 138; 27 Pac. 442.

172. Error in nonsuit may be reviewed by a statement on appeal.—William M. Co. v. Fussy, 13 Mont. 401; 34 Pac. 189.

173. Errors of law, including those arising from the admission or exclusion of evidence, or rulings on conceded facts, may be reviewed on appeal from the judgment alone, without any motion for new trial.—Largey v. Bartlett, 18 Mont. 265; 44 Pac. 962.

174. Error in exclusion of pleadings in another action, offered in evidence, can not be reviewed, where they are not included in the statement on motion for new trial.—Finlen v. Heinze, 28 Mont. 548; 73 Pac. 123.

2. Review of weight and sufficiency of evidence, 175-178.

175. In the absence of a motion for new trial the supreme court will not review the evidence.

Chumasero v. Vial, 3 Mont. 376.
Largey v. Sedman, 3 Mont. 472.
Twell v. Twell, 6 Mont. 19; 9 Pac. 537.
Alder Gulch C. M. Co. v. Hayes, 6 Mont. 31; 9 Pac. 581.
Porter v. Clark, 6 Mont. 246; 11 Pac. 638.

176. When there is no motion for a new trial in the court below, the appellate court will not consider the evidence contained in the record on questions of fact.—Broadwater v. Richards, 4 Mont. 52; 2 Pac. 544.

177. Where the record on appeal shows that no motion for new trial was made nor appeal taken within 60 days after judgment was rendered, a statement, alleging as error the insufficiency of the evidence to support the findings, will be stricken out.—Blessing v. Sias, 7 Mont. 103; 14 Pac. 663.

178. Under Code Civ. Proc., § 1152, the sufficiency of the evidence to support a verdict can be raised on appeal by a bill of exceptions, as well as on appeal from an order in reference to a new trial.—Emerson v. Eldorado D. Co., 18 Mont. 247; 44 Pac. 969.

3. Review of exceptions to referee's report, 179.

179. Exceptions to a referee's report will not be reviewed, unless they are presented in the court below before judgment, exceptions saved to the rulings of the court, and afterwards a motion for a new trial brought up by bill of exceptions.—Kleinschmidt v. Iler, 6 Mont. 122; 9 Pac. 901.

4. Necessity, sufficiency, and scope of statement of grounds, and authentication thereof, 180-199.

180. A statement that does not point out specifically, in some intelligible manner, the errors or grounds upon which an appellant will reply, will not be considered.—Pinney v. Herschfield, 1 Mont. 367.

181. On motion for new trial, a specification of error that "the evidence in the case does not justify the findings of the verdict" is insufficient, as lacking exactness and precision.—Griswold v. Boley, 1 Mont. 545.

182. On motion for new trial, a specification of error that, "the court erred in instructing the jury for the plaintiff, as they were instructed by the court at the time," is insufficient, as being too general.—Id.

183. A party moving for new trial must give notice to the adverse party, which notice must designate the grounds on which the motion will be made; and in case of insufficiency of evidence, it should specify in what particular, and if for errors of law, it should specify the particular errors upon which the party will rely, and this court will confine itself to the investigation of such errors as are alleged in the statement. —Id.

184. The amendment of the Code, providing that the party moving for a new trial shall "give the points in writing, particularly specifying the grounds of such motion,' while doing away with the necessity of a statement, does not contemplate that such grounds shall be pointed out with any less particularity than formerly.—Taylor v. Holter, 2 Mont. 476.

185. Assigning as a reason for new trial, "that the findings and judgment are against law," is too general and indefinite, and will not be considered on appeal.—Id.

186. Assigning as a reason for new trial, "errors in law occuring at the trial and excepted to by plaintiffs," is too general, and will not be considered.—Id.

187. Assigning as a reason for new trial, "that the evidence is insufficient to justify the findings and judgment of the court," is too general and indefinite, and will not be considered. —Id.

188. Comp. Stat., p. 135, § 298, provides that a statement for new trial shall contain specifications of the "particular errors" of law upon which appellant relies, and, "if no specifications be made, the statement shall be disregarded on the hearing of the motion.' *Held*, that a statement which contains nothing but an unorganized mass of testimony, without any particular specifications of error, is not such a statement as is contemplated by the statute, and should be disregarded.—Raymond v. Thexton, 7 Mont. 299; 17 Pac. 258.

189. A statement specifying that, "the evidence shows" certain facts, which are contrary to the findings of the jury, does not comply with Comp. Stat., p. 136, § 293, subd. 3, requiring specifications of "the particulars in which the evidence is insufficient to justify the verdict."—First Nat'l Bank v. Roberts, 9 Mont. 323; 23 Pac. 718.

190. On appeal from an order overruling a motion for new trial, made upon a statement of the case, under Comp. Stat., p. 135, § 298, providing that the statement shall specify the particular errors relied on, and, if no specifications are made, the statement shall be disregarded on hearing of the motion, this court can consider only the specifications found in the record.—Carron v. Wood, 10 Mont. 500; 26 Pac. 388.

191. Where the record was voluminous, a specification on motion for new trial, merely stating that "the evidence clearly shows" that a certain condition of the contract had been fulfilled, without pointing out wherein the evidence of a breach of such condition was insufficient, was properly ignored.—Zickler v. Deegan, 16 Mont. 198; 40 Pac. 410.

192. Where the statement on motion for new trial was not served within 10 days after notice of intention to move therefor, as required by Code Civ. Proc., § 1173, subd. 3, and the time was not extended by stipulation or otherwise, no question presented by the statement can be considered on appeal.—Power v. Lenoir, 22 Mont. 169; 56 Pac. 106.

193. Errors of law on appeal from an order refusing new trial can not be reviewed, where a specification of such errors was omitted from the statement.—Gallagher v. Cornelius, 23 Mont. 27; 57 Pac. 447.

194. Under Code Civ. Proc., § 1173, where a specification of error is that the evidence was insufficient to support the verdict, this court will not consider what the evidence does show, but only what it does not show, and a specification that the evidence is insufficient, because it conclusively shows contributory negligence, etc., will be disregarded.—Cain v. Mining Co., 27 Mont. 529; 71 Pac. 1004.

195. Under Code Civ. Proc., §§ 1171, 1172, the failure to show, by affidavit, an alleged error of the court, in commenting on the probable effect of evidence at the time of its reception, precluded its review on appeal.—Coleman v. Perry, 28 Mont. 1; 72 Pac. 42.

196. Under Code Civ. Proc., § 1173, the court must disregard, on appeal, the statement on motion for new trial, and all questions sought to be presented thereby, when the moving party has failed to comply with the requirements of such section.—Wright v. Matthews, 28 Mont. 442; 72 Pac. 820.

197. Under a notice of intention to move for new trial, specifying the insufficiency of the evidence to justify the decision of the court as regarded plaintiff, the appealing defendant could not urge an objection to the sufficiency of the evidence to sustain the decision in favor of another defendant.—McNinch v. Crawford, 30 Mont. 297; 76 Pac. 698.

198. Where the notice of intention to move for new trial bases the motion on the ground of insufficiency of the evidence to support findings, the movant can not, on appeal, change his position, and claim that the making of the findings was an error at law.—Schilling v. Curran, 30 Mont. 370; 76 Pac. 998.

199. A bill of exceptions, not made a part of the statement on motion for new trial, can not be considered.—In re Colbert's Estate, 31 Mont. 461; 78 Pac. 971.

5. Necessity of appeal from order, 200-202.

200. This court can not review any question of fact if there is no appeal from an order granting or refusing a motion for a new trial. —Allport v. Kelley, 2 Mont. 343.

201. Where defendant's motion for new trial was denied, and he appealed from the judgment alone, assignments of error referring to instructions, not in the record as a part of the judgment roll, but in a statement on motion for a new trial, cannot be considered.—Dawes v. Great Falls, 31 Mont. 9; 77 Pac. 309.

202. Where an appeal is from a judgment, and not from the order overruling motion for new trial, the court will not determine the sufficiency of the evidence, but only whether there is any evidence to support the judgment.—Id.

VI. PARTIES, 203.

203. In an action against joint makers of a note, on appeal by one, a co-maker is not such an adverse party as to be entitled to notice.—Oleson v. Wilson, 20 Mont. 544; 52 Pac. 372.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE, 204-267.

A. TIME OF TAKING PROCEEDINGS, 204-217.
B. AFFIDAVIT, 218.
C. PAYMENT OF FEES OR COSTS AND BONDS OR OTHER SECURITIES, 219-248.
D. WRIT OF ERROR, CITATION, OR NOTICE, 249-265.
E. APPEARANCE, 266-267.

A. TIME OF TAKING PROCEEDINGS, 204-217.

1. LIMITATIONS, 204-208.
2. COMMENCEMENT OF PERIOD OF LIMITATIONS, 209-211.
3. COMPUTATION OF TIME LIMITED, 212-214.
4. EFFECT OF DELAY OR FAILURE TO TAKE PROCEEDINGS, 215-217.

1. Limitations, 204-208.

204. An order refusing to open a default is a special order made after final judgment, from which an appeal, to be reviewed, must be taken within 60 days.—Dietrich v. Steam Dredge, 14 Mont. 261; 36 Pac. 81.

205. When a determination of questions of law involved in the action of the court on motion for nonsuit, or in giving or refusing instructions, requires an examination of the evidence, the appellate court may examine it for such purpose, although the appeal was not taken within 60 days from the rendition of the judgment, as provided by Comp. Stat., p. 174, § 421.—Gilliam v. Black, 16 Mont. 217; 40 Pac. 303.

206. Under Code Civ. Proc., § 1723, unless an appeal from a judgment, rendered on an appeal from a justice's court, be taken within 90 days after entry of the judgment appealed from, it is of no avail, and must be dismissed.—Welcome v. Howell, 20 Mont. 42; 49 Pac. 393.

207. An application for the appointment of a receiver to work a mining claim, pending a suit to settle a controversy as to the title thereto, is not a "special proceeding," within Code Civ. Proc., § 1722, as amended by Laws 1899, p. 146, but is a provisional remedy, which may be had only in an action, and can not be made except as ancillary to and a step in the action itself.—State v. District Court, 28 Mont. 227; 72 Pac. 613.

208. Under Code Civ. Proc., § 1723, an appeal from an order refusing new trial, made on Dec. 3, 1900, not taken until Apr. 6, 1901, was too late.—Powell v. May, 29 Mont. 71; 74 Pac. 80.

2. Commencement of period of limitations, 209-211.

209. An appeal will be dismissed upon motion, when the appeal was not perfected within 90 days after the rendition of the judgment, though it was perfected within the required time after the motion for a rehearing had been denied.—Griswold v. Ryan, 2 Mont. 47.

210. Where the practice of the territorial district court, sitting as a United States district or circuit court, was to enter its judgments only in a book known as the "journal of proceedings," the time within which an appeal might be taken commenced to run from such entry.—Work v. Northern Pacific, 11 Mont. 513; 29 Pac. 280.

211. An appeal from the judgment of the district court, rendered on an appeal from an inferior court, not taken within 90 days of its rendition, as required by Code Civ. Proc., § 1723, subd. 2, is too late.—Warren v. Humble, 26 Mont. 495; 68 Pac. 851.

3. Computation of time limited, 212-214.

212. An appeal from an order made and entered on January 8, denying a motion to vacate a judgment, will be dismissed, where notice thereof was not served until March 10, since such appeal was not taken within 60 days from the making and entry of the order, as required by Code Civ. Proc., § 1723.—Richter v. Eagle Life Ass'n, 24 Mont. 346; 61 Pac. 878.

213. Pending an action to settle a controversy as to the ownership of a mining claim, a receiver was appointed to work the property. On appeal the order of appointment was reversed. Afterwards an order was entered in the nature of a final judgment against the plaintiff in the action for the amount allowed the receiver for compensation, counsel fees, etc. *Held*, to be a "final order in an action," under Code Civ. Proc., § 1723, as amended by Laws 1899, p. 135, and appealable for only 60 days.—State v. District Court, 28 Mont. 227; 72 Pac. 613.

214. Pending an action to settle a controversy as to the ownership of a mining claim, a receiver was appointed. On appeal the order of appointment was reversed. Thereafter, and on January 17, a hearing was had on the final report of the receiver, and, at the conclusion thereof, the court made an order fixing his compensation at a certain sum, and allowing him certain further sums for counsel and stenographer's fees. The order contained no provision as to who should be charged with these allowances. Two days later the receiver moved for an order requiring the plaintiff in the action to pay the allowances, and on January 31 the motion was granted, and an order entered in the form of a final judgment against the plaintiff for the amount thereof. *Held*, that the order of January 31, and not that of January 17, was the appealable order.—Id.

4. Effect of delay or failure to take proceedings, 215-217.

215. An appeal not perfected within the time specified by statute must be dismissed.
Griswold v. Ryan, 2 Mont. 47.
Howard v. Quinn, 2 Mont. 339.
Nelson v. Donovan, 14 Mont. 78; 35 Pac. 227.
Gallagher v. Cornelius, 23 Mont. 27; 57 Pac. 447.

216. A motion to perfect an appeal from the probate to the district court, which was not supported by affidavits, and was submitted after the appeal had been dismissed and a final disposition of the case had been made, was properly overruled by the court.—McMullen v. Armstrong, 1 Mont. 486.

217. Under Code Civ. Proc., § 1723, subd. 2, as amended by Laws 1899, p. 147, an appeal taken more than 90 days after entry of judgment will be dismissed for want of jurisdiction.—Schatzlein v. Passmore, 26 Mont. 500; 68 Pac. 1113.

B. AFFIDAVIT, 218.

218. An order overruling a motion for leave to perfect an appeal from the probate to the district court was in the discretion of the court, where the motion was not supported by affidavits.—McMullen v. Armstrong, 1 Mont. 486.

C. PAYMENT OF FEES OR COSTS AND BONDS OR OTHER SECURITIES, 219-248.

1. Necessity of Security, 219-220.
2. Sureties, 221-222.
3. Amount or Conditions of Bond, 223-225.
4. Requisites of Bond, 226-231.
5. Delivery, Filing, and Service of Bond, 232-235.
6. Amendments and New Security, 236-241.
7. Bonds on Review of Two or More Decisions, 242-248.

1. Necessity of security, 219-220.

219. The supreme court has no jurisdiction in injunction proceedings, where appellant fails to file a proper undertaking on appeal.—Washoe Copper Co. v. Hickey, 23 Mont. 319; 58 Pac. 866.

220. Under Code Civ. Proc., § 1724, omission to file an undertaking in support of an appeal, as therein provided, renders the appeal ineffectual for any purpose.—Johns v. Barnes, 31 Mont. 426; 78 Pac. 703.

2. Sureties, 221-222.

221. The fact that a surety company is insolvent does not deprive it of its right to execute an undertaking on appeal, so as to render the appeal effectual, in the absence of the action for making up deficiency in its assets, required by Code Civ. Proc., § 1900, to be taken by the state auditor, when its liabilities exceed its assets, pending payment of which deficiency said section provides that said company shall not be accepted on a bond.—King v. Elling, 24 Mont. 470; 62 Pac. 783.

222. An "undertaking" on appeal is within Code Civ. Proc., § 604, subd. 3, authorizing the creation of corporations to execute or guarantee any "bond" required by law to be given in any proceeding in court.—Id.

3. Amount or condition of bond, 223-225.

223. An appeal bond, to the effect that plaintiffs will prosecute their appeal with effect, and pay all costs and damages which may be awarded against them, and in favor of defendants, either by dismissal, or on the trial of the appeal, substantially complies with the statute, and protects the appellee, though executed in the sum of $500, when the statute prescribes that the bond shall not be to exceed $300.—Stapleton v. Pease, 2 Mont. 508.

224. Under Code Civ. Proc., §§ 1725, 1731, where appellant appealed from a judgment and from an order denying a new trial, an appeal bond, conditioned that it should be void if appellant pay all damages and costs awarded against it on such appeals, or a dismissal thereof, was insufficient, since the sureties thereby assumed no liability unless both appeals should be decided against appellant or should be dismissed. (See 196 U. S. 119.)—Baker v. Water Co., 24 Mont. 31; 60 Pac. 488.

225. Where appellant appeals from a judgment and from an order denying new trial, an appeal bond, conditioned that it shall be void if appellant pay all damages awarded against him on such appeals, without alternative conditions referring to each separately, is insufficient, as the sureties assume no liability unless both appeals are decided against appellant.—Ramsey v. Burns, 24 Mont. 232; 61 Pac. 129.

4. Requisites of bond, 226-231.

226. If an appeal bond, reciting separate appeals from the judgment, and from different orders, is void for ambiguity as to which appeal it is intended to refer to, appellant can not escape the effect of the ambiguity by claiming that the orders are not appealable, and the bond therefore refers to the judgment, as the court, in determining the validity of the bond, will not examine the record to see what orders are appealable.—Creek v. Bozeman W. W. Co., 22 Mont. 327; 56 Pac. 362.

227. An appeal bond recited four distinct appeals,—one from the judgment, and three from orders,—and that, in consideration "of such appeal, * * * appellant will pay all damages and costs which may be awarded against her." *Held*, that the bond was invalid for ambiguity, in not stating which appeal it was intended to secure.—Id.

228. A notice of appeal declared that the party appealed from a judgment of one date, and from an order of another date, and from "all other judgments, orders and decrees." The bond recited that the party was about to appeal from a certain judgment, order and decree, at the "times" mentioned in the notice. *Held*, that the bond was invalid for ambiguity, in not stating which appeal it was intended to secure.—Murphy v. Northern Pacific, 22 Mont. 577; 57 Pac. 278.

229. Under Code Civ. Proc., § 1739, a certificate "that a good and sufficient undertaking on appeal approved by me has been filed in my office" is fatally defective.—Id.

230. Under Code Civil Procedure, § 1724, where an appellant served notice that he desired to appeal from a judgment and an order denying new trial, but the undertaking referred to an appeal from the judgment only, the appeal will be treated as abandoned, as far as it relates to the order denying new trial, and to that extent will be dismissed, irrespective of the intention of appellant.—Hurley v. O'Neill, 24 Mont. 293; 61 Pac. 658.

231. A notice of appeal recited that the defendants "each hereby appeals." The undertaking, after reciting that the defendants were about to appeal, added that, in consideration of such appeal, the sureties bound themselves to pay damages and costs awarded against appellants, or either of them, on "the appeal." *Held*, that the undertaking would warrant a recovery on a determination of the appeal adverse to both defendants, and was not the undertaking of one defendant merely.—Hayes v. Union Merc. Co., 27 Mont. 264; 70 Pac. 975.

5. Delivery, filing, and service of bond, 232-235.

232. An appeal is ineffectual, unless a bond is filed within the time prescribed by law.—Pardee v. Murray, 4 Mont. 35; 1 Pac. 737.

233. Failure to file an apeal bond within five days of notice of appeal, as required by Code Civ. Proc., § 1724, renders the appeal ineffectual.—Hines v. Carl, 22 Mont. 501; 57 Pac. 88.

234. Under Code Civ. Proc., § 1724, an appeal bond must be filed within five days of the service of the notice on the adverse party, and not within five days from the filing of the notice with the clerk, if the filing occurs after the date of such service.—Savings Bank v. Klaffki, 26 Mont. 384; 68 Pac. 410.

235. The time of filing an appeal bond is not extended, in a case in which the appellee resides at a distance, and the service is made through the mails, by Code Civ. Proc., § 1833.

as the bond is to be filed by appellant, and not by the party served with notice, who is the adverse party.—Id.

6. Amendments and new security, 236-241.

236. Comp. Stat., 174, § 423, provides that the appeal bond must be conditioned that the appellant will pay all damages and costs which may be awarded against him on appeal, "or on a dismissal thereof, not exceeding $300." *Held*, that bond without the words, "or on a dismissal thereof," was only defective, and not void, and therefore was not ground for dismissal, but appellant would be allowed to file a new bond.—Woodman v. Calkins, 12 Mont. 456; 31 Pac. 63.

237. If, after the expiration of the statutory time for perfecting appeals, an appeal bond is adjudged void for ambiguity, appellant can not then prevent a dismissal by filing a valid bond, since it would operate to extend the time for perfecting an appeal.—Creek v. Bozeman W. W. Co., 22 Mont. 327; 56 Pac. 362.

238. Under Code Civ. Proc., §§ 1725, 1726, 1731, where appellant's appeal bond omitted the alternative condition for a dismissal of the appeal, it was insufficient, and the defect could not be cured by inserting such provision in that part of the undertaking providing for a stay of execution.—Hill v. Cassidy, 24 Mont. 108; 60 Pac. 811.

239. Under Code Civ. Proc., § 1740, where appellant failed to file a new bond, she could not prevent a dismissal of the appeal on the ground of excusable neglect, on her affidavit that she had no notice of the motion to dismiss the appeal, and that of her attorney that he notified appellant's husband that she should procure a new bond, and, because of the husband's promise to inform her, the attorney made no further effort in the matter.—Id.

240. Under Code Civ. Proc., § 1740, where a sufficient bond is filed as required therein, a motion to dismiss for insufficiency of the bond must be denied.—Ramsey v. Burns, 24 Mont. 232; 61 Pac. 129.

241. Under Code Civ. Proc., § 1740, an objection to a bond as being only a joint one is not available where, before the hearing of the motion to dismiss, each appellant has filed a due and proper undertaking.—Hayes v. Union Merc. Co., 27 Mont. 264; 70 Pac. 975.

7. Bonds on review of two or more decisions, 242-248.

242. But one cost bond is required in appealing from a judgment and an order, where such appeal is consolidated into one record.—Watkins v. Morris, 14 Mont. 354; 36 Pac. 452.

243. A court granted, first, a restraining order, then an injunction pendente lite, and, afterwards, a permanent injunction, and defendants filed notice of appeal "from the order continuing the restraining order issued therein in force, and from the order granting an injunction against defendants pending the final determination of this action, and from the injunction order granted herein," and the bond recited that, "whereas defendants have taken an appeal from the order in said cause continuing the restraining order in force, granting a temporary injunction, and from the order of temporary injunction," and the defendants in their brief on appeal assigned the temporary and final injunction as separate errors. *Held*, that the appeal should be dismissed, as said bond was void on account of ambiguity, because it could not be referred to either of the orders from which the appeal was sought, although one of said orders was not appealable.—Washoe Copper Co. v. Hickey, 23 Mont. 319; 58 Pac. 866.

244. A single bond, to secure two appeals, from two separate orders, made at different times, after judgment, is void for ambiguity, justifying a dismissal of both appeals.—Grage v. Paulson, 23 Mont. 337; 59 Pac. 1.

245. A single bond on appeal from a final judgment or from an order denying a new trial, conditioned to be void if appellant pay all damages and costs awarded against it on such appeals, or a dismissal thereof, is insufficient. (See 196 U. S. 119.)—Baker v. Water Co., 24 Mont. 113; 60 Pac. 817.

246. A bond, where defendant appeals on one record both from the final judgment entered against him, and from an order refusing new trial, conditioned that appellant will pay all costs and damages awarded against him on the appeal on a dismissal thereof, is not void for the reason that it can not be determined therefrom to which appeal it applies or is to be referred.—Ramsey v. Burns, 24 Mont. 232; 61 Pac. 129.

247. A bond for an appeal from a judgment for plaintiff, and an appeal from an order denying a new trial, stating that the undersigned promises that the defendant will pay all damages and costs awarded against it on appeal, or dismissal thereof, not exceeding $300, was not objectionable in not stating whether the bond was for the appeal from the judgment or for the appeal from the order denying new trial, since the bondsmen were liable for any damages and costs to which the defendant might become entitled under either appeal.—Nolan v. Montana Central, 24 Mont. 327; 61 Pac. 880.

248. A bond on appeals from a judgment, and an order made thereafter, denying a motion to vacate the same, conditioned for the payment of damages and costs on appeal, without specifying to which appeal it applies, is insufficient. —Richter v. Eagle Life Ass'n, 24 Mont. 346; 61 Pac. 878.

D. WRIT OF ERROR, CITATION, OR NOTICE, 249-265.

1. Parties Entitled to Notice, 249-250.
2. Form and Requisites of Notice, 251-258.
3. Service of Notice, 259-265.

1. Parties entitled to notice, 249-250.

249. In a suit to enforce a mechanic's lien, all the defendants were represented by the same attorneys, and made a common defense, claiming no interests adverse to one another. The liens of the mortgagee defendants were held superior to plaintiff's lien, but one of the defendants, who claimed under a prior judgment lien, was defeated, and, on appeal by such defendant and by plaintiff, the same attorneys appeared for the former, who represented all the defendants below, still claiming that there was no conflict of interests between any of their clients, but additional counsel appeared for the mortgagees, and argued that there was such conflict. *Held*, that this court would not allow such a change of attitude, and that it had jurisdiction, though notice of appeal was not served on the mortgagee defendants by the co-defendant.—Johnson v. Puritan M. Co., 19 Mont. 30; 47 Pac. 337.

250. In an action by plaintiffs against their lessee and defendant to quiet title to mining property, *held*, that under the particular circumstances, the lessee was not an "adverse party", within the meaning of Code Civ. Proc., § 1724, on whom defendants were required to serve notice of appeal.—Merk v. Mining Co., 31 Mont. 298; 78 Pac. 519.

2. Form and requisites of bond, 251-258.

251. The provisions of the Code, § 370, requiring a written notice of appeal, are mandatory, and an appeal will be dismissed where the

record shows only an oral notice given in open court.—Cornell v. Latta, 1 Mont. 714.

252. A notice which reads: "Take notice that the above named intervenors appeal to the supreme court from a judgment or decree in this cause, and that appeal is taken from a judgment of the court giving priority to the claim of the plaintiffs, over the claim of the intervenors," is notice of an appeal from the entire judgment, and not from a part thereof.—Creighton v. Hershfield, 2 Mont. 386.

253. Under Comp. Stat., § 174, § 422, providing that an appeal shall be taken by filing with the clerk of the court a notice stating the appeal from the judgment or order or some specific part thereof, such notice, mentioning specifically some orders, will not bring up for review an order not referred to.—Sperling v. Calfee, 7 Mont. 514; 19 Pac. 204.

254. When the notice of appeal fails to advise the adverse party that the order denying a motion for new trial will oe the subject of review, such order can not be considered.—Steuffen v. Jefferis, 9 Mont. 66; 22 Pac. 152.

255. Where an appeal is taken from a "judgment and order * * * denying defendants' motion to vacate," the recital of several appealable orders does not affect defendants' right to appeal.—Bryant v. Davis, 22 Mont. 534; 57 Pac. 143.

256. Alleged insufficiency of a general denial can not be raised first on appeal.—King v. Mining Co., 28 Mont. 74; 72 Pac. 309.

257. The fact that two separate notices of appeal from different orders were included in one paper, though an appeal does not lie from one of the orders, does not affect appellants' right to prosecute the appeal from the other appealable one.—MacGinniss v. Mining Co., 29 Mont. 428; 75 Pac. 89.

258. A notice of appeal from two orders, couched in separate paragraphs, by which, reading the first in connection with each of the others, a separate and distinct notice of each appeal is given, was sufficient, as respondents understood therefrom that appellants intended to prosecute two appeals.—Id.

3. Service of notice, 259-265.

259. An appeal will be dismissed for want of jurisdiction where a copy of the notice was served the day before the notice was filed in the district court. Such filing should precede or be contemporaneous with the service of notice.—Courtright v. Berkins, 2 Mont. 404.

260. The transcript on appeal was filed at the January term, 1876, and the case was continued at the following August term by a written stipulation, in which counsel continued all cases in which they were interested. Respondent, at the January term, 1877, moved to dismiss the appeal because the notice of appeal was served four days before it was filed. *Held*, that the respondent, by his delay, waived the right to make the motion.—Townsley v. Hornbuckle, 2 Mont. 589.

261. An appeal was dismissed Jan. 14, 1888, for want of service of notice thereof upon the clerk, and a new appeal was taken, and transcript filed containing an admission of service of notice by the clerk, dated Jan. 18, 1888, and a notice of appeal, and an admission of its service by the county attorney, dated Dec. 19, 1887. *Held*, that the court would take judicial notice of the fact that the service on the attorney was prior to the dismissal of the former appeal, and dismiss the appeal for want of service of the new appeal on the attorney.—Territory v. Harris, 7 Mont. 429; 17 Pac. 557.

262. Comp. Stat., p. 191, § 492, provides generally that, where a party has an attorney in an action, service of papers shall be upon the attorney. Sec. 422 provides that the notice of appeal may be served "on the adverse party or his attorney." Sec. 631 provides that, when a general and a particular provision of a statute are inconsistent, the particular provision will prevail. *Held*, that service of a notice of appeal on the appellee is sufficient.—Mantle v. Largey, 15 Mont. 116; 41 Pac. 1077.

263. Where a notice of appeal from an order denying a new trial was not filed with the clerk of the district court and served within 60 days after the order denying the motion was entered, as required by Code Civ. Proc., § 1723, subd. 3, and § 1724, the appeal from such order must be dismissed.—Threlkeld v. O'Neal, 26 Mont. 209; 66 Pac. 940.

264. Where a judgment is rendered against two of three defendant co-tort-feasors, counsel for the three can not acknowledge service for the third of the notice of appeal by the defeated two, as the third is adversely interested to escape contribution.—Haves v. Union Merc. Co., 27 Mont. 264; 70 Pac. 975.

265. Where a defendant who recovers judgment has no counsel of record, except such as represents co-defendants, against whom judgment is rendered, and which counsel is therefore incompetent to acknowledge service, on behalf of the successful defendant, of the notice of appeal by the defendants charged, service of such notice on the successful defendant by mailing a copy to his post office address is sufficient.—Id.

E. APPEARANCE, 266-267.

266. Where a party recovered a judgment in the probate court against one who appealed therefrom, and the party recovering the judgment moved to dismiss the appeal in the district court, and proceeded to trial after said motion was overruled, he thereby waived the objection that the undertaking was not perfected in time.—Payne v. Davis, 2 Mont. 381.

267. If the appellee appears and takes part in the proceedings above, he waives notice.—Id.

VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR, 268-273.

268. Though under Comp. Stat., p. 176, § 428, service of the notice, and its filing with the bond prescribed, stays the trial court's proceedings upon the judgment or order appealed from, the court thereafter retains jurisdiction to settle and certify the statement on appeal.—William M. Co. v. Fussy, 13 Mont. 401; 34 Pac. 189.

269. Where an appeal is taken from an order granting an interlocutory injunction, it does not thereafter prevent the court from appointing a receiver in the same action, under Code Civ. Proc., § 1730, but the court may proceed on any other matter embraced in the action, and not affected by such order.—State v. District Court, 22 Mont. 241; 56 Pac. 281.

270. Under Const., art. 8, § 3, the authority to preserve the subject of litigation pending an appeal to the supreme court is exclusively vested in such court from the moment the trial court has entered its final judgment therein, and the trial court has no power whatever to issue an injunction in aid of its appeal.—Finlen v. Heinze, 27 Mont. 107; 69 Pac. 829; 70 Pac. 517.

271. An appellate court has inherent power to preserve the subject of litigation and the status of the parties pending an appeal.—Id.

272. Where a notice of appeal has been duly

filed and served, and a bond has been filed according to law with the clerk of the district court, that court is ousted of jurisdiction, and jurisdiction of the appeal is in the supreme court.—Glavin v. Lane, 29 Mont. 228; 74 Pac. 406.

273. Under Code Civ. Proc., § 1730, providing that an appeal stays all further proceedings in the court below on the judgment or order appealed from, or on the matters embraced therein, the trial court had no authority, after an appeal from a judgment in replevin for the value of property, to correct it by entering a judgment in the alternative.—Hynes v. Barnes, 30 Mont. 25; 75 Pac. 523.

IX. SUPERSEDEAS OR STAY OF PROCEEDINGS, 274-282.

274. An appeal bond filed to supercede or stay the execution of a decree for the sale of real property should provide for an amount to secure the liens recovered for the detention of the property, costs of suit, just damages for delay, and costs and interest on appeal, and be executed to the appellees, and conditioned as required by the 32nd rule of this court.—Mason v. Germaine, 1 Mont. 279.

275. No part of the judgment can be executed, if the proper bond to stay the execution has been given.—Plaisted v. Nowlan, 2 Mont. 359.

276. Under U. S. R. S., § 1007, providing that, where a writ of error may be a supersedeas, it may be obtained by serving the writ on the adverse party, or filing a copy with the clerk within 60 days after the rendition of judgment; and § 1012, providing that appeals shall be subject to the same rules as writs of error,—where no appeal has been taken within 60 days from the rendition of judgment, no supersedeas can be obtained.—First Nat'l Bank v. McAndrews, 7 Mont. 434; 17 Pac. 554.

277. Pending appeal by a corporation from an order refusing to vacate a receivership imposed at the instance of minority stockholders, because of the corporation illegally transferring its stock and property to a foreign corporation, the majority stockholders moved for a stay and for restitution, and offered to make full accounting for all transactions subsequent to the illegal transfer, to allow the injunction restraining it from transferring its property to be made properly, and suffer judgment cancelling the conveyances and declaring valid a re-conveyance, and to indemnify the minority stockholders. The majority represented 149-150 of the stock, and the corporation was solvent and had $1,000,000 in the treasury,—its property being worth $40,000,000,—with no debts. The corporation made a prima facie showing that the management of the receiver would not be as skilled as operation by its own servants, and would not result as advantageously to the shareholders. *Held*, that the stay should be granted, and restitution made, on execution of a sufficient bond.—Forrester v. Mining Co., 22 Mont. 430; 56 Pac. 868.

278. Where an appeal has been dismissed without prejudice because it was improperly taken, the order fixing the amount of the first undertaking for stay of execution was functus officio, and, on the taking of the second appeal, it was the duty of the court to again fix the amount of the undertaking for stay of execution.—State v. District Court, 24 Mont. 330; 61 Pac. 882.

279. Code Civ. Proc., §§ 1722 and 1723, subd. 3, as amended by Laws 1899, pp. 146, 147, provide that, pending an appeal from an order granting an injunction, the supreme court may stay all proceedings on such conditions as may seem proper. By § 1733 an appeal from an order granting an injunction stays proceedings. Const., art. 8, § 3, declares that the jurisdiction of the supreme court shall extend to all cases subject to limitations prescribed by law. Code Civ. Proc., § 19, provides that, in cases of injunction, the supreme court shall have power to issue all writs necessary to the complete exercise of its appellate jurisdiction. *Held*, that pending an appeal from an injunction restraining defendants from entering or working a certain mining claim of which they were in possession, they might not have an order suspending the injunction, since §§ 1722 and 1723, subd. 3, apply, not to a prohibitory injunction, but to one under which some step may be taken; and, regarding the injunction as mandatory in effect, in view of appellant's possession, it was stayed by § 1733; and, conceding that the supreme court's authority on the appeal was not limited to the remedy given in § 1723, subd. 3, and § 1722, neither Const., art. 8, § 3, nor Code Civ. Proc., § 19, authorized a vacation.—Maloney v. King, 26 Mont. 487; 68 Pac. 1012.

280. Under Code Civ. Proc., § 1733, providing that perfecting an appeal to the supreme court shall stay proceedings in the trial court on the judgment or order appealed from, except, etc., a mandatory injunction is stayed by the perfecting of an appeal from the decree.—Maloney v. King, 26 Mont. 492; 68 Pac. 1014.

281. Code Civ. Proc., § 23, authorizes the supreme court to continue an injunction in force, or grant an injunction, pending an appeal, and Sup. Ct. rule 21 prescribes the procedure therefor. Code Civ. Proc., §§ 1722, 1723, subd. 3, as amended by Laws 1899, pp. 146, 147, authorizes an appeal from a judgment granting or dissolving an injunction. *Held*, that the supreme court was not authorized by the designated statutes or other law to stay a perpetual injunction pending appeal therefrom, as the statutes only apply to interlocutory injunctions, and have no reference to staying or suspending the operation of decrees.—Id.

282. The objection that a decree granting a perpetual injunction is void, as not being within the issues, will not be considered on a motion to stay the injunction during the pendency of the appeal.—Id.

X. RECORD AND PROCEEDINGS NOT IN RECORD, 283-493.

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A. MATTERS TO BE SHOWN BY RECORD, 283-297.

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4. MAKING AND FILING OF BILL OF EXCEPTIONS OR STATEMENT, 296-297.

1. Nature, form, and grounds of decision, 283.

283. Where there is no judgment in the record, and it does not appear that there was a judgment entered which could be supplied under suggestion of diminution, an appeal from the judgment will be dismissed without prejudice.—Brunell v. Logan, 16 Mont. 307; 40 Pac. 597.

2. Presentation and reservation of grounds of review, 284-293.

284. This court can not review matters not presented in the record.—Conner v. McPhee, 1 Mont. 73.

285. Where the record shows no exception taken to the computation of interest by the court, this court can not consider the matter.—McFarland v. Cutter, 1 Mont. 383.

286. If an error is clearly pointed out, and the fair presumption from the record is that the exception was taken in due time, it will be considered on appeal.—Shober v. Jack, 3 Mont. 351.

287. An objection to evidence on the general ground of incompetency is sufficiently explicit, if such evidence would not be competent in any phase of the case.—Id.

288. A decision upon a motion for new trial can not be reviewed in the appellate court when there is no evidence in the record.—First Nat'l Bank v. McAndrews, 5 Mont. 251; 5 Pac. 279.

289. A decision upon a motion for new trial can not be reviewed in the appellate court when the record does not show that a notice of the motion, designating the errors complained of, was filed or served upon the opposite party.—Id.

290. Unless a motion for a new trial is in the record the court will not review the action of the court below on such motion.—Gum v. Murray, 6 Mont. 10; 9 Pac. 447.

291. An order on motion for new trial will not be reviewed unless the record shows that notice of the motion, designating the errors complained of, was filed or served upon the opposite party.—Id.

292. Where it does not appear from the record that appellant requested findings in writing by a referee or had such request, if made, entered in the minutes of the court below, as required by Code Civ. Proc., § 1114, as a condition for reversal for want of findings, he can not complain of the referee's failure to make findings.—Gallagher v. Cornelius, 23 Mont. 27; 57 Pac. 447.

293. When the record fails to show whether appellant's demurrer to the complaint was overruled or withdrawn, the failure to sustain it can not be reviewed.—Hefferlin v. Karlman, 30 Mont. 348; 76 Pac. 757.

2. Taking and perfecting proceedings for review, 294-295.

294. In the absence of a stipulation waiving an appeal bond, failure of the district clerk to certify on appeal, as required by Code Civ. Proc., § 1739, that the undertaking "in due form has been properly filed," renders the certificate fatally defective.—State v. Millis, 19 Mont. 444; 48 Pac. 773.

295. It is improper to insert the undertaking on appeal in the transcript.—Menard v. Montana Central, 22 Mont. 340; 56 Pac. 592.

3. Making and filing of bill of exceptions or statement, 296-297.

296. This court will not consider a statement that has not been duly settled and certified, or exceptions that have not been duly presented and signed, according to statute.—King v. Sullivan, 1 Mont. 282.

297. This court can not consider exceptions which have not been reduced to form and signed during the term, or noted by the clerk, unless counsel consent, or the judge orders, that they be prepared in vacation.—Taylor v. Holter, 2 Mont. 476.

B. SCOPE AND CONTENTS OF RECORD, 298-353.

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11. AFFIDAVITS ACCOMPANYING TRANSCRIPT, 353.

1. Proceedings and matters included, in general, 298-303.

298. The opinion of the trial court, purporting to be ordered by said court to be taken as findings of fact and conclusions of law thereon, will not be considered a part of the record, where there is nothing to indicate such order except a note to that effect posted on a page of the transcript over another memorandum.—Fant v. Tandy, 7 Mont. 443; 17 Pac. 560.

299. The opinion of the lower court, though inserted in the record on appeal, can not be resorted to, to add to the order sought to be reviewed, as the Code of Civil Procedure does not require the opinion to be made part of the transcript.—Menard v. Montana Central, 22 Mont. 340; 56 Pac. 592.

300. The opinion of the lower court is no part of the record on appeal, and can not be considered for any purpose.—Cornish v. Floyd-Jones, 26 Mont. 153; 66 Pac. 838.

301. Where, on appeal from an order granting new trial, the opinion of the trial judge, while found in the transcript, is not embraced in any bill of exceptions, it is no part of the record, and can not be considered.—Harrington v. Mining Co., 27 Mont. 1; 69 Pac. 102.

301a. On appeal the opinion of the lower court has no place in the record, and a contention that it shows that the court did not consider certain evidence which was admitted without objection can not be entertained.—Phillips v. Coburn, 28 Mont. 40; 72 Pac. 291.

302. Where the bill of exceptions recited that the records and files of the action were offered and used on the hearing, but neither the complaint, summons, motion for cost bond, nor the proposed answer was incorporated therein,

these papers were not properly before the court.—Emerson v. McNair, 28 Mont. 578; 73 Pac. 121.

303. Under Code Civ. Proc., § 1737, on appeal from an order setting aside a default judgment, the judgment roll, as such, is not properly a part of the record.—Id.

2. Pleadings and proceedings relating thereto, 304-306.

304. Where a complaint is amended, the original complaint forms no part of the record on appeal.—Raymond v. Thexton, 7 Mont. 299; 17 Pac. 258.

305. A motion to strike out a portion of a pleading, being in effect a demurrer, constitutes part of the judgment roll, and an order sustaining the same being deemed excepted to, is reviewable on appeal from the judgment without a bill of exceptions.—Bank v. Fuqua, 11 Mont. 285; 28 Pac. 291.

306. Under Code Civ. Proc., § 1737, where, on appeal from an order denying an application, a copy of the petition and of an affidavit to support it are found in the transcript, neither of which is identified by bill of exceptions, the unidentified petition and the accompanying affidavit can not be considered.—Cornish v. Floyd-Jones, 26 Mont. 153; 66 Pac. 838.

3. Stipulations, 307-309.

307. Where there is no statement on motion for new trial, the court will not consider affidavits relating to verbal stipulations between the attorneys of the parties.—Rankin v. Campbell, 1 Mont. 300.

308. While the oral agreements of attorneys as to the sufficiency of the record are to be disregarded, and the entry of them by the clerk gives them no additional validity so as to entitle them to notice on appeal, where the respondents admit the statement in the transcript to be the one settled by the judge below and referred to on motion for new trial, and the case is submitted on such basis, this court will consider the errors assigned, although the practice is bad and not to be regarded as precedent.—Stewart v. Miller, 1 Mont. 301.

309. Where a deed is, by stipulation, incorporated into the transcript, and refered to as being on file with the clerk, and the court below and the parties treated the instrument as in evidence, the objection that it was not in evidence is without merit.—O'Keefe v. Dyer, 20 Mont. 477; 52 Pac. 196.

4. Interlocutory motions, orders, and judgments, 310-316.

310. A motion for nonsuit is no part of the judgment roll, and the evidence therein will not be considered on appeal from the judgment alone, without a statement, as required by Code Civ. Proc., § 419. (See 117 U. S. 282.)—Kleinschmidt v. McAndrews, 4 Mont. 8, 223; 2 Pac. 286.

311. A statement of the testimony should accompany a bill of exceptions on an appeal from a judgment of nonsuit to make it available.—Rooney v. Tong, 4 Mont. 596; 1 Pac. 720.

312. The record on appeal from judgment of nonsuit should contain a statement of the evidence to accompany the bill of exceptions, or it will be presumed that the judgment was sustained by the evidence.—Id., 4 Mont. 597; 2 Pac. 312.

313. An affidavit and motion for continuance are not part of the record, and must be brought up by bill of exceptions.—Barber v. Briscoe, 8 Mont. 214; 19 Pac. 589.

314. Appeals from injunctions are regularly heard upon the pleadings and affidavits, and therefore no bill of exceptions is necessary when the papers are before the reviewing court.—Blue Bird v. Murray, 9 Mont. 468; 23 Pac. 1022.

315. An appeal from an order denying motion for change of venue may be brought up without a statement or bill of exceptions, it being sufficient that the transcript contains the papers on which the motion was made, certified to by the clerk, as provided by Comp. Stat., p. 178, § 438.—Bookwalter v. Conrad, 14 Mont. 62; 35 Pac. 226.

316. Where the court discharged an attachment because the summons was void, and then gave plaintiff leave to amend the summons, and plaintiff appealed from the order discharging the writ, the decision granting leave to amend did not control, since the order granting such leave was no part of the record on appeal, though included in the transcript, not being one of the papers required by Code Civ. Proc., § 1737, to be certified to the supreme court.—Sharman v. Huot, 20 Mont. 555; 52 Pac. 558.

5. Evidence, 317-320.

317. If the transcript does not contain the certificate of a deposition, it will be presumed that such certificate is insufficient, although the clerk says in a note in the transcript, "Here follows the proper certificate."—McCormick v. Largey, 1 Mont. 158.

318. Where the evidence embodied in the transcript does not form a part of any bill of exceptions the same must be disregarded. (See 110 U. S. 47.)—Higley v. Gilmer, 3 Mont. 433.

319. When this court is precluded from reviewing the evidence, and confined to the judgment roll, in which, under Rev. Stat., p. 95, § 294, the findings are embodied, evidence introduced on the trial, and improperly incorporated in the findings, will be disregarded.—Blessing v. Sias, 7 Mont. 103; 14 Pac. 663.

320. Under Code Civ. Proc., § 1736, a copy of the stenographer's report of evidence, not included in any bill of exceptions or statement settled by the judge, identified merely by the stenographer's certificate, and accompanied by a stipulation of counsel that the statement contains all the evidence, but without waiver of any right to object to the evidence as not being a part of the record, must be stricken from the record on motion, as it could only be made a part of the record under Code Civ. Proc., §§ 1150-1158, relating to the making of bills of exceptions, or under §§ 1170-1176, providing the method for obtaining new trial.—Conklin v. Cullen, 25 Mont. 214; 64 Pac. 502.

6. Instructions, 321-325.

321. Laws 1887, p. 67, providing that instructions given, the giving of them, and the refusal to give instructions requested, "are deemed excepted to, and no exception need be taken to the same, * * * nor any bill of exceptions filed," renders it unnecessary to save exceptions, but does not dispense with the necessity of incorporating such instructions, and the testimony necessary to explain them, in a bill of exceptions, in order that they may be considered on appeal.—Kleinschmidt v. McDermott, 12 Mont. 309; 30 Pac. 393.

322. Prior to the taking effect of the Codes of 1895, the instructions in a case were not a part of the judgment roll, unless included in the bill of exceptions.—Sanderson v. Billings, W. P. Co., 19 Mont. 236; 47 Pac. 998.

323. Instructions given or refused are properly in the record on appeal, when identified by the trial judge, and made a part of the judgment roll, though they are not signed by the party asking them, as required by Code Civ. Proc., § 1080.—Wastl v. Montana Union, 24 Mont. 159; 61 Pac. 9.

324. Under Code Civ. Proc., §§ 1089, subds. 7, 8, and 1151, 1176, 1196, instructions are

properly in the record for review when made a part of the judgment roll, and it is not necessary to include them in the bill of exceptions.—Id.

325. That the giving or refusing of instructions may be reviewed, they must be made part of the judgment roll.—Spencer v. Spencer, 31 Mont. 631; 79 Pac. 320.

7. Proceedings on reference, 326-327.

326. Where a case is referred, and exceptions are taken to the referee's report, they must be presented to the court before judgment thereon, and exceptions saved to the rulings of the court, and, after a motion for a new trial, brought by bill of exceptions into the appellate court; otherwise they can not be reviewed.—Kleinschmidt v. Iler, 6 Mont. 122; 9 Pac. 901.

327. Under Code Civ. Proc., § 1196, findings of fact under an order of reference to hear testimony and report findings of fact did not become a part of the judgment roll, since § 1196 only refers to findings under a reference to hear and determine the issues raised by the pleadings.—Murphy v. Patterson, 24 Mont. 575; 63 Pac. 375.

8. Proceedings on motion for new trial, 328-342.

328. This court will disregard a statement of the evidence on motion for new trial, if such statement has not been incorporated in the bill of exceptions.—Daniels v. Andes Ins. Co., 2 Mont. 500.

329. Defendant made a motion for new trial on the ground that the evidence did not justify the findings and decision, the motion was overruled, and the clerk noted defendant's exception to the ruling, but no bill of exceptions was prepared "in usual form." *Held*, that the action of the clerk did not relieve defendant from the duty of preparing a bill of exceptions "in usual form," and that the evidence could not be reviewed.—First Nat'l Bank v. Irvine, 2 Mont. 554.

330. Where the evidence which is embodied in a transcript does not form a part of any bill of exceptions that has been signed by "the judge who tried the cause," it must be disregarded on appeal. (See 110 U. S. 47.)—Higley v. Gilmer, 3 Mont. 433.

331. Under Comp. Stat., p. 135, § 298, subd. 3, requiring a statement on motion for new trial to be signed by the judge, "with his certificate to the effect that the same is allowed," a statement on motion for new trial, to which no such certificate is attached, will be disregarded on appeal.—Scherrer v. Hale, 9 Mont. 63; 22 Pac. 151.

332. Where amendments were allowed to a statement on motion for new trial, by inserting words and matter at different places, and the same were tacked at the end of the statement with reference to pages and lines, this court will not consider such amendments.—Gallatin Canal Co. v. Lay, 10 Mont. 528; 26 Pac. 1001.

333. Comp. Stat., p. 135, § 298, provides that the "party intending to move for a new trial must * * * file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds on which the motion will be made, and whether upon affidavits, the minutes of the court, a bill of exceptions, or a statement of the case." *Held*, that where a motion is made on affidavits alone, no statement or bill of exceptions is necessary; and where the transcript on appeal contains the notice, based on affidavits, it is immaterial that such notice is not incorporated in the statement, the judgment roll, or included in the bill.—Arnold v. Sinclair, 12 Mont. 248; 29 Pac. 1124.

334. Neither sufficiency of the evidence nor objections to instructions will be considered on appeal, where the statement contains the evidence by question and answer, with no attempt to reduce it to narrative form or omit immaterial matter.—Rodoni v. Lytle, 13 Mont. 123; 32 Pac. 491.

335. A statement on motion for new trial will not be stricken from the record because the evidence is not all in narrative form, unless admonition is unheeded, and the abuse exceeds a just indulgence to litigants unaware of the improper practice.—Penn P. M. Co. v. Schreiner, 14 Mont. 121; 35 Pac. 878.

336. Where amendments to a statement comprise additional matter, which is complete and intelligible in itself, the statement will not be disregarded because the amendments are not engrossed with the record, but occupy a separate position at the end of such statement.—Id.

337. A statement will not be eliminated from the record because it was not filed after settlement (Comp. Stat., p. 135, § 298, subd. 3), where it was filed, and remained with the clerk as a file, until the motion was heard, although it does not appear that it was refiled upon settlement after amendment.—Sell v. Graves, 14 Mont. 341; 36 Pac. 354.

338. A motion to eliminate the statement from the record, because it was not presented to the judge who tried the case, or to the clerk for him, to settle and sign, within 10 days after service of the proposed amendments, is without merit, where the record shows that, after the statement and amendments were filed, it was presented to the judge, and settled, in the presence of counsel for both parties.—Id.

339. Objections to the settlement of a statement must be incorporated therein, to form part of the record on appeal from the order denying new trial.—Beach v. Water Co., 25 Mont. 367; 65 Pac. 106.

340. Under Code Civ. Proc., § 1736, a bill of exceptions used on motion for new trial may be used on appeal from the judgment, though no appeal is taken from the order denying the motion.—Whalen v. Harrison, 26 Mont. 316; 67 Pac. 934.

341. Notice of intention to move for new trial, under Code Civ. Proc., §§ 1173, 1176, 1738, is not a necessary part of the record on appeal from an order denying new trial, unless some objection is presented to the notice in the trial court.—King v. Mining Co., 28 Mont. 74; 72 Pac. 309.

342. Under Code Civ. Proc., § 1196, the statement is no part of the judgment roll.—Powell v. May, 29 Mont. 71; 74 Pac. 80.

9. Judgment and proceedings thereafter, 343-345.

343. Under Comp. Stat., p. 178, § 438, which provides that appellant shall furnish a transcript of the notice of appeal, undertaking on appeal, pleadings which formed the issues tried, the judgment, and such parts of the judgment roll as are necessary to present the points relied on, certified to by the clerk of the court or by the attorneys of the parties, the order appealed from is not to be incorporated in the judgment roll by a bill of exceptions or statement on appeal, when properly certified to by the clerk of the court.—Mining Co. v. Weinstein, 7 Mont. 346; 17 Pac. 108.

344. On an appeal from the taxation of costs, the record contained the statement that part of the bill of costs allowed was witness fees and part attorney's fees, which was not signed by the judge nor made part of the judgment roll by bill of exceptions or statement on appeal. *Held*, that there being no other authentication of the items of the bill as allowed, the question of the illegality of the taxing of at-

torney's fees was not properly before the court. —Id., 7 Mont. 440; 17 Pac. 113.

345. No bill of exceptions is necessary to bring up for review a ruling on a motion to direct the clerk to enter a judgment nunc pro tunc as of the day of its rendition.—Parrott v. McDevitt, 14 Mont. 203; 36 Pac. 193.

10. Bill of exceptions or statement, 346-352.

346. The transcript contained an agreed statement of facts, upon which the case was tried, but this agreed statement of facts not being included in a statement on appeal, and settled or agreed to in accordance with Civ. Code, § 323, nor saved nor included in a bill of exceptions, nor by a certificate of judge referred to as having been used on the trial, it forms no part of the record which this court will consider on appeal.—Noteware v. Sterns, 1 Mont. 311.

347. A bill of exceptions can not be considered as part of the record, unless it is allowed in the manner and filed within the time prescribed by statute. (See 117 U. S. 282.)—Kleinschmidt v. McAndrews, 4 Mont. 8, 223; 2 Pac. 286.

348. A statement on appeal, containing the evidence and exceptions saved by appellant, is part of the judgment roll, and brings up for review the bills of exceptions therein contained. —Emerson v. Eldorado D. Co., 18 Mont. 247; 44 Pac. 969.

349. Where proposed amendments to a bill of exceptions, which were allowed by the court, were not incorporated therein, such bill of exceptions will be disregarded on appeal, since the proposed bill and amendments were both necessary to constitute a bill of exceptions.—Yellowstone Nat'l Bank v. Gagnon, 25 Mont. 268; 64 Pac. 664.

350. Where proposed amendments to a bill of exceptions, which were allowed, were not incorporated in the bill, but only appeared in the transcript, they can not be considered on appeal, since they are not part of the record.—Id.

351. Where plaintiff's bill of exceptions was made up entirely of matters occurring after the entry of final judgment, it was no part of the judgment roll, and hence would not be considered on defendant's appeal from an order denying new trial.—Beach v. Water Co., 25 Mont. 367; 65 Pac. 106.

352. Where the bill of exceptions recites service of notice of appeal upon counsel for respondent, and shows such counsel's acknowledgment of the same, a contention that such service of notice does not appear from the record is without merit.—Porter v. Mining Co., 29 Mont. 347; 74 Pac. 938.

11. Affidavits accompanying transcript, 353.

353. Where an affidavit made by the attorney for respondent on appeal was filed with the clerk of this court, but it did not appear that the affidavit was served on appellant or his attorney, the affidavit will not be considered, but will be stricken from the file.—Threlkeld v. O'Neal, 26 Mont. 209; 66 Pac. 940.

C. NECESSITY OF BILL OF EXCEPTIONS OR STATEMENT OF FACTS, 354-371.

1. Decisions not Otherwise Reviewable, 354-359.
2. Presentation of Grounds of Review, 360-362.
3. Presentation of Exceptions Taken, 363-364.
4. Substitutes, 365-371.

1. Decisions not otherwise reviewable, 354-359.

354. Upon motion for new trial there must be, in every instance, either a statement, signed by the attorneys of the parties, or settled and certified by the judge, or affidavits showing the errors alleged. (See 12 Wall. 259; 20 Wall. 689.)—Mason v. Germaine, 1 Mont. 263.

355. Nothing which is not a part of the judgment roll can be considered, unless presented by exceptions duly preserved and signed, or by a statement settled and certified, as required by statute.—King v. Sullivan, 1 Mont. 282.

356. Where the order appealed from is a final judgment, no bill of exceptions is necessary, under Rev. Stat., p. 91, § 280.—Fredericks v. Davis, 6 Mont. 457; 13 Pac. 124.

357. Error in granting a nonsuit can not be considered when there is no bill of exceptions. —Harding v. McLaughlin, 23 Mont. 334; 58 Pac. 895.

358. Although Code Civ. Proc., § 1151, provides that a new trial order is deemed excepted to, and no bill of exceptions is required, the mode of presenting on appeal affidavits in support of motion for new trial is by formal bill of exceptions, and in this bill should be embraced, unless there is a waiver or an estoppel, the notice of intention.—Carr v. Closser, 27 Mont. 94; 69 Pac. 560.

359. On appeal from an order setting aside a default judgment, the only method by which the papers used below on the hearing can be cetified to this court, as the papers used on the hearing, is by incorporating the same in the bill of exceptions under Code Civ. Proc., §§ 1737, 1739.—Emerson v. McNair, 28 Mont. 578; 73 Pac. 121.

2. Presentation of grounds of review, 360-362.

360. The evidence must be brought to the appellate court by a bill of exceptions, or it will not be considered. (See 110 U. S. 47.)—Higley v. Gilmer, 3 Mont. 433.

361. When the statement contains no exceptions, and there is no bill of exceptions in the transcript, alleged errors in the admission of evidence can not be considered.—Bass v. Buker, 6 Mont. 442; 12 Pac. 922.

362. Under the Code of Civil Procedure, on appeal from an order, the only mode of bringing up the evidence relied on before the court on the hearing of the motion for the order, is by bill of exceptions, except where the Code authorizes another mode, and, in the absence of such bill, the evidence will not be considered as properly identified on appeal.—Rumney L. & C. Co. v. Cattle Co., 19 Mont. 57; 49 Pac. 395.

3. Presentation of exceptions taken, 363-364.

363. When no exceptions to the findings of fact appear in the record, they must stand as true.—Wilson v. Davis, 1 Mont. 183.

364. Merely noting an exception, without filing a bill of exceptions, does not become a part of the judgment roll, save as to matters that the law deems excepted to, and presents no question that the court can treat.—Rooney v. Tong, 4 Mont. 596; 1 Pac. 720.

4. Substitutes, 365-371.

365. A mere motion filed in a cause, assuming that certain facts exist, can not be regarded as a substitute for a bill of exceptions or statement of facts agreed on by the parties or certified by the court, as contemplated by the statute. —Marden v. Wheelock, 1 Mont. 49.

366. An appeal from a decision sustaining a motion for nonsuit should be by statement on appeal, containing the evidence, settled by the court in the presence of the parties. (See

117 U. S. 282.)—Kleinschmidt v. McAndrews, 4 Mont. S. 223; 2 Pac. 286.

367. On appeal from a decision refusing nonsuit, the evidence can be brought up either by bill of exceptions or statement on appeal.—Id.

368. The only remedy on appeal from a decision of nonsuit is by a statement on appeal.—Frost v. O'Neil, 4 Mont. 226; 2 Pac. 315.

369. Where there is nothing in the transcript to show where the statement on motion for new trial begins, or what papers are included therein, a mere transcript of the stenographer's notes of the evidence can not be regarded as a statement on motion for new trial or a statement on appeal; and evidence thus presented will not be considered.—Fant v. Tandy, 4 Mont. 443; 17 Pac. 560.

370. Under Comp. Stat., p. 135, § 296, subd. 7, instructions may be brought before the appellate court, without a bill of exceptions, in the statement on motion for new trial, from the decision on which motion an appeal is taken.—Kleinschmidt v. McDermott, 12 Mont. 309; 30 Pac. 393.

371. Where the record on appeal properly consisted of the order appealed from and affidavits on which it was made, in place of a "statement," though it was in form a statement, a motion to strike from the record, on the ground that it was not prepared or served in the time for statements on appeal, was properly denied.—Griggs v. Kalispel M. Co., 14 Mont. 300, 36 Pac. 81.

D. CONTENTS, MAKING, AND SETTLEMENT OF STATEMENT, 372-379.

372. Service of notice of the settlement of a statement on the adverse party is not necessary, when he has notice that the statement has been filed, and has filed no amendments thereto, and the statement was settled in open court.—Edwards v. Tracy, 2 Mont. 22.

373. The power of settling a case is not personal in the trial judge, but belongs to the court, and may be exercised by his successor in office.—Id.

374. This court will not examine the evidence in the transcript, if it is not certified to be correct by the judge who tried the case, or agreed upon by the parties.—Smith v. Williams, 2 Mont. 195.

375. It is the duty of the judge who tried the case to settle the statement, when the parties disagree, and in doing so he must rely upon his own recollection of what the testimony was, and not allow a new trial, out of court, to ascertain what transpired in court; and a party can not, under the rule of the supreme court, procure a hearing to prove the facts of a statement, when the judge certifies according to his recollection of the testimony, but only in cases where it appears that he refused to certify as he remembers it.—Hale v. Ditch Co., 2 Mont. 498.

376. Where the statement on appeal was filed more than 20 days after entry of judgment, but within 20 days after entry of the order overruling the motion for new trial, appellant waived no rights by his failure to file the statement within 20 days after entry of judgment.—First Nat'l Bank v. Irvine, 2 Mont. 554.

377. Exceptions contained in the statement can not be considered unless settled by the judge.

Raymond v. Thexton, 7 Mont. 299; 17 Pac. 258.

Becker v. Yellowstone, 10 Mont. 87; 24 Pac. 700.

378. When the evidence contained in a statement on appeal is a transcript of the stenographer's notes by question and answer, the record will not be considered on appeal, and it will be presumed that the findings are supported by the evidence.—Barger v. Halford, 10 Mont. 57; 24 Pac. 699.

379. Unless exceptions to defective findings are settled as required by Code Civ. Proc., § 1115, they are not properly a part of the transcript, and will not be considered.—Gallagher v. Cornelius, 23 Mont. 27; 57 Pac. 447.

E. MAKING, FORM, AND REQUISITES OF TRANSCRIPT, 380-400.

1. Necessity, 380.
2. Record or Part Thereof Included, 381-387.
3. Original Papers, 388.
4. Papers not of Record, 389.
5. Stipulations as to Contents, 390.
6. Form and Arrangement, 391-397.
7. Sufficiency, 398-399.
8. Effect of Failure to Make Proper Transcript, 400.

1. Necessity, 380.

380. On appeal from an order made after final judgment, it is the duty of appellant to cause the record to contain all the papers used on the trial at which such order was entered, and respondent can compel appellant to present to the supreme court a perfect record.—Ervin v. Collier, 2 Mont. 605.

2. Record or part thereof included, 381-387.

381. The transcript on appeal from an order refusing to open a judgment entered on failure to answer within the time limited in the order denying defendant's motion to compel plaintiff to elect between counts, should contain such motion for an election and the order thereon, or a formal description thereof, and mere reference thereto in the affidavits on motion to open the judgment is not sufficient.—Butte Butchering Co. v. Clarke, 19 Mont. 306; 48 Pac. 303.

382. Where an amended complaint was served after demurrer sustained, the transcript on an appeal not involving the demurrer need not contain the original complaint, or the order sustaining the demurrer.—Id.

383. A record, consisting only of a bill of exceptions, notice of appeal, and certificate of the clerk, and which does not purport to contain a certified copy of the judgment roll, as such, part of the papers constituting which are contained in the bill of exceptions, the existence of others being merely recited therein, is insufficient to give the court jurisdiction.—Beck v. Holland, 28 Mont. 460; 72 Pac. 972.

384. The requirements of Code Civ. Proc., § 1736, are not complied with by simply inserting in the record a copy of the bill of exceptions, or statement, even though it includes copies of all papers constituting the judgment roll.—Featherman v. Granite, 28 Mont. 462; 72 Pac. 972.

385. Under Code Civ. Proc., § 1736, the presence of copies of the papers mentioned therein in the judgment roll in the record is jurisdictional, and without it the court can not consider any question on the appeal.—Id.

386. Though there is no formal judgment roll, consisting of the papers enumerated in Code Civ. Proc., § 1196, because there was no formal answer, as the only papers which could be incorporated in the roll—the complaint, stipulation with exhibit attached (which the court

and parties treated as amending the complaint and presenting an issue), judgment, and bill of exceptions—were in the record, properly certified as constituting the judgment roll, will be considered as such.—Bickford v. Kirwin, 30 Mont. 1; 75 Pac. 518.

387. Appeal from a judgment will be dismissed, where the record does not contain a copy of the judgment, as required by Code Civ. Proc., § 1736, or showing that the judgment has been entered, as required by § 1722, as amended by Laws 1899, p. 146.—Johns v. Barnes, 31 Mont. 426; 78 Pac. 703.

3. Original papers, 388.

388. Under Code Civ. Proc., § 1738, the court can only consider "copies" of the papers mentioned therein and in § 1176, and hence a record composed of original papers withdrawn from the files of the district court, will not support an appeal.—Cornell v. Matthews, 28 Mont. 457; 72 Pac. 975.

4. Papers not of record, 389.

389. Where, on appeal from an order granting a new trial, there was inserted in the transcript a copy of the notice of motion to move for new trial, the notice not being made part of any bill of exceptions or statement on motion for new trial, nor a constituent part of the judgment roll, as defined in Code Civ. Proc., § 1196, or, in the absence of a bill of exceptions or statement, one of the papers required by §§ 1176, 1738, to be furnished to the appellate court, it will be stricken from the transcript.—Carr v. Closser, 25 Mont. 149; 63 Pac. 1043.

5. Stipulations as to contents, 390.

390. Though entered in the transcript on appeal, the oral agreements of attorneys as to the contents of the record should be disregarded. —Stewart v. Miller, 1 Mont. 301.

6. Form and arrangement, 391-397.

391. A refusal to consider an appeal will be warranted, where the transcript does not comply with the rules of this court.—Brownell v. McCormick, 7 Mont. 12; 14 Pac. 651.

392. If the transcript, whether printed or in writing, does not comply with rule 7, requiring each paper to be separately inserted, the appeal will be dismissed, with costs.—Owsley v. Warfield, 7 Mont. 102; 14 Pac. 646.

393. The transcript must contain an alphabetical index of its contents, specifying the page of each separate paper, order, or proceeding. —Id.

394. A record on appeal should contain an orderly and chronological statement of the case, and pleadings should be inserted but once, and then referred to by page.—Newell v. Meyendorff, 9 Mont. 254; 23 Pac. 333.

395. That the amendments are all placed at the end of the statement is not necessarily a violation of the requirement that matters be stated in chronological order.—Wulf v. Manuel, 9 Mont. 276; 23 Pac. 723.

396. The record on appeal should contain an orderly, chronological statement of the case, and it is the duty of the trial judge to see that the same is correct, both in substance and form, before settling it.—Authier v. Bennett, 16 Mont. 110; 40 Pac. 182.

397. An appeal from an order overruling a motion will be dismissed, where the record consists of unidentified papers, strung together with nothing to indicate that they were used on the hearing, or that there was any other evidence before the court when it made the order complained of.—State v. Millis, 19 Mont. 444; 48 Pac. 773.

7. Sufficiency, 398-399.

398. A transcript which contains a verbatim copy of the stenographer's notes, with the questions and answers not reduced to narrative form and having much testimony not applying to the points relied upon, is not such a record as should be filed on appeal. (See 137 U. S. 340.) —Montana Ry. Co. v. Warren, 6 Mont. 275; 12 Pac. 641.

399. An order overruling a motion for new trial can not be reviewed unless the transcript contains a specification of errors or bill of exceptions.—McLeod v. Dickenson, 11 Mont. 438; 28 Pac. 551.

8. Effect of failure to make proper transcript, 400.

400. Under Code Civ. Proc., § 1736, the court, on appeal from a final judgment, acquires no jurisdiction where the transcript contains no copy of any summons, proof of service, complaint or other pleadings, constituting a part of the judgment roll, within § 1196.—Stanton v. Lewis, 28 Mont. 267; 72 Pac. 658.

F. AUTHENTICATION AND CERTIFICATION, 401-413.

401. When it appears that the evidence has never been certified to as correct, by the judge who tried the case, and there is no agreement to that effect by the parties, such evidence will not be considered.—Smith v. Williams, 2 Mont. 195.

402. Complaints, affidavits and undertakings which have been copied into the transcript by the clerk, and not properly certified, will not be considered.—Howard v. Quinn, 2 Mont. 339.

403. Where the entire record purports, at the outset, to be a bill of exceptions, but is not signed as such by the trial judge, it will not be considered. (See 117 U. S. 282.)—Kleinschmidt v. McAndrews, 4 Mont. 8, 223; 2 Pac. 286.

404. Affidavits submitted to the court in support of a motion for new trial, but which are not properly set forth in the record, will not be considered.—Raymond v. Thexton, 7 Mont. 299; 17 Pac. 258.

405. Where it appears that notice to move for new trial is not properly signed and certified to, it will be stricken from the record.—Id.

406. An order denying a motion for new trial can not be considered, where the alleged statement of the record has not been signed by the judge of the trial court.—Steuffen v. Jefferis, 9 Mont. 66; 22 Pac. 152.

407. Under Code Civ. Proc., § 1739, the clerk has no authority to certify what evidence was before the court at the hearing, or to make any other statement not required by said section.—State v. Millis, 19 Mont. 444; 48 Pac. 773.

408. Rule 8, § 1, providing that any printed matter introduced in evidence in the trial court may be made a part of the record on appeal by being authenticated by the certificate of the trial judge, printed matter so introduced in evidence will not be considered unless certified to by the trial court.—Stevens v. Ravalli, 25 Mont. 306; 64 Pac. 876.

409. Under Code Civ. Proc., § 1739, and Pol. Code, § 4636, providing that transcripts must be certified by the clerk, under seal, after comparison with the original files, no other method of authentication is lawful.—Shadville v. Barker, 26 Mont. 45; 66 Pac. 496, 761.

410. Under Code Civ. Proc., § 1739, on appeal from a final judgment, it must be certified that the record contains a true copy of the judgment roll. A certificate which only states that the transcript contains true copies of certain

designated papers, contained in the judgment roll, is insufficient.—Featherman v Granite, 28 Mont. 462; 72 Pac. 972.

411. Under Code Civ. Proc., § 1739, a certificate of the clerk, omitting the word "properly," and inserting the date of the filing of the undertaking, is sufficient, it appearing that the undertaking has been filed in time.—Davidson v. Wampler, 29 Mont. 61; 74 Pac. 82.

412. Where the statement was not certified by the clerk of the trial court to be a correct copy of the original, it could not be considered on an appeal from an order denying a motion for new trial, under Code Civ. Proc., §§ 1738, 1739, 1176.—Powell v. May, 29 Mont. 71; 74 Pac. 89.

413. A contention that the record does not contain a notice of appeal and judgment roll, properly certified, can not be sustained where appellant procured a new certificate of the clerk, which appears attached to the transcript, and by which the clerk certifies that the record contains "full, true, and correct" copies of the judgment roll and notice of appeal, to which no objection was made.—Porter v. Mining Co., 29 Mont. 347; 74 Pac. 938.

G. TRANSMISSION, FILING, PRINTING, AND SERVICE OF COPIES, 414-416.

414. That appellant was out of the state, his postoffice address being unknown to his family or counsel; that he failed to furnish his counsel with necessary funds to procure a transcript; that he was not advised prior to his departure as to when the appeal was required to be taken; that his counsel was not advised of his intended departure.—*Held*, not sufficient excuse for failure to file the transcript within the statutory time.—Trotter v. Kleinschmidt, 21 Mont. 532; 55 Pac. 29.

415. Rule 4, § 2, requires a transcript on appeal to be filed with the clerk within 60 days after the appeal is perfected. An appeal was perfected August 3, and a defective transcript furnished appellant on demand September 11. No demand for a corrected copy was made, and the defective copy furnished was filed October 22. A motion to dismiss the appeal was filed October 8. *Held*, that appellant was guilty of laches, and his appeal would be dismissed.—Shadville v. Barker, 26 Mont. 45; 66 Pac. 496, 761.

416. Although the supreme court has jurisdiction of an appeal after notice and bond have been properly filed and served, under Code Civ. Proc., § 1736, where the record is defective in any of the particulars mentioned in the section, the appeal can not be held and determined.—Glavin v. Lane, 29 Mont. 228; 74 Pac. 406.

H. DEFECTS, OBJECTIONS, AMENDMENT, AND CORRECTION, 417-427.

417. No question of fact will be considered in this court unless all the evidence relating thereto be embodied or definitely referred to in the statement. (See 12 Wall. 259; 20 Wall. 689.)—Mason v. Germaine, 1 Mont. 263.

418. A motion to strike from the transcript the complaints, affidavits and undertakings for attachment will be sustained, when it appears that such papers were not used on the hearing below.—Howard v. Quinn, 2 Mont. 339.

419. If respondent takes no proceedings to compel the production of a complete record, he can not, on the argument, urge deficiency of the record.—Ervin v. Collier, 2 Mont. 605.

420. If the undertaking was filed within the statutory time, and the record is erroneous in stating the contrary, the correction must be made in the court below, for which purpose the cause will be remitted.—Pardee v. Murray, 4 Mont. 35; 1 Pac. 737.

421. Failure to comply with the rules requiring each paper in a transcript to be separately inserted and indexed, is ground for dismissal.—Owsley v. Warfield, 7 Mont. 102; 14 Pac. 646.

422. A statement on motion for new trial must be certified to and signed by the judge.—Raymond v. Thexton, 7 Mont. 299; 17 Pac. 258.

423. A supplementary transcript, showing amendments to the statement, sent up on an order granting a motion suggesting a diminution of the record, should not be stricken from the files, where there is a dispute as to whether or not such amendments are incorporated in the original statement; since, if they are, no harm will result from duplication, while, if they are not, the party calling therefor is entitled to have them in the record.—Doyle v. Gore, 13 Mont. 471; 34 Pac. 846.

424. Where there is no judgment in the record, and it does not appear that there was a judgment which could be supplied under suggestion of diminution, the appeal will be dismissed.—Brunell v. Logan, 16 Mont. 307; 40 Pac. 597.

425. Though the notice of intention to move for new trial is an indispensable part of the record on appeal, it is waived where the adverse party offers amendments to the proposed statement, without objecting to the want of such notice.—Harrigan v. Lynch, 21 Mont. 36; 52 Pac. 642.

426. A bill of exceptions, as presented for settlement, contained a copy of the order appealed from, which merely denied the motion to vacate the appointment of a receiver. The amendment to the bill, proposed and allowed, set out that the court refused to grant the motion to discharge the receiver, because defendants had refused to comply with the order appointing the receiver, and had violated it, and stood charged with contempt of court, to which the judge directed to be added a statement corroborating such alleged facts. No such reasons were announced, either by express words or by implication at the time the order was made. *Held*, that the reasons for the refusal of the order were immaterial, since the court, having "heard" the motion involving substantial rights, could not punish for contempt by deciding against the movants, and hence this court can not strike out such amendments from the bill, under Code Civ. Proc., § 1157, though it may disregard them.—Forester v. Mining Co., 23 Mont. 122; 58 Pac. 40.

427. Where, on appeal, the transcript prepared and certified by the clerk is defective, for failure to comply with the rules, and appellant's counsel prepares a corrected transcript, and, instead of having the clerk certify thereto as required by Code Civ. Proc., § 1739, detaches the certificate from the defective transcript and attaches it to the corrected one, without the knowledge or authority of the clerk, such transcript can not be considered.—Shadville v. Barker, 26 Mont. 45; 66 Pac. 496, 761.

I. CONCLUSIVENESS AND EFFECT, AND CONTRADICTING, 428-429.

428. After a statement on appeal has been settled by the judge who tried the case, this court will not correct the same, upon receiving the affidavits of parties, claiming that the testimony of witnesses has not been reported correctly.—Largey v. Sedman, 3 Mont. 357.

429. Where a record contains a certificate of the clerk, as required by Code Civ. Proc., § 1739, an undertaking may be shown to be void for uncertainty by filing a certified copy of the

same in the supreme court, where such copy does not tend to contradict the record as to any mater of fact.—Washoe Copper Co. v. Hickey, 23 Mont. 319; 58 Pac. 866.

J. QUESTIONS PRESENTED FOR REVIEW, 430-488.

1. In General, 430-434.
2. Pleading, 435-442.
3. Questions on Interlocutory Proceedings, 443-445.
4. Reference, 446.
5. Conduct of Trial or Hearing, 447-448.
6. Admissibility of Evidence, 449-454.
7. Sufficiency of Evidence, 455-472.
8. Instructions, 473-482.
9. Findings, 483-484.
10. Grounds for New Trial, 485-487.
11. Questions Arising After Judgment, 488.

1. In general, 430-434.

430. This court will presume, in the absence of evidence, that the court below found the facts correctly. (See 12 Wall. 259; 20 Wall. 689.) —Mason v. Germaine, 1 Mont. 263.

431. Where the variance between the original summons and the copy served is not discussed, this court will not presume that it was material, and declare the service of the summons void.—Dunschen v. Higgins, 2 Mont. 302.

432. Where allegations touching laches, the statute of limitations, and estoppel, were denied by replication, but the evidence was not preserved in the record, the court's findings on these questions will not be disturbed on appeal. —Beach v. Water Co., 25 Mont. 379; 65 Pac. 111.

433. Where, on application for an injunction, affidavits offered by defendants were received, over plaintiff's objection that copies had not been served on his counsel, as required by the rules of the district court, and the record does not show the provisions of such rules, this court is unable to say whether the ruling was erroneous.—Anaconda C. M. Co. v. Heinze, 27 Mont. 161; 69 Pac. 909.

434. As, on collateral attack, the question whether the court rendering a judgment had jurisdiction over the person of defendant, must be tried by an inspection of the judgment roll, and by that alone, where the judgment roll is not made a part of the record on appeal this court can not try the question.—Haupt v. Simington, 27 Mont. 480; 71 Pac. 672.

2. Pleading, 435-442.

435. This court can inquire at any time into the sufficiency of the complaint to support the judgment which has been entered thereon.—Territory v. Road Co., 2 Mont. 96.

436. This court will not consider an alleged error in refusing to allow the filing of an amended complaint, unless the record sets forth a statement of the grounds on which exception was taken to the ruling of the court below.—Rooney v. Tong, 4 Mont. 597; 2 Pac. 312.

437. Refusal to allow an amendment is not error where the transcript does not show that any amendment was prepared or submitted, or that good cause was shown therefor.—Bickle v. Irvine, 9 Mont. 251; 23 Pac. 244.

438. Under a complaint containing only a general allegation that plaintiff had suffered damages in the sum of $500 by defendant's wrongful seizure and withholding the possession of plaintiff's premises, some damages may be proved; and a contention on appeal that the complaint is insufficient to sustain the judgment for damages can not be noticed, where the judgment roll only is upon review, and there is nothing from which to judge whether the proof received was germane to the allegations of the damages that might be proved thereunder.—Haggin v. Lorentz, 13 Mont. 406; 34 Pac. 607.

439. Where the amendment allowed to an amended answer is not in the record, nor its character or substance revealed by the transcript, it will not be considered.—Babcock v. Caldwell, 22 Mont. 460; 56 Pac. 1081.

440. Where the record does not show what amendment, if any, was made to the complaint, error in allowing it will not be considered.—Anderson v. Cook, 25 Mont. 330; 64 Pac. 873; 65 Pac. 113.

441. Under Code Civ. Proc., § 1172, alleged error in striking certain attorneys' names from the answer can not be considered, where the record contains no affidavits.—King v. Mining Co., 28 Mont. 74; 72 Pac. 309.

442. On appeal by plaintiff from a judgment for intervenor, where neither the order striking out plaintiff's answer to the complaint in intervention, the one refusing him leave to file an answer, nor the one granting intervenor's motion for judgment on the pleading, was in the record, alleged error therein can not be reviewed.—Doty v. McClusky, 28 Mont. 507; 73 Pac. 118.

3. Questions on interlocutory proceedings, 443-445.

443. On an appeal from an order dissolving an attachment, the record sufficiently sets forth the grounds for the action of the court, when copies of the order and papers used on the motion are contained in the transcript, and certified to by the clerk.—Vaughn v. Dawes, 7 Mont. 360; 17 Pac. 114.

444. On appeal from a judgment, there being no bill of exceptions nor statement, the question of error in refusing an application for continuance is not properly before the court, although the affidavit for continuance appears in the transcript.—Sherman v. Higgins, 7 Mont. 479; 17 Pac. 561.

445. Where there was nothing in the record to show that any motion for a continuance was made, heard or determined by the court, or that the court ever made an order continuing the case, an assignment that the court erred in overruling defendant's motion for a continuance could not be reviewed.—Miller v. Matheson, 28 Mont. 132; 72 Pac. 414.

4. Reference, 446.

446. Although exceptions were taken to the findings of the referees in this case, the testimony upon which they based their findings is not made a part of the record in this court. They can not be reviewed, but must stand as true.—Wilson v. Davis, 1 Mont. 183.

5. Conduct of trial or hearing, 447-448.

447. An assignment of error alleging irregularity in the proceedings of the court below will not be considered, unless supported by affidavits, as required by § 234 of the Code.—Orr v. Haskell, 2 Mont. 225.

448. Under Code Civ. Proc., § 1172, an alleged error, consisting in the use of certain language by the court in the presence of the jury during the trial, can not be reviewed, where the error is not preserved and brought into the record by affidavit.—Tague v. John Caplice Co., 28 Mont. 51; 72 Pac. 297.

6. Admissibility of evidence, 449-454.

449. An exception to the admission of evidence will not be examined, if all the evidence is not before the court.—King v. Sullivan, 1 Mont. 282.

450. This court will not pass upon the competency of a question, unless the bill of exceptions states what was intended to be proved by such question. (See 111 U. S. 775.)—Randall v. Greenhood, 3 Mont. 506.

451. Where a bill of exceptions, taken to the admission of improper evidence taken by depositions, is based upon the notice given to take the depositions, and such notice nowhere appears in the transcript, this court can not consider the specification. (See 141 U. S. 222.) —Starr v. Gregory C. M. Co., 6 Mont. 485; 13 Pac. 195.

452. Where the evidence is not in the record, the exclusion of certain evidence claimed to be in rebuttal will not be reviewed.—Benham v. Reduction Co., 18 Mont. 591; 46 Pac. 816.

453. Where plaintiff, in an action to recover damages for the diversion of water adjacent to his placer claim, offered in evidence a certified copy of the application for patent, which was excluded, the ruling excluding it can not be considered, in the absence of the application from the record.—Leggat v. Carroll, 30 Mont. 384; 76 Pac. 805.

454. The rejection of an offer of proof will not be reviewed, where the party making the offer did not state and have placed on the record what he intended to prove.—Thornton v. Bretherton, 32 Mont. 80; 80 Pac. 10.

7. Sufficiency of evidence, 455-472.

455. Where the evidence is not all in the record, its sufficiency can not be reviewed.
Davis v. Germaine, 1 Mont. 210.
Morse v. Swan, 2 Mont. 306.
Nichols v. Dobbins, 2 Mont. 540.
Territory v. Roberts, 9 Mont. 12; 22 Pac. 132.
Beatty v. Mining Co., 15 Mont. 314; 39 Pac. 82.
Power v. Stocking, 26 Mont. 478; 68 Pac. 857.
Ramsey v. Burns, 27 Mont. 154; 69 Pac. 711.
Merk v. Mining Co., 31 Mont. 298; 78 Pac. 519.

456. A motion for nonsuit will not be considered, unless the evidence is before the court.
Kleinschmidt v. McAndrews, 4 Mont. 8; 2 Pac. 286.
Lockey v. Horsky, 4 Mont. 457; 1 Pac. 19.
Rooney v. Tong, 4 Mont 597; 2 Pac. 312.

457. In an action for forcible entry, where the transcript fails to give all the evidence, this court will presume that plaintiff's possession was satisfactorily proved to support the judgment, though the evidence included in the transcript presented is insufficient for the purpose. —Boardman v. Thompson, 3 Mont. 387.

458. Where a motion for nonsuit is sustained, exceptions thereto cannot be considered, unless the evidence is before the court. There being no statement of the evidence in the transcript it will be presumed not only that the nonsuit was properly granted, but that the plaintiff did not make out a prima facie cause of action in its complaint.—King v. National M. & E. Co., 4 Mont. 1; 1 Pac. 727.

459. Alleged errors in the admission or rejection of evidence will not be considered on appeal, unless the evidence is embodied in a bill of exceptions, properly settled and signed by the judge.—Territory v. Bell, 5 Mont. 562; 6 Pac. 60.

460. On an apeal from a judgment, the judgment roll alone is before the court, and the evidence can not be considered.—Clark v. Baker, 6 Mont. 153; 9 Pac. 911.

461. On an appeal from an order denying motion for new trial, there being no evidence before this court, the judgment and decree will be presumed to be supported by the evidence.—Beck v. Beck, 6 Mont. 318; 12 Pac. 694.

462. The record on appeal from a judgment of nonsuit, where proof was introduced by defendant, should contain all of plaintiff's evidence, and if defendant, by the proof which it saw fit to introduce, aided plaintiff, or supplied any deficiencies in his proof, plaintiff would be entitled to have such testimony also made a part of the record.—McKay v. Montana Union Ry. Co., 13 Mont. 15; 31 Pac. 999.

463. Where the record contains no motion for new trial, the question of the sufficiency of the evidence can not be considered.—Beatty v. Mining Co., 15 Mont. 314; 39 Pac. 82.

464. On an appeal from the judgment, the evidence, when not contained in the record, will be presumed to support the judgment.—Burns v. Paulsen, 16 Mont. 333; 40 Pac. 789.

465. Where the record does not show that the statement contains all the evidence, an examination can not be made of its alleged insufficiency to support a finding of fact.—Currie v. Montana Central, 24 Mont. 123; 60 Pac. 989.

466. Sufficiency of the evidence to support the decree can not be considered, where it does not appear from the certificate of the trial judge settling the statement, or from the statement or bill of exceptions, that the record contains all the evidence.—King v. Mining Co., 28 Mont. 74; 72 Pac. 309.

467. Where the record does not purport to contain all the evidence, it will be presumed that there was sufficient competent evidence to support the decree.—Id.

468. Where the statement on appeal merely stated that plaintiff called certain witnesses, who testified as therein set forth, and that defendant called certain witnesses, whose testimony was also given, it was not made to appear that all the evidence given was contained in the record.—Id.

469. Where it is not apparent from any recital therein that the record contains all the evidence, or the substance thereof, and there is no statement in the certificate of the judge from which it may be inferred that the bill contains all the evidence in substance, its sufficiency can not be reviewed.—Robertson v. Longley, 28 Mont. 128; 72 Pac. 423.

470. Where it did not appear that the record on appeal contained all evidence introduced at the trial, or the substance thereof applicable to the errors assigned, this court could not review the sufficiency of the evidence to sustain the verdict.—Landt v. Schneider, 31 Mont. 15; 77 Pac. 307.

471. Under Code Civ. Proc., § 1155, if a bill of exceptions or statement appears to contain all material evidence, or the substance thereof, given on the trial of the case, referring to the points brought before this court for review, the court has full power to consider the sufficiency of the evidence, if properly specified as a ground of error.—Handley v. Sprinkle, 31 Mont. 57; 77 Pac. 296.

472. On appeal from a judgment in claim and delivery for cattle converted by defendant, the court must presume, in the absence of evidence, that such evidence supported the verdict, which found that plaintiff was the owner of only a part of the cattle claimed, and placed a value upon the part, averaging more per head than the sum claimed for all averaged per head. —McGregor v. Lang, 32 Mont. 568; 81 Pac. 343.

8. Instructions, 473-482.

473. Instructions not contained in the record will not be reviewed.—Marden v. Wheelock, 1 Mont. 49.

474. Where the evidence is not in the record, a judgment will not be reversed on account of instructions given, when, on any reasonable state of facts relevant to the issues, the instructions might have been correct.—Parchen v. Peck, 2 Mont. 567.

475. Where no evidence is before the court, it will be presumed that the instructions were based upon competent testimony.—Black v. Black, 5 Mont. 15; 2 Pac. 317.

476. Unless the evidence is before the court, it will not be decided whether or not the instructions were applicable to the evidence, or the verdict misdirected.—Territory v. Bell, 5 Mont. 562; 6 Pac. 60.

477. When the giving of instructions is excepted to all the instructions given should be contained in the record.—Renshaw v. Switzer, 6 Mont. 464; 13 Pac. 127.

478. The refusal of instructions will not be considered, unless all the instructions given and refused are contained in the record.—Id.

479. The refusal to give an instruction that is not set out in the record can not be considered.—Littrell v. Wilcox, 11 Mont. 77; 27 Pac. 394.

480. Instructions will not be reviewed, unless made a part of the judgment roll, or incorporated in a statement or bill of exceptions. —Missoula E. L. Co. v. Morgan, 13 Mont. 394; 34 Pac. 488.

481. Where it appears there was sufficient competent testimony to sustain the verdict, under proper instructions, and the record does not contain the instructions, it will be presumed that the court properly instructed the jury.—Reynolds v. Fitzpatrick, 28 Mont. 170; 72 Pac. 510.

482. Where the transcript does not contain any evidence, the judgment will not be reversed on the ground that the instructions were erroneous, unless they would have been erroneous under any state of facts.—Pryor v. Walkerville, 31 Mont. 618; 79 Pac. 240.

9. Findings, 483-484.

483. Where plaintiff contended that the evidence did not support the finding as to a sum due defendant, and the objection in the record was made as to a certain finding, which disclosed that the jury, in that finding, did not undertake in any way to determine the amount due defendant, this court could not review the matter.—Murray v. Haldorn, 25 Mont. 218; 64 Pac. 511; 69 Pac. 835.

484. Where certain printed exhibits, material to the determination of a cause, are not in the record, the findings of the trial court will not be reviewed, since all the evidence is not before the court.—Stevens v Ravalli, 25 Mont. 306; 64 Pac. 876.

10. Grounds for new trial, 485-487.

485. Comp. Stat., p. 135, §§ 296, 297, require an application for new trial to be made either on affidavits, minutes of the court, bill of exceptions or statement of case. *Held*, that on an appeal from an order refusing new trial, where there is neither a statement, bill nor minutes, but the transcript contains an application for a continuance based on affidavits, not certified to as having been used on the motion for new trial, as required by statute, the application for continuance will not be reviewed.—Sherman v. Higgins, 7 Mont. 479; 17 Pac. 561.

486. The refusal of a new trial will be presumed if there is no statement of the case in the record, nor any specification of errors of law or of particulars in which the evidence is insufficient.—Wood v. Gleim, 19 Mont. 22; 47 Pac. 5.

487. There being no notice of intention to move for new trial in the record, nor anything to show waiver of such notice, the order overruling the motion for new trial will not be reviewed.—Grinnell v. Davis, 20 Mont. 222; 50 Pac. 556.

11. Questions arising after judgment, 488.

488. On appeal from the taxation of costs, where the record only contained the statement that part of the costs allowed was witness fees and part attorney's fees, which was not signed by the judge nor made part of the judgment roll by bill of exceptions or statement on appeal, the question of the illegality of the taxing of attorney's fees was not properly before the court.—Mining Co. v. Weinstein, 7 Mont. 440; 17 Pac. 113.

K. MATTERS NOT APPARENT OF RECORD, 489-492.

489. Where a motion to set aside and modify an order has been made at the term at which the order sought to be modified was made, but no order is made upon such motion until a subsequent term of the court, the appellate court will, although this last does not appear on the record, take judicial notice of the date of the making of such order.—Fredericks v. Davis, 6 Mont. 460; 13 Pac. 125.

490. On questions relating to the entry of judgment, this court can only look to the record, made at the time, and can not be controlled by statements in the affidavit for new trial, though the order granting new trial was based thereon. —Ogle v. Potter, 24 Mont. 501; 62 Pac. 920.

491. The instructions, which are a part of the judgment roll, not appearing therein, as it is certified, but being merely in the statement on motion for new trial, can not be considered. —Butte M. & M. Co. v. Kenyon, 30 Mont. 314; 76 Pac. 696; 77 Pac. 319.

492. Code Civ. Proc., § 1196, provides that after entering judgment the clerk must attach together certain papers which constitute the judgment roll, and § 1151 declares that the instructions are to be deemed excepted to, and that no bill of exceptions is required; § 1080 as amended by Laws 1897, p. 241, declares that all instructions must be filed as a part of the record, and that the refusal to give instructions shall be deemed excepted to, and no bill of exceptions shall be required. *Held*, that where instructions do not appear in the judgment roll, but merely in the statement on motion for new trial, they can not be considered.—Id.

493. Instructions not being made part of the judgment roll are not open to review.—Shropshire v. Sidebottom, 30 Mont. 406; 76 Pac. 941.

XI. ASSIGNMENT OF ERRORS, 494-511.

A. Necessity, 494-495.
B. Specification of Errors, 496-507.
C. Including Several Errors in One Assignment, 508.
D. Annexation to Record, 509.
E. Scope and Effect of Assignment, 510.
F. Effect of Failure to Assign Errors, 511.

A. NECESSITY, 494-495.

494. An instruction can not be reviewed in the absence of an assignment of error.—Murray v. Heinze, 17 Mont. 353; 42 Pac. 1057; 43 Pac. 714.

495. Though the opinion of the trial court can not be considered as any part of the case,

where it is submitted by all the parties in their briefs, without objection, it may be read as suggestive of what may be the just determination of the case.—Porter v. Printing Co., 26 Mont. 170; 66 Pac. 839; 67 Pac. 67.

B. SPECIFICATION OF ERRORS, 496-507.

496. An assignment of error which does not point out wherein the evidence is insufficient to support the findings of fact, will not be reviewed by this court.—Thorp v. Freed, 1 Mont. 651.

497. An assignment of error that the court erred in its findings of fact and conclusions of law is too general.—Id.

498. An assignment that the court erred in rendering judgment against one party, when it should have been for another, is too general. —Id.

499. An assignment of error will be disregarded that does not specify particularly and clearly wherein the evidence fails to support the verdict.—Stafford v. Hornbuckle, 3 Mont. 485.

500. When the notice of motion for new trial contains a specific assignment of error, and the notice is made part of the statement on motion for a new trial, it is sufficient compliance with the requirement of the Practice Act for a specification of error in the statement.—Dawes v. Powers, 5 Mont. 59; 1 Pac. 421.

501. When the ground upon which a motion for new trial in a civil action is based upon the insufficiency of the evidence to justify the judgment, and the statement does not specify the particulars in which the evidence is alleged to be insufficient, that question will not be considered.—Bass v. Buker, 6 Mont. 442; 12 Pac. 922.

502. Where plaintiff's motion for judgment was overruled, the specification of error in the statement that "the court erred in overruling and denying plaintiff's motion for judgment at the close of defendant's case," is sufficient.—Emerson v. Ditch Co., 18 Mont. 247; 44 Pac. 969.

503. Where there is a designation of a material fact at issue, and a specification that there was a failure to prove such designated fact, it is sufficient to enable the court to examine and determine whether the finding complained of was sustained by the evidence.—Strasburger v. Beecher, 20 Mont. 143; 49 Pac. 740.

504. Where assignments of error in rulings as to the admission of evidence do not refer to the page of the transcript where the matters are to be found, the assignments will not be considered.—Reins v. King, 27 Mont. 511; 71 Pac. 763.

505. Under Code Civ. Proc., § 1152, specifications which merely state what the evidence shows, and not what it does not show, will not be considered on appeal.—Ball v. Gussenhoven, 29 Mont. 321; 74 Pac. 871.

506. A specification which merely states that the evidence does not justify certain special findings of the jury, because to justify such findings it must have been believed by the jury that the plaintiff at the time of her injury was both blind and non compos mentis, is so lacking in any specification as to the insufficiency of the evidence that it can not be considered.—Id.

507. Rule 10, subd. 3, providing that the specifications of error relied on shall set out separately and particularly each error intended to be urged, does not require appellant to set out the reasons why the decision objected to is erroneous, and hence a specification that the court erred in sustaining defendant's motion for nonsuit was sufficient, without a further statement that it was error for the court to hold that the evidence was insufficient to go to the jury as tending to support the allegations of the complaint, which should be disregarded as surplusage.—Nord v. Mining Co., 30 Mont. 48; 75 Pac. 681.

C. INCLUDING SEVERAL ERRORS IN ONE ASSIGNMENT, 508.

508. An assignment that the court erred in giving instructions 1 to 8, and in refusing to give instructions 1 to 6, is too indefinite, and will not be considered. (See 14 Otto 618.)—Fredericks v. Davis, 3 Mont. 251.

D. ANNEXATION TO RECORD, 509.

509. A statement on appeal that does not contain an assignment of errors must be disregarded.—Frohner v. Rodgers, 2 Mont. 179.

E. SCOPE AND EFFECT OF ASSIGNMENT, 510.

510. An assignment that the court erred in a finding will not be considered, where the court amended its finding, and there was no assignment that the amended finding was erroneous. —Miller v. Matheson, 28 Mont. 132; 72 Pac. 414.

F. EFFECT OF FAILURE TO ASSIGN ERRORS, 511.

511. Where appellant fails to properly present the question of the giving of an instruction for review because of the absence of an exception and an assignment of error, this court will not review the instruction as a matter of convenience or expediency, to avoid the expense of another trial.—Murray v. Heinze, 17 Mont. 353; 42 Pac. 1057; 43 Pac. 714.

XII. BRIEFS, 512-551.

A. Form and Requisites, in General, 512.
B. Statement of Case or Facts, 513-516.
C. Specification of Errors, 517-526.
D. Incorporation of Assignment of Errors, 527-528.
E. References to Record, 529-537.
F. Points and Argument, 538.
G. Filing and Service, 539.
H. Defects and Objections, 540-542.
I. Striking out for Improper Matter, 543.
J. Scope and Effect, 544.
K. Failure to File or Serve, or to File or Serve in Time, 545-551

A. FORM AND REQUISITES, IN GENERAL, 512.

512. Under rule 10, § 3, requiring the brief of appellant to contain a concise abstract of the case, referring to the page number in the transcript, and a specification of errors relied on, an appeal from a judgment and an order denying a new trial will be affirmed, where appellant's brief does not refer to the page number in the transcript, contain any specification of errors, nor attempt to state from what either appeal was taken.—Beer v. Lieneman, 26 Mont. 93; 66 Pac. 690.

B. STATEMENT OF CASE OR FACTS, 513-516.

513. Error in refusing to permit the introduction of evidence will not be considered where

the brief fails to set it forth in hæc verba, or in substance, in conformity with rule 5, subd. 3.—Sullivan v. Schultz, 22 Mont. 341; 57 Pac. 279.

514. Where the statement in appellant's brief fails in every respect to comply with the requirements of rule 10, § 3, subd. a, providing that such brief shall contain "a concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised, which abstract shall refer to the page numbers in the transcript in such manner that pleadings, evidence, orders and judgment may be easily found," the judgment will be affirmed.—Kranich v. Water Co., 26 Mont. 370; 68 Pac. 408; 71 Pac. 672.

515. Under rule 10, § 3, subds. a, b, a brief which opened with the statement that the action was one in ejectment, but did not refer to the pleadings, judgment or orders, nor inform the court whether there was an appeal from the judgment or order denying a new trial, or both, or even that any appeal had been taken, and which, though assigning four errors on the admission and exclusion of evidence, neither set out the evidence nor referred to the pages of the transcript containing it, necessitated an affirmance of the judgment and order denying a new trial.—Casey v. Thieviege, 27 Mont. 517; 71 Pac. 755.

516. Where appellant's brief did not comply with rule 10, § 3, the judgment will be affirmed.

Larkin v. Mining Co., 28 Mont. 41; 72 Pac. 304.

Allen v. Reely, 28 Mont. 525; 73 Pac. 118.

C. SPECIFICATION OF ERRORS, 517-526.

517. Where appellant's brief contains no specification of errors, as required by rule 5, subd. 3, the appeal will be dismissed.

Gibson v. Hubbard, 22 Mont. 517; 57 Pac. 88.

Anderson v. Carlson, 23 Mont. 43; 57 Pac. 439.

Harrington v. Smith, 25 Mont. 111; 63 Pac. 1036.

518. Where appellant's brief does not comply with rule 10, § 3, providing that the brief must contain a specification of the errors relied on, set out separately and particularly, and properly numbered, the judgment will not be reviewed.

Cole v. Ryan, 24 Mont. 122; 60 Pac. 991.

Schatzlein v. Godin, 24 Mont. 483; 62 Pac. 619.

Rehberg v. Greiser, 24 Mont. 487; 62 Pac. 820; 63 Pac. 41.

Patterson v. Pfouts, 25 Mont. 163; 64 Pac. 222.

Driscoll v. Shields, 26 Mont. 494; 68 Pac. 851.

Schilling v. Curran, 30 Mont. 370; 76 Pac. 998.

519. Where appellants claim that the verdict is supported only by incompetent evidence, but they do not in their brief point out, as required by the rules, this court will not review the evidence.—Congdon v. Olds, 18 Mont. 487; 46 Pac. 261.

520. That the supreme court has occasionally overlooked infractions of the rule requiring briefs to contain a specification of errors does not require it to abrogate the rule, or overlook such infractions in other instances.—Rehberg v. Greiser, 24 Mont. 487; 62 Pac. 820; 63 Pac. 41.

521. Whether a decision is "against law," in that the findings do not sustain the judgment, is an error of law, and not of fact, required to be set out in the brief in specifications of error.—Id.

522. Whether evidence is sufficient to sustain a finding is an error of law required to be set out in the brief in specifications of error.—Id.

523. Under rule 10, § 3, an appeal wherein appellant's brief contains no specification of errors will not be considered, but the order or judgment appealed from will be affirmed, in the absence of a motion to dismiss.—Patterson v. Pfouts, 25 Mont. 163; 64 Pac. 222.

524. Under such rule an appeal, wherein appellant's brief contains no specification of errors will be dismissed on motion of respondent.—Id.

525. It is not necessary for appellant to assign his reasons in the specifications of error contained in his brief.—State v. Justice Court, 31 Mont. 258; 78 Pac. 498.

526. Where the brief of appellant fails to show on what he relies for a reversal of the judgment, and the applicability of propositions discussed can not be determined without an independent investigation, the judgment will be affirmed.—McIntosh Hdw. Co. v. Flathead, 32 Mont. 254; 80 Pac. 239.

D. INCORPORATION OF ASSIGNMENT OF ERRORS, 527-528.

527. Assignments of error presented in the bill of exceptions, but not set forth in the brief, will be deemed to be waived, and will not be considered.—Cope v. Prospecting Co., 1 Mont. 53.

528. The separate setting out of the specifications of error in appellant's brief, as required by rule 5, § 3, is a condition precedent to the determination of the appeal on its merits.—Babcock v. Caldwell, 22 Mont. 460; 56 Pac. 1081.

E. REFERENCES TO RECORD, 529-537.

529. Where the brief does not refer to the pages where evidence alleged to have been erroneously admitted is shown, the assignments will not be considered.—Gregg v. Kommers, 22 Mont. 511; 57 Pac. 92.

530. A brief filed by appellant which does not, in the statement, make appropriate references to the transcript, showing where evidence of a witness or pleadings are to be found, or which does not specify errors complained of in accordance with rule 5, is so defective as to justify the court in dismissing the appeal.—Smith v. Denniff, 23 Mont. 65; 57 Pac. 557.

531. Under rule 5, § 3, a statement that the court reserved its decision as to the findings of the jury, and thereafter set aside certain findings, and substituted findings of its own (referring to the pages of the transcript where this was shown), was insufficient, insofar as the question whether the evidence justified the findings was concerned, in not referring to the pages of the transcript where the evidence to support the findings was to be found.—Rehberg v. Greiser, 24 Mont. 487; 62 Pac. 820; 63 Pac. 41.

532. Under rule 10, § 3, an appeal will be dismissed where the statement in appellant's brief does not indicate the pages in the transcript where the complaint, answer, findings and judgment are to be found.—Conklin v. Cullen, 25 Mont. 30; 63 Pac. 686.

533. The order appealed from will be affirmed, where the statement does not conform to rule 10, and fails to inform the court from what order or judgment the appeal is taken, or that any judgment was entered.—Matusevitz v. Hughes, 26 Mont. 212; 66 Pac. 939; 68 Pac. 467.

534. A violation of rule 10, § 3, by filing a statement containing no reference to the pages

of the transcript, and which did not refer to a ruling on motion for non-suit, assailed as erroneous, precluded a hearing of the appeal on its merits.—Power v. Stocking, 26 Mont. 478; 68 Pac. 857.

535. An order denying a new trial will be affirmed on appeal where appellant's brief fails entirely to comply with rule 10, § 3, subd. a, and the appeal from the order denying the new trial is not referred to or submitted in the statement. —Warren v. Humble, 26 Mont. 495; 68 Pac. 851.

536. Under rule 10, § 3, a brief containing no reference whatever to the pleadings, order or judgment, warrants an affirmance of the judgment and order appealed from.—Elliott v. Martin, 27 Mont. 519; 71 Pac. 756.

537. Under rule 10, § 3, assignments of error on the admission and rejection of evidence will not be considered, where there are many specifications of error and no reference to the pages of the record.—Butte M. & M. Co. v. Kenyon, 30 Mont. 514; 76 Pac. 696; 77 Pac. 319.

F. POINTS AND ARGUMENT, 538.

538. Under rule 10, § 3, subd. c, where appellant's brief contained citations of authorities, without attempting to apply or refer them to errors assigned by him, such assignments of error would not be considered.—Missoula Merc. Co. v. O'Donnell, 24 Mont. 65; 60 Pac. 991.

G. FILING AND SERVICE, 539.

539. Under Pol. Code, § 460, the attorney general is entitled to be served with a copy of the brief on appeal by plaintiff in an action against a county.—McIntosh Hdw. Co. v. Flathead, 32 Mont. 254; 80 Pac. 239.

H. DEFECTS AND OBJECTIONS, 540-542.

540. An appeal will be dismissed for failure of brief to contain, as required by rule 5, § 3, a statement of case, specifications of error, and instructions of the giving or refusing of which counsel complains.—Beck v. O'Connor, 21 Mont. 109; 53 Pac. 94.

541. That rule 5, § 5, prescribes that a brief not conforming therewith shall be returned to the clerk without filing, does not prevent the court from dismissing the appeal for such defect; the court having inherent power to affirm or dismiss judgments appealed from when not presented in substantial compliance with its rules.—Rehberg v. Greiser, 24 Mont. 487; 62 Pac. 820; 63 Pac. 41.

542. Statements in appellant's brief on motion for rehearing that the cause is of as much importance to the litigants as more important cases are to parties interested therein, and that the fact that the record is obscure, does not relieve the court of its duty to study the record, and that the court is establishing an absurd equitable doctrine, and which deny the legal and moral right of the court to do what the opinion shows it has done, are disrespectful to the court, and will not be considered.—Anderson v. Cook, 25 Mont. 330; 64 Pac. 873; 65 Pac. 113.

I. STRIKING OUT FOR IMPROPER MATTER, 543.

543. Language in a brief attempting to cast reproach or contempt upon the court below should not be tolerated.—Brownell v. McCormick, 7 Mont. 12; 14 Pac. 651.

J. SCOPE AND EFFECT, 544.

544. An argument in the brief on appeal which controverts the allegations of the pleadings of the party filing the brief will not be considered.—Fisk v. Cuthbert, 2 Mont. 593.

K. FAILURE TO FILE OR SERVE, OR TO FILE OR SERVE IN TIME, 545-551.

545. Where no brief is filed by appellant, calling attention to an error in the judgment roll, no error will be presumed.—Steuffen v. Jefferis, 9 Mont. 66; 22 Pac. 152.

546. In the absence of a rule to that effect, appellant's failure to file briefs within the time required by the rules, is no ground for dismissal. —Logan v. Rickards, 14 Mont. 334; 36 Pac. 318.

547. Where no brief is filed or argument made the appellate court will not search the record for error.—Harris v. Ramsey, 16 Mont. 302; 40 Pac. 589.

548. Upon proper showing, the appellate court will not dismiss an appeal because appellant's brief was not served or filed in time.— Ferleigh v. Kelly, 24 Mont. 369; 62 Pac. 495, 685.

549. Under rule 10, § 5, failure to file a brief within 60 days, no order having been made advancing the hearing, will necessitate a dismissal of the appeal.—Butler v. McCormick, 27 Mont. 515; 71 Pac. 764.

550. Under rule 10, §§ 4, 5, respondent's brief will be stricken from the files when filed more than 30 days after appellant's brief has been served upon him.—Knobb v. Reed, 28 Mont. 42; 72 Pac. 304.

551. A brief, referring to the complaint, with citation of page and marginal number, but to no other matter which would aid the court in examining the points in controversy, is not a compliance with rule 10, § 3, subd. a, and necessitates an affirmance of the judgment.—Id.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT, 552-572.

A. Grounds of Dismissal, 552-563.
B. Motion for Dismissal, 564-568.
C. Effect of Dismissal, 569.
D. Abandonment, 570.
E. Reinstatement, 571-572.

A. GROUNDS OF DISMISSAL, 552-563.

552. Where a complaint in foreclosure is in due form, and a demurrer thereto is voluntarily withdrawn by defendants, and judgment is entered and sale made, no error appearing, the appeal will be dismissed.—Fratt v. Walk, 8 Mont. 291; 20 Pac. 641.

553. Where a motion to dismiss an appeal has been made, for insufficiency of the appeal bonds, the maxim, communis error facit jus, does not apply, because a great many appeals during the past have been secured by undertakings equally as defective. (See 196 U. S. 119.)—Baker v. Water Co., 24 Mont. 113; 60 Pac. 817.

554. Under Code Civ. Proc., § 1740, where a motion to dismiss for failure to file a sufficient bond has been submitted, the court can not permit the filing of a sufficient bond, and reinstatement of the appeal thereby.—Id.

555. Under Code Civ. Proc., §§ 1723, 1724, an attempted appeal from a judgment will be dismissed, where the notice is not served on the respondent, or filed in the office of the clerk of the court, until after one year from the date of the judgment.—Ramsey v. Burns, 24 Mont. 232; 61 Pac. 129.

556. Where plaintiff appealed from a judgment in favor of defendant, and also from an order denying new trial, the fact that the transcript did not disclose that any bill of exceptions or statement was settled or certified, constituted no reason for dismissing either appeal. —Taney v. Vollenweider, 24 Mont. 367; 62 Pac. 413.

557. Under Code Civ. Proc., § 1723, subd. 2, an appeal from a judgment of a district court, rendered on an appeal from a justice's court, if not taken within 90 days after its entry, will be dismissed.—Morris v. McLaughlin, 25 Mont. 151; 64 Pac. 219.

558. Code Civ. Proc., § 1740, refers only to a case where an insufficient undertaking has been filed in the trial court, and does not embrace a case where no undertaking whatever has been filed within the time limited by law.—Hahn v. James, 26 Mont. 50; 66 Pac. 463.

559. Under Code Civ. Proc., § 1732, a failure of the sureties on an appeal board to justify after exception taken thereto, and a failure to submit new sureties, did not render the appeal ineffectual, so as to authorize a dismissal thereof, but merely destroyed the effect of the undertaking in so far as it would operate as a supersedeas.—Threlkeld v. O'Neal, 26 Mont. 209; 66 Pac. 940.

560. Since the notice of intention to move for new trial is not one of the papers required to be sent up by copy by Code Civ. Proc., §§ 1176, 1738, but should be embraced in the statement or bill of exceptions, which are of the required papers, where it is not so embraced, though all the papers required by statute are before the court, the dismissal of the appeal is not the proper remedy, but the order denying motion for new trial will be affirmed.—In re Reilly's Estate, 26 Mont. 358; 67 Pac. 1121.

561. The unnecessary incorporation of formal parts of pleadings, writs and other papers in the transcript on appeal, in violation of rule 7, is not ground for dismissal of the appeal.—Greene v. Brewing Co., 28 Mont. 380; 72 Pac. 751.

562. Where an appeal was taken from a judgment and from an order denying new trial, a motion to dismiss the appeal, on the ground that the record or statement on motion for new trial did not contain a specification of errors, was properly denied, since such objection was not ground for dismissal of the appeal from the judgment.—Bond v. Hurd, 31 Mont. 314; 78 Pac. 579.

563. Where, after an appeal by the distributees of a decedent's estate from a decree making distribution, and before the appeal was heard, appellants executed receipts for their awards under the decree, and it was satisfied and the administrator discharged, the receipts reciting that it was not intended to recover any money or property referred to in the decree not yet discovered, thus implying that the execution was the only reservation made by appellants as to the liability of the administrator —the supreme court was thereby deprived of jurisdiction.—In re Black's Estate, 32 Mont. 51; 79 Pac. 554.

B. MOTION FOR DISMISSAL, 564-568.

564. On motion to dismiss, a point involving the merits of the appeal will not be considered. —Ryan v. Maxey, 15 Mont. 100; 38 Pac. 228.

565. The certificate to the transcript on appeal, required of the clerk by Code Civ. Proc., § 1739, that an undertaking in due form has been filed, may be amended if defective, and, when so amended prior to the submission of the motion to dismiss, the motion will be overruled.—Nolan v. Montana Central, 24 Mont. 327; 61 Pac. 880.

566. Where plaintiff appealed from a judgment in favor of defendant, and also from an order denying new trial, and defendant filed a motion to strike the transcript and to dismiss both appeals, the fact that the transscript did not contain a copy of the order denying the motion for new trial would not sustain the motion to dismiss, since it in no wise affected the appeal from the judgment, and the motion must be denied or granted as a whole.—Taney v. Vollenweider, 24 Mont. 367; 62 Pac. 413.

567. Though a second motion to dismiss an appeal on grounds existing at the time of the first motion should ordinarily not be heard, it will be, where the first motion was denied, with leave to move anew, on grounds not stated in the first motion, without restriction as to presentation of matters occurring after the filing of the first motion.—King v. Elling, 24 Mont. 470; 62 Pac. 783.

568. A motion to dismiss an appeal presents generally but two questions,—whether the appeal lies from the particular order or judgment, and whether, if it does, the appellant has prosecuted it as required by the statutes and the rules of the supreme court.—In re Davis' Estate, 27 Mont. 235; 70 Pac. 721.

C. EFFECT OF DISMISSAL, 569.

569. By the express provisions of Code Civ. Proc., § 1741, the dismissal of an appeal effects an affirmance, unless the dismissal is expressly made without prejudice.—McIntosh Hdw. Co. v. Flathead, 32 Mont. 254; 80 Pac. 239.

D. ABANDONMENT, 570.

570. Where appellant fails to file a brief, or appear and make argument, after he has received notice of the time at which the case has been set, he will be deemed to have abandoned his appeal, and the judgment appealed from will be affirmed, since it is incumbent on him to point out the errors relied on for a reversal.—Killhonic v. Nuss, 24 Mont. 292; 61 Pac. 648.

E. REINSTATEMENT, 571-572.

571. An appeal that has been dismissed will not be reinstated on the motion of appellant, supported by his affidavit showing that his neglect to perfect the appeal was caused by the verbal statements or agreements of respondents.—Orr v. Harding, 1 Mont. 387.

572. Mandamus is the proper remedy to reinstate, in the district court, an appeal properly brought within its jurisdiction, and which it dismissed on the ground of want of jurisdiction.—State v. District Court, 13 Mont. 370; 34 Pac. 298.

XIV. DOCKETS, 573.

573. A stipulation stating that a case can be argued in 15 minutes to a side is insufficient to bring it within rule 7, § 4a, providing that cases shall be placed on the short cause docket on stipulation of counsel that the cause "will be argued in 15 minutes to the side, and that, in their opinion, the cause can be fully presented in such time."—American Sav. & Loan Ass'n v. Burghardt, 17 Mont. 545; 43 Pac. 923.

XV. REHEARING AND REARGUMENT, 574-580.

574. In an equity case, a motion for a rehearing does not, per se, operate as a supersedeas or stay of the remittitur and mandate. —Columbia Mining Co. v. Holter, 1 Mont. 429.

575. When the right to move for a rehearing is not given by statute, but by a rule of the supreme court, the court may prescribe the terms on which argument on the motion will be heard.—Id.

576. Respondents asked for a rehearing, and, in their motion, presented all the points they would rely upon if a hearing were granted. *Held*, to be improper practice.—Wells v. Clarkson, 2 Mont. 379.

577. When an engagement of counsel in an inferior court conflicts with one in the supreme court, his duty is to attend the latter.—Helena v. Brule, 15 Mont. 429; 39 Pac. 456.

578. Though an appeal from an order denying new trial should have been dismissed, because of the failure of the record to contain a copy of the judgment entered, as required by Code Civ. Proc., §§ 1176, 1738, the court, on rehearing, on appeal from a judgment which is dismissed, and from an order denying new trial, which is affirmed, will not reopen the case to correct this technical error of practice.—Lisker v. O'Rourke, 28 Mont. 129; 72 Pac. 416, 755.

579. On motion for rehearing, it was alleged, as a ground of surprise, that the court refused to consider the instructions, on the ground that they were not contained in the judgment roll; the moving party alleging that the court permitted the certificate of the clerk to be amended at the hearing, so as to show that the transcript contained a copy of the judgment roll, and that he would have amended the transcript so as to complete the judgment roll upon an intimation that it did not contain a complete copy. *Held*, that such ground was insufficient, inasmuch as the court, during the hearing, can not examine the record to determine what questions raised by the argument are properly presented.—Butte M. & M. Co. v. Kenyon, 30 Mont. 314; 76 Pac. 696; 77 Pac. 319.

580. A petition for rehearing should be presented only in those cases where reasonably good grounds exist, and this should appear on the face of the petition. The court should not be asked to reconsider matters which have been considered and determined, especially where its view has been conceded by counsel to be supported by authority.—Collins v. Insurance Co., 32 Mont. 329; 80 Pac. 609; 80 Pac. 1092.

XVI. REVIEW, 581-831.

A. Scope and Extent in General, 581-610.
B. Interlocutory, Collateral, and Supplementary Proceedings and Questions, 611-615.
C. Parties Entitled to Allege Error, 616-628.
D. Amendments and Trial de Novo, 629-630.
E. Presumptions, 631-665.
F. Discretion of Lower Court, 666-702.
G. Questions of Fact, Verdicts, and Findings, 703-736.
H. Harmless Error, 737-810.
I. Error Waived in Appellate Court, 811-815.
J. Decisions of Intermediate Courts, 816-817.
K. Subsequent Appeals, 818-831.

A. SCOPE AND EXTENT IN GENERAL, 581-610.

1. Matters or Evidence Considered in Determining Question, 581-582.
2. Questions Considered, 583-586.
3. Theory and Grounds of Decision Below, 587-594.
4. Extent of Review Dependent on Mode of Review, 595.
5. Nature of Decision Appealed From, and Review of Other Decisions, 596-610.

1. Matters or evidence considered in determining question, 581-582.

581. The supreme court ought not to be governed in the review of a case on appeal by observations in the opinion of the court below as to matters of fact involved.
Thorp v. Freed, 1 Mont. 651.
Horsky v. Moran, 13 Mont. 250; 34 Pac. 360.

582. Under Code Civ. Proc., § 1736, the order disposing of a motion for new trial is not a part of the statement itself.—Mahoney v. Dixon, 31 Mont. 107; 77 Pac. 519.

2. Questions considered, 583-586.

583. Where there is sufficient evidence to support a verdict for defendants, the question as to which party had the burden of proof is immaterial, and will not be determined.—Elliott v. Martin, 27 Mont. 519; 71 Pac. 756.

584. The conclusion reached by the trial court as to the effect of a deed is not binding on the appellate court, where the facts surrounding its execution are not controverted.—M. O. P. Co. v. Mining Co., 27 Mont. 536; 71 Pac. 1005.

585. Under Code Civ. Proc., § 1736, any question of law which is raised in the statement, if otherwise properly presented, will be considered and passed on by this court; and thus, while it can not consider the question of the insufficiency of the evidence to support the verdict or decision, it can determine the question of law as to whether there is any evidence to support such verdict or decision.—Mahoney v. Dixon, 31 Mont. 107; 77 Pac. 519.

586. Whether a verdict is supported by any substantial evidence, being a question at law, may be determined on appeal from the judgment.—Carman v. Mont. Cent. 32 Mont. 137; 79 Pac. 690.

3. Theory and grounds of decision below, 587-594.

587. Where the judgment or order is correct, it will not be reversed because the court gave a wrong or insufficient reason for its rendition.
McMullen v. Armstrong, 1 Mont. 486.
Thorp v. Freed, id. 651.

588. A provision in the Civil Code, that the court or judge shall state in writing the grounds upon which new trial is granted or refused, is directory, and appellants were not prejudiced by the grounds not being specially stated in writing.—Grant v. Spencer, 1 Mont. 136.

589. The opinion of the district court is not a finding, nor a part of the judgment, so as to require a review thereof.—State v. District Court, 16 Mont. 274; 40 Pac. 600.

590. Though a motion for new trial, made for errors in law, is granted solely on the ground that plaintiff's cause of action is barred by limitations, the appellate court may consider other errors specified; and, if it appears from the whole record that the motion was properly granted, the order will be affirmed, though the reason given was erroneous.—Menard v. Montana Central, 22 Mont. 340; 56 Pac. 592.

591. Where, had the proper objection been made to evidence, the party offering it would have been enabled to obviate the defect, a ruling sustaining an improper objection will be affirmed.—Yoder v. Reynolds, 28 Mont. 183; 72 Pac. 417.

592. Alleged error in failing to require a witness to answer a question, which he refused to answer, on the ground that it involved a privileged communication from a client, was not cause for reversal, where the evidence sought to be elicited was inadmissible, though no objection was made at the time.—Bullard v. Smith, 28 Mont. 387; 72 Pac. 761.

593. Where a demurrer to a complaint has been sustained for failure to state a cause of action, the judgment entered thereon will be affirmed on appeal, if this court concludes that the demurrer should have been sustained upon some other ground, although such ground was not suggested or argued, and although the lower court may have sustained the demurrer for a wrong reason.—Porter v. Mining Co. 29 Mont. 347; 74 Pac. 938.

594. A recital in a bill of exceptions that the court below, in deciding a demurrer, only passed on the question that the complaint did not state facts sufficient to constitute a cause of action, because the contract sued on was ultra vires, does not affect the rule that this court will sustain a judgment on the demurrer, if the whole complaint fails to state a cause of action for some other reason than that recited. —Id.

4. Extent of review dependent on mode of review, 595.

595. This court can not review any question of fact, if there is no appeal from an order granting or refusing motion for new trial.—Allport v. Kelley, 2 Mont. 343.

5. NATURE OF DECISION APPEALED FROM, AND REVIEW OF OTHER DECISIONS, 596-610.

(a) REVIEW OF OTHER ORDERS OR JUDGMENTS, IN GENERAL, 596.

(b) REVIEW ON APPEAL FROM FINAL JUDGMENT, 597-600

(c) REVIEW ON APPEAL FROM A JUDGMENT BY CONSENT, 601.

(d) REVIEW ON APPEAL FROM RULING OR MOTION FOR DISMISSAL OR NONSUIT, 602-603.

(e) APPEAL FROM ORDER ON MOTION FOR NEW TRIAL OR APPEAL AFTER NEW TRIAL GRANTED, 604-610.

(a) Review of other orders or judgments, in general, 596.

596. Under Code Civ. Proc., § 1736, a statement on motion for new trial can not render the question whether or not the evidence was sufficient in weight to sustain the decision of the court or the verdict of the jury reviewable on appeal from the judgment, since such question could only be reviewed on appeal from an order denying a motion for new trial.—Withers v. Kemper, 25 Mont. 432; 65 Pac. 422.

(b) Review on appeal from final judgment, 597-600.

597. An appeal from the judgment rendered in the court below does not authorize us to review the order refusing new trial.—Allport v. Kelley, 2 Mont. 343.

598. Want of evidence to support a judgment may be relied on and considered on appeal.—Beaudin v. Oregon Short Line, 31 Mont. 238; 78 Pac. 303.

599. On appeal from the judgment only, the record may be examined to determine whether there is any evidence to support a finding.—Sheldon v. Powell, 31 Mont. 249; 78 Pac. 491.

600. The statement on motion for new trial, as settled in the record, may be considered, on appeal from the judgment, as to all errors of law therein specified, though an appeal from the order denying motion for new trial was not taken in the time allowed.—Lynch v. Herrig, 32 Mont. 267; 80 Pac. 240.

(c) Review on appeal from a judgment by consent, 601.

601. One can not complain, on appeal, of a judgment entered by his consent.—Corby v. Abbott, 28 Mont. 523; 73 Pac. 120.

(d) Review on appeal from ruling or motion for dismissal or non-suit, 602-603.

602. An order requiring plaintiff to give security for costs, or justify, is intermediate and can be reviewed on appeal from the judgment dismissing the action, upon the failure of the party to comply with the same.—Marsh v. Kinna, 2 Mont. 547.

603. To justify reversal on appeal from a nonsuit, in an action for personal injuries, the evidence must not leave either the negligence of defendant, or that it was the proximate cause of the injury, to conjecture; and, if it is equally consonant with some theory inconsistent with either of these facts, it does not tend to prove them, within the rule that whatever the evidence tends to prove will, on such appeal, be taken as established.—Shaw v. Mines Co., 31 Mont. 138; 77 Pac. 515.

(e) Appeal from order on motion for new trial, or appeal after new trial granted, 604-610.

604. On an appeal from the judgment, an order overruling motion for new trial, whatever appears in the bill of exceptions, taken at the trial and allowed by the court, is properly before us for consideration and decision.—Isaacs v. McAndrews, 1 Mont. 437.

605. An order striking out a portion of the answer, alleged as error, and referred to in the statement on motion for new trial as "an error of law occurring at the trial," which appears to have been made before the trial, is an error involving discretion, and can not be considered on motion for new trial, but is reviewable only on appeal from the judgment.—Scherrer v. Hale, 9 Mont. 63; 22 Pac. 151.

606. Where the trial court amends its judgment on motion of defendant to cure certain defects therein, an appeal by defendant from the original judgment, and from an order denying a motion for new trial, will not be dismissed on the ground that it should have been from the amended judgment, as appeal from the order denying new trial brings the entire case before the court.—Wolf v. Great Falls W. P. & T. Co., 15 Mont. 49; 38 Pac. 115.

607. Under Code Civ. Proc., §§ 1170, 1171, subd. 7, the point that the complaint fails to state facts sufficient to constitute a cause of action, made by demurrer, which was overruled before the trial, and not renewed or otherwise presented at the trial, can not be considered on an appeal from an order denying new trial. —Schatzlein v. Passmore, 26 Mont. 500; 68 Pac. 1113.

608. Review on appeal from an order denying new trial, being limited by Code Civ. Proc., § 1171, to the consideration of "errors of law occurring at the trial and excepted to by the party making the application," the question whether the complaint states a cause of action can not be considered on such appeal, where from the record it does not appear that its sufficiency was questioned below.—Campbell v. Great Falls, 27 Mont. 37; 69 Pac. 114.

609. The responsiveness of the verdict to the issues may be determined on appeal from an order denying new trial, though there was

no appeal from the judgment, under Code Civ. Proc., §§ 1170, 1171.—Hamilton v. Murray, 29 Mont. 80; 74 Pac. 75.

610. Where, at the outset of the trial, defendant objects to the introduction of evidence by plaintiff on the ground that the complaint does not state a cause of action, the question whether the complaint states a cause of action is reviewable on appeal from an order denying new trial.—Ayotte v. Nadeau, 32 Mont. 498; 81 Pac. 145.

B. INTERLOCUTORY, COLLATERAL, AND SUPPLEMENTARY PROCEEDINGS AND QUESTIONS, 611-615.

611. Under Civ. Pr. Act, § 378, this court can reverse a final judgment under an appeal from an order made subsequent to final judgment.—Collier v. Field, 2 Mont. 320.

612. In determining whether a new trial was properly granted for alleged errors in instructions, the court can not consider the testimony. —Mulligan v. Montana Union, 19 Mont. 135; 47 Pac. 795.

613. Where a decree determining partnership accounts is rendered after the dissolution of the firm, and the receiver therefor is thereafter ordered to sell the partnership property, an appeal from an order confirming such sale does not raise any question concerning the order of sale, since such order is a special order, made after final judgment, from which an appeal is authorized by Code Civ. Proc., § 1720.—Murphy v. Patterson, 24 Mont. 591; 63 Pac. 380.

614. An order, made after judgment, refusing to sign a bill of exceptions, can not be considered on appeal from the judgment and from an order denying new trial.—McGlauflin v. Wormser, 28 Mont. 177; 72 Pac. 428.

615. An order confirming a guardian's annual settlement, being appealable under Laws 1899, p. 146, where no appeal was taken from it, questions respecting the settlement could not be considered on a subsequent appeal from an order for a sale of the ward's land.—In re Scheuer's Estate, 31 Mont. 606; 79 Pac. 244.

C. PARTIES ENTITLED TO ALLEGE ERROR, 616-628.

616. Appellant can not assign as error erroneous rulings prejudicial to others, but not prejudicial as to him.—Edwards v. Tracy, 2 Mont. 49.

617. Where a suit for an injunction is brought against A and B, but the summons is not served upon B, nor does he appear, and a writ of injunction is granted against defendant, but not served upon B, and A moves for a dissolution, in which motion B takes no part, nor appeals from the order denying the motion, he is not before the court on an appeal by A from such order.—Davenport v. Kleinschmidt, 6 Mont. 502; 13 Pac. 249.

618. On the trial of an action brought by an employee for damages for personal injuries, where the only instruction given on the question of ordinary care and reasonable care or diligence was one asked for by plaintiff, he can not be heard to complain, on appeal, that the jury were not sufficiently instructed on that point.—Kelley v. Cable Co., 7 Mont. 70; 14 Pac. 633.

619. Where a defendant has interposed a demurrer to a complaint, which is overruled, but fails to stand upon his demurrer, and answers over and goes to trial on the merits, he waives his right to be heard upon his objection to the overruling of the demurrer, unless the complaint should be so defective as not to support the judgment. The same rule applies to the overruling of a demurrer to a supplemental complaint.—Garver v. Lynde, 7 Mont. 108; 14 Pac. 697.

620. Where the parties to an equitable action submit special findings to the jury, and concede the right of the judge, sitting as a chancellor, to treat them as advisory merely, they can not be heard on appeal to question the power of the court to exercise the right to adopt or disregard them, according to his conscience. —Harris v. Lloyd, 11 Mont. 390; 28 Pac. 736.

621. Where one of the defendants in an action defaults, and judgment is rendered thereon, the other defendants can not complain of such judgment on appeal, the defaulting defendant himself having taken no appeal.—Hoffman v. Gallatin, 18 Mont. 224; 44 Pac. 973.

622. Objections made and exceptions taken below by respondent can not be properly assigned as error.—Buck v. Fitzgerald, 21 Mont. 482; 54 Pac. 942.

623. Where the judgment on foreclosure fails to expressly provide that no deficiency judgment shall be entered against the mortgagor, and he does not appeal therefrom, no other party to the appeal can object thereto.—Gregg v. Kommers, 22 Mont. 511; 57 Pac. 92.

624. In a suit against stockholders of a corporation, defendants could not allege error in the admission in evidence of the report of a stockholders' meeting, when by subsequent amendment of their pleadings they admitted the existence of the evidence objected to.—King v. Mining Co., 28 Mont. 74; 72 Pac. 309.

625. Though, in a mechanic's lien foreclosure, plaintiffs declare on a contract under which a settlement was to be had on a final estimate of defendant's superintendent, and defendant denies that plaintiffs have complied with the contract, yet, where both parties, on the trial, seek to impeach the superintendent's estimate, defendant can not complain that the admission of plaintiffs' evidence of its inaccuracy was error.—Cook v. Railroad Co., 28 Mont. 340; 72 Pac. 678.

626. A party who takes no appeal can obtain no relief on the appeal of other parties, except so far as the relief granted appellants may incidentally affect his rights.—MacGinniss v. Mining Co., 29 Mont. 428; 75 Pac. 89.

627. Where appellant has insisted from the commencement of the suit that the case was solely of equitable jurisdiction, he can not complain if the appellate court considers the appeal on his own theory.—Hendrickson v. Wallace, 29 Mont. 504; 75 Pac. 355.

628. Where plaintiff objected to the introduction of any evidence of conditions subsequent to a certain date, and his objection was sustained, he could not complain of the subsequent limitation of his own evidence to the showing of conditions prior to the date named. —Murray v. Butte, 31 Mont. 177; 77 Pac. 527.

D. AMENDMENTS AND TRIAL DE NOVO, 629-630.

629. An action appealed from the probate to the district court is tried de novo, and the judgment therein is not affected by any defect or infirmity arising in the probate court.—McCormick v. Hubbell, 4 Mont. 87; 5 Pac. 314.

630. Where the proof in an action on an express contract shows an implied contract, and no objection to the variance is made on the trial, this court will regard the complaint as amended to conform to the proof.—Nyhart v. Pennington, 20 Mont. 159; 50 Pac. 413.

E. PRESUMPTIONS, 631-665.

1. In General, 631-634.
2. Facts or Evidence not Shown by Record, 635-638.

3. Pleading, 639-641.
4. Interlocutory Orders, 642.
5. Conduct of Trial or Hearing, 643.
6. Dismissal, Nonsuit, or Direction of Verdict, 644-645.
7. Findings of Court, 646-651.
8. Order Granting or Refusing New Trial, 652-657.
9. Judgment, 658-659.
10. Orders and Proceedings After Judgment, 660-662.
11. Bill of Exceptions, 663-664.
12. Transcript, 665.

1. In general, 631-634.

631. Where a judge, on refusing to submit an issue, notes, "Not submitted for the reason that defendants admitted these facts," the note must be considered as a reason for the ruling, and not as the record of an admission or as a finding.—Taylor v. Stewart, 1 Mont. 316.

632. Although a complaint may have been defective by being too general, yet, if counsel considered it sufficient to go to trial upon; and the court deemed it sufficient to render a judgment upon, all such defects are deemed cured by the verdict.—Frohner v. Rodgers, 2 Mont. 179.

633. Where the record showed that on the overruling of objections to the admission in evidence of the judgment roll in a former action, the judge, without objection, directed the stenographer to enter a statement that it had been admitted that an appeal from the judgment was pending, it will be presumed, on appeal, in the action in which the judgment roll was introduced, that the fact of the pending appeal sufficiently appeared.—Boucher v. Barsalou, 27 Mont. 99; 69 Pac. 555.

634. The transcript on appeal must show error directly, and not by way of presumption only.—Swain v. McMillan, 30 Mont. 433; 76 Pac. 943.

2. Facts or evidence not shown by record, 635-638.

635. Where it did not appear on what ground a judgment in favor of defendants was rendered, it would be presumed, on appeal, that plaintiff failed to make out a prima facie case on the merits, and hence, where the evidence is not in the record, the judgment will be affirmed.—Boe v. Hawes, 28 Mont. 201; 72 Pac. 509.

636. It will be presumed, on appeal, that an agreement within the statute of frauds, set forth in the pleadings, was in writing, there being nothing in the record to show the contrary.—Hefferlin v. Karlman, 29 Mont. 139; 74 Pac. 201.

637. In an action on an assigned demand there was admitted in evidence on behalf of plaintiff a so-called "duplicate" written assignment, but on appeal by defendant it did not appear from the record whether the original or duplicate assignment was delivered to plaintiff by the assignor, or whether the paper admitted in evidence was merely a copy of the original. *Held*, that it was not shown that error was committed, even if the original or duplicate should have been produced instead of a copy.—Hennessy v. Furniture Co., 30 Mont. 264; 76 Pac. 291.

638. Where a transcript does not contain any testimony, bill of exceptions, or statement on motion for new trial, it must be presumed that the evidence supported the judgment, and that the instructions were based on the testimony.—Pryor v. Walkerville, 31 Mont. 618; 79 Pac. 240.

3. Pleading, 639-641.

639. After verdict it will be presumed that the proof on the trial supplied the defect in pleading.—Hershfield v. Aiken, 3 Mont. 442.

640. Where the evidence is not in the record, this court can not presume that there was proof to supply an omitted averment.—Anderson v. Hulme, 5 Mont. 295; 5 Pac. 865.

641. On exceptions from an order directing defendant to answer an amended complaint within three days, there appearing in the record no copy of the original complaint, and in the bill of exceptions no statement to show in what the complaint was insufficient, or what defects were to be cured by amendment, it will be presumed that the amendment was as to a mere matter of form, and should be governed by Comp. Stat., p. 87, § 113, allowing no delay for answering such amendment, and not by § 115, allowing service and 10 days for answering amendments to the substance of the complaint.—Barber v. Briscoe, 8 Mont. 214; 19 Pac. 589.

4. Interlocutory orders, 642.

642. This court, in support of the trial court's order suppressing a deposition, will assume that it contained no proper certificate, where none is in the bill of exceptions, though the clerk states in a note, "Here follows the proper cetrificate."—McCormick v. Largey, 1 Mont. 158.

5. Conduct of trial or hearing, 643.

643. In the absence of a contrary showing, it will be presumed, on appeal, where a collateral attack on a judgment for want of jurisdiction over the person of defendant has been made in the court below, that the court tried the question by an inspection of the judgment roll in the case in which the judgment was rendered, and by that alone.—Haupt v. Simington, 27 Mont. 480; 71 Pac. 672.

6. Dismissal, nonsuit, or direction of verdict, 644-645.

644. In considering the correctness of the ruling of the court below in granting a nonsuit, this court will consider as proven every fact which the evidence tended to prove.
Herbert v. King, 1 Mont. 475.
Gans v. Woolfolk, 2 Mont. 463.
Allen v. Bell, 32 Mont. 69; 79 Pac. 582.

645. Where the record does not bring up the transcript upon the incompleteness or insufficiency of which the motion to dismiss was predicated, this court has no means of examining the grounds of such motion, and is, in the absence of such, bound to presume the action of the court in sustaining it correct.—McMullen v. Armstrong, 1 Mont. 486.

7. Findings of court, 646-651.

646. Where there are no findings of fact, the presumption is that all facts necessary to support the judgment were found.
Ming v. Truett, 1 Mont. 322.
Thorp v. Freed, 1 Mont. 651.
Morse v. Swan, 2 Mont. 306.
Fabian v. Collins, 3 Mont. 215.
Alder Gulch C. M. Co. v. Hayes, 6 Mont. 31; 9 Pac. 581.
Ingalls v. Austin, 8 Mont. 333; 20 Pac. 637.
Slater Brick Co. v. Shackleton, 30 Mont. 390; 76 Pac. 805.

647. Where the testimony is sufficient to support the findings they will not be disturbed.—Francisco v. Benepe, 6 Mont. 243; 11 Pac. 637.

648. On an appeal, where it appears that no motion for new trial was made, the court will conclude that all the findings are supported

by the evidence; that there was no evidence to sustain findings requested and refused; and that where there is no finding on any issue, the court found in favor of the plaintiff on that issue.—Mining Co. v. Bank, 7 Mont. 530; 19 Pac. 210.

649. Under Code Civ. Proc., §§ 1114, 1115, findings will not be reversed, though they did not support a judgment for defendant, plaintiff not having requested findings or filed exceptions for defective findings, since it would be presumed that the court impliedly found for the prevailing party on the issues of fact not covered by the express findings.—Yellowstone Nat'l Bank v. Gagnon, 25 Mont. 238; 64 Pac. 664.

650. The error in a finding that a deed was executed Dec. 16, 1893, where, under the facts admitted, it was executed on or about Apr. 19, 1893, was harmless.—Grogan v. Trading Co., 30 Mont. 229; 76 Pac. 211.

651. Where a finding on the value of property in dispute was made, and not objected to, and the sufficiency of the evidence is not brought before this court for consideration, the court will presume that the finding was sustained by the evidence, and will not consider a contention that the judgment is excessive.—Schilling v. Curran, 30 Mont. 370; 76 Pac. 998.

8. Order granting or refusing new trial, 652-657.

652. When the transcript does not disclose the grounds upon which the motion for new trial was granted, the order granting such new trial will be affirmed, as it may have been for insufficiency of evidence; and, as the testimony is conflicting, it would not be disturbed.—Kircher v. Conrad, 9 Mont. 191; 23 Pac. 74.

653. It will be presumed, in the absence of evidence, that the statement on motion for new trial was served on the adverse party, where it has been allowed and settled by the trial court.—Murray v. Hauser, 21 Mont. 120; 53 Pac. 99.

654. An order for new trial being general in terms, it must be assumed that the trial court was of opinion that the evidence was sufficient in the sense that it preponderated against the conclusion of the jury.—Harrington v. Mining Co., 27 Mont. 1; 69 Pac. 102.

655. Where the court's order overruling a motion for new trial indicated the particular ground on which it was made, every legitimate intendment will be indulged to support it.—Wright v. Matthews, 28 Mont. 442; 72 Pac. 820.

656. Under Code Civ. Proc., § 1736, it will be presumed, in the absence of a showing to the contrary, that the statement disclosed by the record, as prepared and settled, and filed according to law, was actually used upon the motion for new trial, where it also appears that a decision on the motion was made.—Mahoney v. Dixon, 31 Mont. 107; 77 Pac. 519.

657. Where an order granting new trial is general, it will be affirmed if either of the grounds assigned in support thereof is sufficient.—Gillies v. Mining Co., 32 Mont. 320; 80 Pac. 370.

9. Judgment, 658-659.

658. This court will presume, if the contrary does not appear on the record, that the court below found facts sufficient to support the judgment.

Ming v. Truett, 1 Mont. 322.
Morse v. Swan, 2 Mont. 306.
Stafford v. Hornbuckle, 3 Mont. 485.

659. Courts will not reverse a judgment when, from the whole record, justice appears to have been done.—Caruthers v. Pemberton, 1 Mont. 111.

10. Orders and proceedings after judgment, 660-662.

660. A motion to retax costs, which is not supported, either by the records in the case, by affidavits showing illegal charges, or by a statement presenting them, will not be considered, the presumption being that the court below based its ruling on such considerations.—Hibbard v. Tomlinson, 2 Mont. 220.

661. Where a statement on motion for new trial has been allowed and settled, this court will presume, in the absence of evidence to the contrary, that it was duly served on the adverse party.—Beach v. Water Co., 25 Mont. 367; 65 Pac. 106.

662. On appeal from a decree allowing an attorney's fee, the presumption, in the absence of a contrary showing, is that the court followed the established rule and considered the amount and character of the services rendered, the labor, time, and trouble involved, the character and importance of the litigation in which the services were rendered, the amount of money or the value of the property to be affected, the professional skill and experience called for, the character and standing in their profession of the attorneys, and the result secured.—Forrester v. Mining Co., 29 Mont. 397; 74 Pac. 1088; 76 Pac. 211.

11. Bill of exceptions, 663-664.

663. Where the record shows that on a refusal to give instructions the court's rulings were "duly excepted to," it will be presumed that the exceptions were taken at the proper time and in the proper manner.—Simonton v. Kelly, 1 Mont. 363.

664. In the absence of a showing to the contrary it will be presumed that the court below, in settling the bill of exceptions, made the same conform to the truth.—Swenson v. Kleinschmidt, 10 Mont. 473; 26 Pac. 198.

12. Transcript, 665.

665. Under Code Civ. Proc., § 3266, subd. 15, it will be presumed, in the absence of a showing to the contrary, that instructions found in the proper place in the record, with proper endorsements thereon, were put there by the trial court and its officers.—Wastl v. Montana Union, 24 Mont. 159; 61 Pac. 9.

F. DISCRETION OF LOWER COURT, 666-702.

1. Nature and Extent of Discretionary Power, 666.
2. Power to Review in General, 667.
3. Injunction, 668-672.
4. Opening Default, 673-677.
5. Amendment and Striking Out of Pleadings, 678-680.
6. Proceedings Preliminary to Trial, 681.
7. Rulings on Trial, 682.
8. Reception of Evidence, 683-685.
9. New Trial or Rehearing, 686-699.
10. Proceedings After Judgment, 700-701.
11. Costs and Allowances, 702.

1. Nature and extent of discretionary power, 666.

666. Judicial discretion is not to be interfered with, unless it clearly appears that that discretion has been abused; but this is not to be interpreted as granting to the district courts "unlimited discretion," the exercise of which is not to be revised by this court. Legal discretion must always be guided and controlled by certain legal principles.—M. O. P. Co. v. Mining Co., 22 Mont. 159; 56 Pac. 120.

2. Power to review in general, 667.

667. An order refusing an interlocutory injunction will be reversed on appeal if the court abused its discretion.—Butte & B. C. M. Co. v. M. O. P. Co., 21 Mont. 539; 55 Pac. 112.

3. Injunction, 668-672.

668. The granting of a preliminary injunction, being largely a matter of discretion, will be sustained, where there was a reasonable showing in support of plaintiff's application in the lower court.—Anaconda C. M. Co. v. Mining Co., 17 Mont. 519; 43 Pac. 924.

669. Where an injunction pendente lite has been granted, it devolves upon the party complaining to show that its issuance was an abuse of discretion.—Heinze v. Mining Co., 20 Mont. 523; 52 Pac. 263.

670. Where the owner of a mining claim sought to restrain the owner of a neighboring claim from removing ore from beneath the surface of plaintiff's claim, and the issue was as to the course of defendant's vein across his claim, and the evidence was conflicting, the issue of an injunction pendente lite would not be disturbed.—Parrot S. & C. Co. v. Heinze, 25 Mont. 139; 64 Pac. 326.

671. Evidence on which a temporary injunction is dissolved will be held sufficient to sustain the order of dissolution, where no abuse of discretion is shown, even though it would not authorize a denial on final hearing of the relief demanded in the bill.—Craver v. Stapp, 26 Mont. 314; 67 Pac. 937.

672. An injunction pendente lite against a corporation and a trustee of its stock to prevent disposing of a certin portion thereof will not be interfered with, where the evidence at the preliminary hearing tends to prove the allegations of the complaint.—McDonald v. Gerrick, 29 Mont. 373; 74 Pac. 1083.

4. Opening default, 673-677.

673. Where defendant applied in vacation for relief from a judgment against him, and showed by proper affidavits that he had a meritorious defense, and had employed counsel to represent him, but, through a misunderstanding between counsel, a personal judgment was taken against him by default, of which he had no knowledge until after the adjournment of court for the term, the order of the trial court, in vacating the judgment, should not be disturbed.—Whiteside v. Logan, 7 Mont. 373; 17 Pac. 34.

674. Though the setting aside of a default judgment is a matter of discretion, such action will be set aside, if it appears that there has been an abuse of discretion.—Benedict v. Spendiff, 9 Mont. 85; 22 Pac. 500.

675. Where the court uses its discretion unwisely in acting upon a motion to set aside a default judgment, its action will be reversed.—In re Davis' Estate, 15 Mont. 347; 39 Pac. 292.

676. Since, under Code Civ. Proc., § 774, applications to set aside default judgments are addressed to the discretion of the court, its action thereon will not be interfered with unless a manifest abuse of discretion is shown.—Hegaas v. Hegaas, 28 Mont. 266; 72 Pac. 656.

677. The power conferred by Code Civ. Proc., § 774, on the court to relieve a party from a judgment, etc., taken against him through his mistake, inadvertence, surprise, or excusable neglect, is discretionary, and its exercise will not be revised except for abuse thereof.—Greene v. Rowan, 29 Mont. 263; 74 Pac. 456.

5. Amendment and striking out of pleadings, 678-680.

678. An application for leave to withdraw a counterclaim, after the testimony had closed, but before the court finally charged the jury, is a matter over which the court should exercise a sound discretion, and it has power to grant or refuse amendments, and upon such terms as it thinks just and proper.—Isaacs v. McAndrew, 1 Mont. 427.

679. The refusal to allow a party to amend his pleadings rests in the sound discretion of the court, and this court can only review that ruling when it appears that there has been some abuse of discretion.—First Nat'l Bank v. How, 1 Mont. 604.

680. Refusal to order a bill of particulars to be furnished is not error, unless abuse of discretion is shown.—Beach v. Water Co., 25 Mont. 379; 65 Pac. 111.

6. Proceedings preliminary to trial, 681.

681. An order granting a motion for change of venue will be affirmed, where no error in the exercise of discretion appears, and no brief is filed or argument made by appellant.—Harris v. Ramsey, 16 Mont. 302; 40 Pac. 589.

7. Rulings on trial, 682.

682. Discretion of the court in granting a view of premises will not be reviewed, in the absence of a clear showing of error.—Maloney v. King, 30 Mont. 158; 76 Pac. 4.

8. Reception of evidence, 683-685.

683. The latitude of cross examination rests largely in the discretion of the court, and is not to be interfered with save for abuse.—Forrester v. Mining Co., 29 Mont. 397; 74 Pac. 1088; 76 Pac. 211.

684. The re-opening of a party's case, after he had closed it, for the purpose of admitting further testimony, is in the discretion of the court, and will not be disturbed, unless abuse of discretion is shown.—Schilling v. Curran, 30 Mont. 370; 76 Pac. 998.

685. Under Code Civ. Proc., § 3371, the granting or refusing of an application to exclude a witness from the court room is in the discretion of the court, subject to review only for abuse thereof.—Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

9. New trial or rehearing, 686-699.

686. Where the record shows a conflict of testimony, the granting or refusing of a new trial is in the discretion of the trial court, and its action will not be disturbed.

Beck v. Beck, 6 Mont. 285; 12 Pac. 646.
Chauvin v. Valiton, 7 Mont. 581; 19 Pac. 215.
Kilby v. Baker, 9 Mont. 398; 24 Pac. 22.
Merchants Nat'l Bank v. Greenhood, 16 Mont. 395; 41 Pac. 250.
Murray v. Heinze, 17 Mont. 353; 42 Pac. 1057; 43 Pac. 714
Ray v. Cowan, 18 Mont. 259; 44 Pac. 821.
Butte & B. M. Co. v. Lexington, 23 Mont. 177; 58 Pac. 111.
O'Rourke v. Sherman, 23 Mont. 310; 58 Pac. 810.
Campbell v. Great Falls, 27 Mont. 37; 69 Pac. 114.

687. The granting of a motion for new trial rests in the sound legal discretion of the court, and where it does not appear that irregularities of counsel or parties in any manner affected the conduct of the jury, this court will presume that there was no abuse of discretion in refusing to grant a new trial.—Kinna v. Horn, 1 Mont. 597.

688. An order granting a new trial, on the ground of insufficiency of the evidence, will not be disturbed, under the rule that a verdict will

not be disturbed if there is evidence to support it, as such rule does not apply to trial courts. —McCauley v. Tyler, 11 Mont. 51; 27 Pac. 391.

689. A ruling on a motion for new trial will not be disturbed, where the evidence is conflicting, and no abuse of judicial discretion appears, upon a consideration of the whole record.—Mattock v. Goughnour, 13 Mont. 300; 34 Pac. 36.

690. An order granting a new trial will not be reversed when, upon consideration of the evidence and assignments, no abuse of discretion appears.—Haggin v. Saile, 14 Mont. 79; 35 Pac. 514.

691. The discretion of the court, in ruling on a motion for new trial, will be controlled, when it appears to have been exercised without any sufficient or substantial reason.—Holland v. Huston, 20 Mont. 84; 49 Pac. 390.

692. Granting or refusing a new trial for errors occurring at the trial is within the sound discretion of the lower court.—Vogt v. Baldwin, 20 Mont. 322; 51 Pac. 157.

693. The discretion of the judge in granting a new trial, on the ground that the verdict is against the weight of evidence, will not be disturbed on appeal.—Hamilton v. Nelson, 22 Mont. 539; 57 Pac. 146.

694. This court will not disturb the action of the judge in setting aside a verdict, where he is satisfied that it is not warranted by the evidence.—Patten v. Hyde, 23 Mont. 23; 57 Pac. 407.

695. Where, in an action of ejectment for the recovery of a mining claim, the evidence of plaintiff's compliance with the law as to doing the required amount of assessment work is conflicting, the judgment of the court, in refusing new trial, will be affirmed.—Penn v. Oldhauber, 24 Mont. 287; 61 Pac. 649.

696. An order denying new trial should not be reversed, because of inaccuracy in the instructions, which clearly did not result in prejudice to the complaining party.—Schatzlein v. Passmore, 26 Mont. 500; 68 Pac. 1113.

697. Where the evidence was conflicting, and the court, in making an order for new trial, excluded from its consideration the question of its sufficiency, such conclusion will be accepted without a re-examination.—Rand v. Kipp, 27 Mont. 138; 69 Pac. 714.

698. The granting or refusing of new trial, upon the ground of surprise or newly discovered evidence, rests largely in the discretion of the court, and its ruling will not be disturbed, in the absence of an abuse of such discretion.—Landeau v. Frazier, 30 Mont. 267; 76 Pac. 290.

699. An application for new trial, on the ground of newly discovered evidence, is addressed to the discretion of the judge, and his action will not be disturbed, except for a clear abuse of his discretion.—In re Colbert's Estate, 31 Mont. 477; 80 Pac. 248.

10. Proceedings after judgment, 700-701.

700. The refusal of the court to stay execution, upon a motion made after final judgment, was within the discretion of the court, and will not be revised, unless a clear abuse of discretion is shown.—Clarke v. Gonu, 2 Mont. 538.

701. A motion to stay proceedings in relation to a judgment revoking a physician's license will not be overruled, where such stay was refused by the lower court, and it does not appear that there was an abuse of discretion. —Board v. Kellogg, 14 Mont. 243; 36 Pac. 48.

11. Costs and allowances, 702.

702. The decree of a court of equity, allowing an attorney's fee, on conflicting evidence, and supported by credible testimony, will not be disturbed.—Forrester v. Mining Co., 29 Mont. 397; 74 Pac. 1088; 76 Pac. 211.

G. QUESTIONS OF FACT, VERDICTS, AND FINDINGS, 703-736.

1. VERDICTS, 703-719.
2. FINDINGS OF COURT, 720-733.
3. QUESTIONS OF FACT ON INTERLOCUTORY OR SPECIAL PROCEEDINGS, 734-736.

1. VERDICTS, 703-719.

(a) SUFFICIENCY OF EVIDENCE IN SUPPORT, 703-704.
(b) ON CONFLICTING EVIDENCE, 705-711.
(c) AGAINST WEIGHT OF EVIDENCE, 712-715.
(d) AMOUNT OF RECOVERY, 716.
(e) APPROVAL OF TRIAL COURT, 717-719.

(a) Sufficiency of evidence in support, 703-704.

703. A verdict will not be disturbed where there is evidence to support it.
Caruthers v. Pemberton, 1 Mont. 111.
Lincoln v. Rodgers, 1 Mont. 217.
Davis v. Blume, 1 Mont. 463.
Griswold v. Boley, 1 Mont. 545.
Upton v. Larkin, 7 Mont. 449; 17 Pac. 728.
Grace M. E. Church v. Rickards, 16 Mont. 70; 40 Pac. 73.
Ball v. Gussenhoven, 29 Mont. 321; 74 Pac. 871.

704. In a civil action, this court will not disturb the verdict, if there is evidence to support it, unless the same seems to have been the result of passion or prejudice.—Kennon v. Gilmer, 5 Mont. 257; 5 Pac. 847.

(b) On conflicting evidence, 705-711.

705. A verdict on conflicting evidence will not be disturbed.
Mining v. Truett, 1 Mont. 322.
Kinna v. Horn, 1 Mont. 597.
Budd v. Perkins, 6 Mont. 223; 9 Pac. 916.
Montana R. Co. v. Warren, 6 Mont. 275; 12 Pac. 641.
Frank v. Murray, 7 Mont. 4; 14 Pac. 654.
Carron v. Wood, 10 Mont. 500; 26 Pac. 388.
Quigley v. Birdseye, 11 Mont. 439; 28 Pac. 741.
Cabbage v. Schultz, 16 Mont. 14; 39 Pac. 911.
Barnett v. Brown, 18 Mont. 367; 45 Pac. 551.
Huston v. Nuss, 19 Mont. 113; 47 Pac. 634.
Baxter v. Hamilton, 20 Mont. 327; 51 Pac. 265.
Sanford v. Gates, 21 Mont. 277; 53 Pac. 749.
Wastl v. Montana Union, 24 Mont. 159; 61 Pac. 9.
Nelson v. Great Northern, 28 Mont. 297; 72 Pac. 642.
Babcock v. Maxwell, 29 Mont. 31; 74 Pac. 64.
Hefferlin v. Karlman, 29 Mont. 139; 74 Pac. 201.
McMillan v. Frank, 30 Mont. 61; 75 Pac. 685.
Butte M. & M. Co. v. Kenyon, 30 Mont. 314; 76 Pac. 696; 77 Pac. 319.

706. Where the evidence is conflicting, the jury are to determine the facts, and their verdict will not be disturbed, unless clearly un-

supported by the evidence before them.—Kleinschmidt v. Dunphy, 1 Mont. 118.

707. This court will not disturb a verdict on the ground of insufficiency of the evidence, where such verdict is supported by substantial testimony, although there is conflict as to facts which the jury must find in order to arrive at a verdict.—Sweetland v. Olsen, 11 Mont. 27; 27 Pac. 339.

708. Where there is a substantial conflict in the testimony, even though this court would have found differently from the jury, the verdict will not be disturbed.—Pearson v. Harper, 16 Mont. 143; 40 Pac. 1 1.

709. A verdict for a specified sum, for cutting timber on plaintiff's land and carrying it away, will not be disturbed, where the evidence is conflicting, though not entirely satisfactory.—Nelson v. Milling Co., 18 Mont. 125; 44 Pac. 406.

710. Whether the verdict is unsupported by any substantial evidence, being a question of law, may be reviewed on appeal from a judgment; but whether the evidence is sufficient to support the verdict, where there is conflicting evidence, can not be so reviewed.—Ball v. Gussenhoven, 29 Mont. 321; 74 Pac. 871.

711. Where the instructions fairly present to the jury the questions involved, and the evidence is conflicting and is amply sufficient to sustain the verdict, and no reversible error is apparent, the case will be affirmed.—Rowe v. Shannon, 30 Mont. 238; 76 Pac. 1132.

(c) Against weight of evidence, 712-715.

712. Although the evidence is, in some respects, conflicting, a verdict will not be set aside, as contrary to evidence, unless clearly unsupported by evidence.—Toombs v. Hornbuckle, 1 Mont. 286.

713. A verdict or finding will not be disturbed as against the evidence, because of a mere preponderance of evidence against it, but will be set aside only when it is palpably against the weight of evidence, or clearly shows that the jury were mistaken, or were influenced by passion, prejudice or corruption.—Id.

714. Even if we were satisfied that the weight of evidence was decidedly against the verdict, yet if the verdict is fairly sustained by any evidence in the case, it will not be disturbed, unless it shall appear the result of passion, prejudice, fraud, accident or mistake.—Griswold v. Boley, 1 Mont. 545.

715. If a verdict is in flat contradiction of all the evidence in the case, and there is nothing to support it, it will be set aside on appeal.—Northern Pacific v. Schimmell, 6 Mont. 161; 9 Pac. 889.

(d) Amount of recovery, 716.

716. A finding as to the amount of damages resulting from the taking and detention of plaintiff's cattle will not be disturbed.—Proctor v. Irvin, 22 Mont. 547; 57 Pac. 183.

(e) Approval of trial court, 717-719.

717. A verdict which has some evidence to support it, and which the court refuses to set aside, will not be disturbed.—O'Donnell v. Bennett, 12 Mont. 242; 29 Pac. 1044.

718. Where the verdict has been reviewed by the court below in determining the credit to be given to witnesses, it will not be disturbed.—Bradshaw v. Degenhart, 15 Mont. 267; 39 Pac. 90.

719. Denial of new trial for insufficiency of evidence will not be disturbed, there being a substantial conflict of the evidence.—Hendrickson v. Wallace, 29 Mont. 504; 75 Pac. 355.

2. FINDINGS OF COURT, 720-733.

(a) Conclusiveness in General, 720.
(b) Effect in Equitable Actions, 721-722.
(c) Sufficiency of Evidence in Support, 723-724.
(d) On Conflicting Evidence, 725-731.
(e) Against Weight of Evidence, 732.
(f) Amount of Recovery, 733.

(a) Conclusiveness in general, 720.

720. Where complainant's equities are presented under his complaint and evidence, without evidence for defendant, the trial court's finding that, under the evidence, complainant had not established his case, is res judicata, if the court's holding was correct.—Campbell v. Flannery, 32 Mont. 119; 79 Pac. 702; 80 Pac. 240.

(b) Effect in equitable actions, 721-722.

721. A finding of fact made in an equity case by the lower court, on conflicting evidence, will not be disturbed.—Wetzstein v. Largey, 27 Mont. 212; 70 Pac. 717.

722. Under Code Civ. Proc., § 21, as amended by Acts 2d Ex. Sess., 1903, p. 7, appellant must show that the preponderance of evidence is against the findings, before this court will disturb such findings, on the ground of insufficiency of the evidence.—Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

(c) Sufficiency of evidence in support, 723-724.

723. A judgment will not be disturbed, when the evidence is sufficient to justify the findings.

Vantilburgh v. Hamilton, 2 Mont. 413.
Story v. Black, 5 Mont. 26; 1 Pac. 1.
McMillan v. Carter, 6 Mont. 215; 9 Pac. 906.
First Nat'l Bank v. Hall, 8 Mont. 341; 20 Pac. 638.
Watkins v. Morris, 16 Mont. 309; 40 Pac. 600.
Noyes v. Ross, 23 Mont. 425; 59 Pac. 367.

724. On an appeal from a judgment alone, when there was no motion for new trial, this court can not review the evidence upon which the court below based its findings.—Vantilburgh v. Black, 2 Mont. 371.

(d) On conflicting evidence, 725-731.

725 Where the evidence is conflicting, the findings of the trial court will not be disturbed.

Travis v. McCormick, 1 Mont. 347.
Ingalls v. Austin, 8 Mont. 333; 20 Pac. 637.
Brownfield v. Bier, 15 Mont. 403; 39 Pac. 461.
Reardon v. Patterson, 19 Mont. 231; 47 Pac. 956.
Johnson v. Curtis, 21 Mont. 199; 53 Pac. 541.
Anderson v. Cook, 25 Mont. 330; 64 Pac. 873; 65 Pac. 113.
Stevens v. Curran, 28 Mont. 366; 72 Pac. 753.
Hennessy v. Furniture Co., 30 Mont. 264; 76 Pac. 291.
Slater Brick Co. v. Shackleton, 30 Mont. 390; 76 Pac. 805.
Way v. Sherman, 30 Mont. 410; 76 Pac. 942.

726. A finding on conflicting evidence will not be disturbed, though seemingly against the preponderance of evidence, unless the preponderance is very great, or so strong as to justify an inference that the court was mistaken, or

was influenced by passion, prejudice or corruption, or failed to consider all the evidence.
Ming v Truett, 1 Mont. 322.
Travis v. McCormick, id. 347.

727. Where the court below heard the evidence, and personally examined the premises, and the facts found in favor of defendant are upon a substantial conflict of evidence, the court's findings will not be disturbed.—Leonard v. Shatzer, 11 Mont. 422; 28 Pac. 457.

728. Where, on application for an injunction pendente lite to restrain defendants from obstructing a private road, which plaintiff claims by prescription, the evidence is conflicting, the finding that such road has not been acquired, an order denying the injunction should be affirmed.—M. O. P. Co. v. Mining Co., 25 Mont. 427; 65 Pac. 420.

729. Where, in an action to determine an adverse claim to mining property, evidence as to the location of the veins, their apices, and their dip and strike, was conflicting, a finding on such issues will not be reversed.—M. O. P. Co. v. Mining Co. 27 Mont. 288; 70 Pac. 1114.

730. This court, on an appeal from an order denying an injunction, will not reverse the order as being an abuse of discretion, where the finding of fact upon which the order rests is based on conflicting evidence, there being some evidence tending to support such finding.—Boston etc. Min. Co. v. M. O. P. Co., 27 Mont. 431; 71 Pac. 471.

731. Under Laws 2d Ex. Sess., 1903, p. 1, this court will hesitate to overturn findings based on substantially conflicting evidence, which would justify an inference in favor of either party; but where the conflict is trifling, or the evidence preponderates decidedly against the findings, the court will examine the facts and establish its own conclusion.—Bordeaux v. Bordeaux, 32 Mont. 159; 80 Pac. 6.

(e) Against weight of evidence, 732.

732. Where the testimony in the record fails satisfactorily to show that the findings are against the weight of evidence they must stand as approved by the trial court.—Meadowcraft v. Walsh, 15 Mont. 544; 39 Pac. 914.

(f) Amount of recovery, 733.

733. In an action to enforce a mechanic's lien for papering the walls of a building, the issue was as to the number of rolls of paper. The evidence consisted of a mass of figures and estimates by defendant's witnesses. *Held*, that a verdict, though it did not conform to the estimate of any one witness, would not be disturbed.—Marsh v. Morgan, 18 Mont. 19; 44 Pac. 85.

3. Questions of fact on interlocutory or special proceedings, 734-736.

734. In considering the sufficiency of evidence to go to the jury, on appeal from a judgment of dismissal or nonsuit, this court must allow it the weight which every reasonable inference can properly give it.—Herbert v. King, 1 Mont. 475.

735. The report of a referee showed that a motion for nonsuit was overruled, when argument thereon closed, and that defendant thereupon declined to introduce any evidence, and that showing was substantiated by affidavits of witnesses, and contradicted by affidavits of defendant's counsel. *Held*, that the record shows an election on the part of defendant to stand on his motion for nonsuit.—Emerson v. Bigler, 21 Mont. 200; 53 Pac. 621.

736. The determination of questions of fact on motion for preliminary injunction will not be disturbed on appeal, unless clearly against the evidence.—Forrester v. Mining Co., 21 Mont. 544; 55 Pac. 229, 353.

H. HARMLESS ERROR, 737-810.

1. Prejudice to Rights of Party as Ground of Review, 737-739.
2. Presumptions as to Effect of Errors, 740-741.
3. Burden to Show Prejudice From Error, 742.
4. Errors Favorable to Party Complaining, 743-746.
5. Technical or Formal Errors, 747.
6. Pleading, 748.
7. Interlocutory Proceedings, 749.
8. Selecting Jurors, 750-751.
9. Conduct of Trial or Hearing, 752-753.
10. Rulings on Questions to Witnesses, 754-761.
11. Rulings as to Evidence in General, 762-763.
12. Admission of Evidence, 763a-778.
13. Exclusion of Evidence, 779-787.
14. Submission of Issues or Questions to Jury, 788-789
15. Instructions to Jury, 790-806.
16. Verdict, 807-808.
17. Findings by Court, 809.
18. Judgment, 810.

1. Prejudice to rights of party as ground of review, 737-739.

737. A judgment will not be reversed because of the admission of improper testimony, when it is clear that it involves no injury to the party appealing.—Stafford v. Hornbuckle, 3 Mont. 485.

738. Decisions upon mere matters of practice will not be disturbed, even if erroneous, unless it is apparent that injustice will likely result from adherence thereto, or that a change will not work a wrong.—Carr v. Closser, 27 Mont. 94; 69 Pac. 560.

739. Where the evidence was such as to preclude plaintiff's recovery in any event, she was not prejudiced, though certain of the findings in favor of defendant were outside the issues made by the pleadings.—Goon v. Proctor, 27 Mont. 526; 71 Pac. 1003.

2. Presumptions as to effect of errors, 740-741.

740. Where it is not shown that the error did not, or could not, prejudice the party against whom it was committed, the error will be presumed to be injurious.—Parrin v. Montana Central, 22 Mont. 290; 56 Pac. 315.

741. Error being apparent, prejudice will be presumed.—Lawrence v. Westlake, 28 Mont. 503; 73 Pac. 119.

3. Burden to show prejudice from error, 742.

742. A party may not complain of irregularity in the transfer of a case from one department to another of a district court, in the absence of a showing that he was prejudiced by the transfer.—Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

4. Errors favorable to party complaining, 743-746.

743. A defendant can not complain of a judgment for less than the full amount of plaintiff's claim, on the ground that, if recovery be had, it must be for the full amount.—White Sulphur Springs v. Pierce, 21 Mont. 130; 53 Pac. 103.

744. Plaintiff can not complain of instructions taking the defense of adverse possession

from the jury.—Hoar v. Hennessy, 29 Mont. 253; 74 Pac. 452.

745. Where, in an action on account for merchandise, the account showed that defendant had been credited with the price of certain halter chains sued for, the refusal to strike such items from the account, and the introduction of the account in evidence containing such item, was harmless.—Stagg v. St. Jean, 29 Mont. 288; 74 Pac. 740.

746. Even if it is error, in an action for rent, to undertake, at the instance of the parties, to determine defendants' liability, under the terms of the lease, for an installment of rent not in fact due at the commencement of the action, defendants, in whose favor was the decision, and who have not appealed, may not complain of such action of the court.—Bickford v. Kirwin, 30 Mont. 1; 75 Pac. 518.

5. Technical or formal errors, 747.

747. Under Code Civ. Proc., § 778, a demurrer to a complaint, on the ground that two causes of action were improperly united therein, was properly overruled, on plaintiff's dismissing as to one cause of action.—Caplice v. Cassidy, 25 Mont. 81; 63 Pac. 799.

6. Pleading, 748.

748. Error in permitting amendment to conform to proof was harmless, where the original pleading was broad enough to cover the proof.—Hunter v. Montana Central, 22 Mont. 525; 57 Pac. 140.

7. Interlocutory proceedings, 749.

749. Under Code Civ. Proc., § 778, an order confirming a receiver's sale of partnership property will not be set aside, on an appeal therefrom, where it is not shown that the property was not sold at its full value, or that appellant was prejudiced thereby.—Murphy v. Patterson, 24 Mont. 591; 63 Pac. 380.

8. Selecting jurors, 750-751.

750. Where the findings of the jury were advisory, and were adopted by the court, and are not attacked on appeal, error, if any, in refusing to sustain a challenge to a juror for cause, is immaterial.—Leggatt v. Leggatt, 13 Mont. 190; 33 Pac. 5.

751. In an action for equitable relief, the findings of the jury are advisory merely, and the erroneous refusal of a challenge to a juror, who participated in the findings, is no ground for reversal, where such findings were not attacked at all, or, if so, by insufficient specifications of error.—Zickler v. Deegan, 16 Mont. 198; 40 Pac. 410.

9. Conduct of trial or hearing, 752-753.

752. Improper conduct of counsel in the argument is harmless in an action in equity, where the findings of the jury are advisory only.—Lawlor v. Kemper, 20 Mont. 13; 49 Pac. 398.

753. Where, during the examination of a witness for defendants on an application for an injunction, the judge remarked that an injunction pendente lite would be granted on the evidence then before the court, such action does not constitute reversible error, he having heard the whole case before finally deciding that such injunction should issue.—Maloney v. King, 25 Mont. 188; 64 Pac. 351.

10. Rulings on questions to witnesses, 754-761.

754. Allowing improper questions will not reverse a judgment, where it appears from the whole record that appellant was not injured thereby.—Randall v. Greenhood, 3 Mont. 506.

755. A judgment will not be reversed because the mere form of a question made it leading, where it appears that appellant could not have been injured by the question and answer.—Id.

756. Possible error in allowing a buyer to be cross examined as to whether he put up his sign on the saloon sold, to defraud creditors of the seller, where answered in the negative, was not prejudicial.—Gallick v. Bordeaux, 22 Mont. 470; 56 Pac. 961.

757. Where a witness had voluntarily stated that a certain affidavit produced by him in evidence was for evidence in another case, in which he had been under arrest, a question put to such witness on cross examination as to what he was arrested for, if error, was not prejudicial.—Matusevitz v. Hughes, 26 Mont. 212; 66 Pac. 939; 68 Pac. 467.

758. In view of the presumption that the court below did not consider incompetent testimony in refusing an injunction pendente lite, improper cross examination of plaintiff's witnesses is not ground for reversal, no injury having been shown.—Colusa Parrot Co. v. Barnard, 28 Mont. 11; 72 Pac. 45.

759. Error in refusing to permit cross examination of plaintiffs' witness, as to the extent of his admitted interest in a suit, is not ground for reversal, where other evidence shows that, for purposes of collection, the witness had assigned to plaintiffs his account against defendant, which constituted one of the causes of action.—Hefferlin v. Karlman, 30 Mont. 348; 76 Pac. 757.

760. Any error in allowing plaintiff, on cross examination, to be asked how a certain account stood, is harmless, he having answered that he did not know.—McCormick v. Johnson, 31 Mont. 266; 78 Pac. 500.

761. Where, in an action for breach of contract to purchase certain milk, the court sustained an objection to a question asked of one of defendant's employees whether there was any fraud on defendant's part, or anyone acting under him, to break the contract, but was not answered, the fact that before a ruling on the question was finally made, the witness stated that he did not want to answer the question unless he had to, that he was in the confidence of defendant, and did not want to be placed in the position of telling what happened and what did not happen, was reversible error.—Brazell v. Cohn, 32 Mont. 556; 81 Pac. 339.

11. Rulings as to evidence in general, 762-763.

762. The refusal to rule on objections to a question is harmless, where the answer thereto is competent.—Quinn v. Quinn, 22 Mont. 403; 56 Pac. 824.

763. A witness was asked whether he had any placer ground prior to 1875, and answered that he did not remember whether he bought a certain person out in 1875 or 1876. The court struck out the portion of the answer "concerning the buying of placer ground prior to 1875." *Held*, that the ruling was practically without meaning and harmless.—Murray v. Butte, 31 Mont. 177; 77 Pac. 527.

12. ADMISSION OF EVIDENCE, 763a-778.

(a) PREJUDICIAL EFFECT IN GENERAL, 763a-765.
(b) FACTS OTHERWISE ESTABLISHED, 766-770.
(c) DEFECTS SUPPLIED OR OBJECTIONS REMOVED SUBSEQUENTLY, 771-772.
(d) ERRORS CURED BY INSTRUCTION, 773.
(e) ON TRIAL WITHOUT JURY, 774-778.

(a) Prejudicial effect in general, 763a-765.

763a. In a suit to have an assignment de-

clared fraudulent and removed as an obstruction to levy of execution, the admission in evidence of a conversation between plaintiff and assignors, occurring after the assignment, to the effect that the assignors had hoped to make a settlement with their creditors by borrowing money, but were prevented by plaintiff's action, if error, is harmless.—Merchants Nat'l Bank v. Greenhood, 16 Mont. 395; 41 Pac. 250.

764. Where defendant in a mechanic's lien foreclosure seeks to impeach its superintendent's estimate of the work, the admission of hearsay evidence of his statements that his estimate was erroneous is harmless error.—Cook v. Railroad Co., 28 Mont. 340; 72 Pac. 678.

765. In an action for the conversion of lumber, a witness for plaintiff testified that the lumber was turned over to him as plaintiff's agent by the original owner, and, in testifying, stated that a memorandum he then held in his hand showed the total amount received by him, that the different amounts were figured thereon, and that it was a correct statement of the amount of pieces and sizes of lumber. *Held*, that any error in admitting the memorandum in evidence was harmless, since, if it had been excluded, witness would have been entitled to refer to it, and state the amount of lumber turned over to him.—Babcock v. Maxwell, 29 Mont. 31; 74 Pac. 64.

(b) Facts otherwise established, 766-770.

766. Comp. Stat., p. 1055, § 1483 et seq., provide that, when owners of mining claims have performed the required labor, they may make an affidavit of the facts, and file the same with the county clerk, and such affidavit shall be prima facie evidence of the facts therein stated. *Held*, that in an action to try the right to the possession of mining land, where the person who made the affidavit testified as to the facts therein contained, the admission of the affidavit could not prejudice the adverse party.—Davidson v. Bordeaux, 15 Mont. 245; 38 Pac. 1075.

767. Where, in an action against a city for damages resulting from a defective street, it is admitted that the city, through its mayor and council and police, had personal knowledge of the defect before the accident, the error, if any, in admitting evidence that the overseer of streets said several days after the accident that he knew of the defect, and had intended to repair it, was without prejudice—Snook v. Anaconda, 26 Mont. 128; 66 Pac. 756.

768. Where, in an action for an accounting between members of a firm engaged in operating a ranch on government land, defendant recognized that plaintiff had succeeded to the interest of defendant's former partner, and that the lands had been used by plaintiff and defendant for the purposes of the business of both, error, if any, in admitting in evidence a deed from defendant's former partner to plaintiff for her interest in such land on the ground that the grantor could not convey any title to the government land, was harmless.—Whipple v. Stuart, 26 Mont. 219; 66 Pac. 941.

769. Where, on a motion for an injunction to restrain defendants from taking ore from beneath the surface of plaintiff's ground, the court has received incompetent evidence, and excluded material evidence offered by plaintiff, and it is reasonably apparent that the court was influenced thereby in denying the motion, the order will be reversed, even though the competent evidence received was sufficient to sustain the order.—Anaconda C. M. Co. v. Heinze, 27 Mont. 161; 69 Pac. 909.

770. The admission of evidence in proof of matters admitted by the pleadings is not reversible error.—Thornton v. Bretherton, 32 Mont. 80; 80 Pac. 10.

(c) Defects supplied or objections removed subsequently, 771-772.

771. In an action against a surety for the failure of his principal to perform an excavating contract, the admission in evidence of the rental value of the building erected over the excavation, if error, was harmless where the jury stated in their verdict that it was for the money expended by the owner on the contract.—Hamilton v. Woodworth, 17 Mont. 327; 42 Pac. 849.

772. Where the value of certain ore was considered and determined by the jury, and their finding thereon is not attacked, possible error in the admission of evidence touching such value will not be considered.—Gassert v. Black, 18 Mont. 35; 44 Pac. 401.

(d) Errors cured by instructions, 773.

773. It is error to admit parol evidence to vary the terms of a written contract, and, if admitted, the error is not corrected by an instruction to the jury to disregard it, if the verdict was in fact influenced thereby, and a new trial should be granted notwithstanding such instruction.—Nelson v. Spears, 16 Mont. 351; 40 Pac. 786.

(e) On trial without jury, 774-778.

774. Where a cause is tried to the court without a jury, the admission of incompetent evidence will not afford ground for reversal, the presumption being that the court did not consider it in arriving at its conclusion.

King v. Mining Co., 28 Mont. 74; 72 Pac. 309.
Lane v. Bailey, 29 Mont. 548; 75 Pac. 191.
Way v. Sherman, 30 Mont. 410; 76 Pac. 942.

775. Where, on application for an injunction to restrain the obstruction of a road, the trial court admitted irrelevant evidence, its order should not be reversed on that ground, if there was sufficient competent evidence to sustain its findings, since it will be presumed that its decision was based on such competent evidence.—M O. P. Co. v. Mining Co., 25 Mont. 427; 65 Pac. 420.

776. Where, on a trial before the court without a jury, inadmissible evidence is received over objection, but it, as compared with the evidence properly received, was so trifling and unimportant as not to affect the result, the error was presumptively harmless, and it will be presumed that the court disregarded such evidence.—Cobban v. Hecklen, 27 Mont. 245; 70 Pac. 805.

777. The admission of incompetent evidence on the hearing of a motion for an injunction pendente lite is not ground for reversal, in view of the presumption that the court acted only on the competent evidence adduced.—Colusa Parrot Co. v. Barnard, 28 Mont. 11; 72 Pac. 45.

778. Under Laws 2nd Ex. Sess., 1903, p. 7, authorizing the supreme court to review questions of fact and of law in equity cases, in a suit to determine water rights, the findings will not be disturbed because of the erroneous admission of evidence, where the remainder of the evidence preponderates in favor of the findings.—Hays v. Buzard, 31 Mont. 74; 77 Pac. 423.

13. Exclusion of evidence, 779-787.

779. The error of the court in excluding a question propounded to a witness is cured by allowing the witness to answer another question of the same character.—Ruff v. Rader, 2 Mont. 211.

780. The exclusion of evidence can operate no injury to the party offering it, where other testimony is freely admitted, competent to estab-

lish all that was sought to be proved by the evidence excluded.—Brownfield v. Bier, 15 Mont. 403; 39 Pac. 461.

781. It is harmless error to exclude evidence of a fact which, if proved, could not have affected the result.—Butte & B. M. Co. v. Sloan, 16 Mont. 97; 40 Pac. 217.

782. On cross examination of plaintiff, who had fallen into an excavation from the sidewalk, he was asked if he could not have walked on the outside, so as to have avoided the accident, to which he gave an affirmative answer, whereupon his counsel objected to the question, saying that "a pedestrian does not have to walk on the outside." *Held*, that the error in sustaining such objection was harmless, plaintiff having previously answered the same question without objection.—Cannon v. Lewis, 18 Mont. 402; 45 Pac. 572.

783. Where the testimony of a witness is stricken out, and then is subsequently admitted, the error, if any, in striking out the testimony, is immaterial.—Reardon v. Patterson, 19 Mont. 231; 47 Pac. 956.

784. Error in refusing to permit a witness to be asked whether he is unfriendly to the adverse party is cured by afterwards permitting him to testify to facts which show him to be unfriendly.—Quinn v. Quinn, 22 Mont. 403; 56 Pac. 824.

785. Error in unduly restricting cross examination of a witness was not prejudicial, when the testimony sought to be elicited was covered by subsequent testimony.—Ackley v. Insurance Co., 25 Mont. 272; 64 Pac. 665.

786. Where, in an action to determine an adverse claim to mining property, defendant contended that there were veins which had their apices in defendant's claim, which in their descent into the earth united with those having their apices in plaintiff's claim, giving defendant title to the whole vein below the point of union, but the court found that no such vein existed, the exclusion of the notice of location of defendant's claim and conveyances before the issuance of his patent, to show that such claim was located prior to plaintiff's claim, was harmless.—M. O. P. Co. v. Mining Co., 27 Mont. 288; 70 Pac. 1114.

787. Error in excluding evidence to impeach a witness for defendant is harmless where, excluding his testimony, there is a clear preponderance of the evidence in favor of the findings for defendant.—Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

14. Submission of issues or questions to jury, 788-789.

788. Where, in an equity case, the special findings of fact of the jury were modified by the court, and their general verdict disregarded, errors in the instructions, or in permitting them to return a general verdict, were harmless.—Wetzstein v. Largey, 27 Mont. 212; 70 Pac. 717.

789. The submission of issues unauthorized by the peladings is harmless; the findings thereon, in view of the authorized findings, being immaterial.—Spencer v. Spencer, 31 Mont. 631; 79 Pac. 320.

15. Instructions to jury, 790-806.

790. Instructions to the jury may not be complained of in an equity case.

Lawlor v. Kemper, 20 Mont. 13; 49 Pac. 398.
King v. Mining Co., 28 Mont. 74; 72 Pac. 309.
Cook v. Railroad Co., 28 Mont. 340; 72 Pac. 678.
Talbott v. Water Co., 29 Mont. 17; 73 Pac. 1111.
Hendrickson v. Wallace, 29 Mont. 504; 75 Pac. 355.

791. Where the verdict is right on the merits, the judgment will not be reversed on account of errors in the instructions.—Carruthers v. Pemberton, 1 Mont. 111.

792. A judgment will not be reversed on account of an erroneous instruction upon a material point, or one not involved in the case, where such error works no injury.—Parchen v. Peck, 2 Mont. 567.

793. In an action for damages for loss of crops by reason of defendant's interference with plaintiff's water right, the refusal of the court to instruct the jury, at the request of defendant, in effect, that plaintiff could only recover for the net profits of his crops after deducting the cost of planting and raising, can not be held prejudicial when the verdict was for nominal damages, and the plaintiff had proved the market value of the water, and the damage from the loss of it and his crops, describing what he had planted and what they were worth, defendant having had full opportunity to cross examine as to such matters.—Quigley v. Birdseye, 11 Mont. 439; 28 Pac. 741.

794. A complaint in replevin by a seller was predicated on false representations of the buyer, and on an alleged conditional sale, evidenced by a statement in the invoice that the goods were merely consigned "subject to replevy." The jury found that the seller was entitled to a rescission for the buyer's fraud. *Held*, that refusal to instruct that the statement in the invoice was insufficient to make the shipment a mere consignment was harmless.—Richardson v. Goodkind, 22 Mont. 462; 56 Pac. 1079.

795. Since findings of a jury in an equity suit are advisory only, a judgment will not be reversed for the giving of erroneous instructions, where the court, in making its findings of fact, approved some of those found by the jury, and made other findings which were supported by the evidence.—Haggin v. Saile, 23 Mont. 375; 59 Pac. 154.

796. Where the court, under Code Civ. Proc., § 3390, subd. 3, erroneously designates the plaintiff by name and authorizes his testimony to be disregarded if he has testified falsely in any part of his evidence, such error is harmless, when a verdict is returned in his favor.—Ashley v. Telephone Co., 25 Mont. 286; 64 Pac. 765.

797. Where a receiver is appointed for a water company, which has negligently failed to properly fill an excavation made in the street, and suit is brought against the receiver for the injury resulting therefrom, after his appointment, error in contradictory instructions, some of which stated his liability as dependent on notice, and others as being absolute, does not authorize the reversal of a judgment for plaintiff, since the liability is not dependent on notice, and it is immaterial whether the question of notice was considered by the jury.—Robinson v. Mills, 25 Mont. 391; 65 Pac. 114.

798. Where, in an action against a city for injury caused by a defective sidewalk, the jury are correctly instructed as to the duty of the city relating to walks, but the court, in a paragraph relating to the notice to the city of a defect, declared its duty to be to keep sidewalks "in good condition and safe," instead of in a reasonably safe and good condition, the verdict should not be set aside on that ground, since it was manifest that the jury could not have been misled by the charge as a whole.—Leonard v. Butte, 25 Mont. 410; 65 Pac. 425.

799. In ejectment, where the court charged to find for defendant if the fence and stone wall about which the controversy arose were erected

"on the line agreed upon" between the parties, plaintiff was not prejudiced by the later use of the indefinite phrase, "if a portion of the fence" rested on the lot of each, etc., where plaintiff failed to show any encroachment, and the jury, from their verdict, evidently found that the wall was lawfully built—equally on the lot of each.—Hoar v. Hennessy, 29 Mont. 253; 74 Pac. 452.

800. In ejectment, an instruction that if the board fence erected by defendant on the wall about which the controversy arose was so situated as to enclose the land upon which the stone wall rested, belonging to plaintiff, they should find for plaintiff to that extent, though subject to criticism, was favorable to plaintiff.—Id.

801. In an action for personal injuries defendant was not injured by an instruction that plaintiff might recover sums expended for medical attention, where plaintiff claimed $5,000 for the injury alone, and the verdict returned was a general one for only $2,000.—Ball v. Gussenhoven, 29 Mont. 321; 74 Pac. 871.

802. In an action against the lessor of a mining claim, on an alleged agreement to indemnify the lessees for expenses incurred in case an adjoining owner's suit should be compromised, or the mining claim sold, any error in an instruction that the order of dismissal in the adjoining owner's suit was not final was harmless, where it was undisputed that the lessor sold the claim.—McMillan v. Frank, 30 Mont. 61; 7 Pac. 685.

803. Where, in a suit to determine an adverse claim to a mining location, defendant was estopped to deny that the suit was equitable in its character, he could not object to instructions to the jury.—Mares v. Dillon, 30 Mont. 117; 75 Pac. 963.

804. Notwithstanding Const., art. 3, § 10, provides that in all suits and prosecutions for libel, the truth thereof may be given in evidence, and that the jury, under the direction of the court, shall determine the law and the facts, an erroneous instruction to the prejudice of plaintiff is cause for reversal, though the jury returned a verdict for defendant.—Paxton v. Woodward, 31 Mont. 195; 78 Pac. 215.

805. A judgment for plaintiff in an action for injuries resulting from a defective sidewalk will not be reversed for instructions which confused the names of streets, where it does not appear that defendant was prejudiced by the obvious mistake.—Pryor v. Walkerville, 31 Mont. 618; 79 Pac. 240.

806. A charge authorizing a jury to award damages in accordance with both standards provided by Code Civ. Proc., § 4333, was harmless where there was no evidence warranting an assessment of damages in accordance with one of the standards, and there was no claim that the amount of the verdict was excessive, or that the evidence was insufficient to justify the verdict.—Thornton v. Bretherton, 32 Mont. 80; 80 Pac. 10.

16. Verdict, 807-808.

807. A party in whose favor a motion for new trial was decided can not object that it was heard in his absence.—Wulf v. Manuel, 9 Mont. 276; 23 Pac. 723.

808. Where the evidence would have supported a verdict for a greater amount than that returned in favor of plaintiff, defendants were not entitled to object that the exact amount awarded was not justified by the evidence.—Brazell v. Cohn, 32 Mont. 556; 81 Pac. 339.

17. Findings by court, 809.

809. A finding that a demand has been made upon a guarantor to pay a note guaranteed by him, though not supported by plaintiff's evidence that the guarantor stated that suit would have to be brought before he would pay it, is harmless error; for the evidence warrants a finding that the guarantor waived a demand.—Stanford v. Coram, 26 Mont. 285; 67 Pac. 1005.

18. Judgment, 810.

810. In an action in claim and delivery, for property alleged to have been wrongfully seized by defendant, there was no evidence to sustain a finding for damages for the taking, and plaintiff remitted damages awarded by the verdict, judgment being entered in the alternative for the return of the property or for the value thereof. *Held*, that as defendants secured all the relief to which they were entitled, the fact that the usual course in such cases was not pursued, was not sufficient ground for new trial.—Osmers v. Furey, 32 Mont. 581; 81 Pac. 345.

I. ERROR WAIVED IN APPELLATE COURT, 811-815.

811. Where errors specified were not argued or referred to in the brief on appeal, they are waived.

Commissioners v. Lineberger, 3 Mont. 231.
Montana Ry. Co. v. Warren, 6 Mont. 275; 12 Pac. 641.
Murray v. Mining Co., 25 Mont. 14; 63 Pac. 719.
Maloney v. King, 25 Mont. 188; 64 Pac. 351.
Anderson v. Cook, 25 Mont. 330; 64 Pac. 873; 65 Pac. 113.

812. Reasons in support of a judgment, stated in the objection in the trial court, will be considered, though not urged on appeal, where it is uncertain on what particular ground the court sustained the objection, and it is necessary to remand the case for trial.—Bardwell v. Anderson, 13 Mont. 87; 32 Pac. 285.

813. The point that, there being three appeals,—one from the judgment, one from the order refusing to open default, and one from refusal to modify,—the one appeal bond filed is insufficient to give jurisdiction, is not properly presented, not being raised by motion to dismiss, but in the printed brief and in the oral argument.—Morse v. Callantine, 19 Mont. 87; 47 Pac. 635.

814. Where no brief is filed or submitted, nor any oral argument made pointing out any of the matters on which appellants rely for relief, the judgment will be affirmed.—Mendenhall v. Lyon, 25 Mont. 343; 65 Pac. 5.

815. Where, in appellant's original brief and in the oral argument, no reference was made to error in refusing to grant a motion for nonsuit, an assignment based on such refusal will be considered waived.—King v. Mining Co., 28 Mont. 74; 72 Pac. 309.

J. DECISIONS OF INTERMEDIATE COURTS, 816-817.

816. Where the record does not bring up the transcript from a probate court, on which a motion to dismiss an appeal to the district court was predicated, it will be presumed that the court was right in sustaining the motion.—McMullen v. Armstrong, 1 Mont. 486.

817. Whether appellant's negligence in filing transcript on appeal from a justice's court was excusable was a matter in the district court's discretion; and its finding will not be disturbed when not abused.—Meyers v. Gregans, 20 Mont. 450; 52 Pac. 83.

K. SUBSEQUENT APPEALS, 818-831.

1. SCOPE AND EFFECT OF REVIEW, 818-820.
2. FORMER DECISION AS LAW OF CASE, 821-827.
3. PERSONS AND QUESTIONS CONCLUDED, 828-831.

1. Scope and extent of review, 818-820.

818. The decisions of this court will not be reversed unless they are in conflict with a statute or controlling decision, to which the attention of the court has not been directed, or it appears that some question, which is decisive of the case, has been omitted by counsel and overlooked by the court.—Davis v. Clark, 2 Mont. 394.

819. Errors in a former decision of this court can not be reviewed on an appeal from the judgment rendered in the court below in pursuance of such decision, but only on motion for a rehearing or appeal to a higher court.—Barkley v. Tieleke, 2 Mont. 433.

820. An appeal from the judgment of the court below entered in conformity with the judgment and order of the supreme court on a former appeal will be dismissed, as being in effect an appeal from the supreme court's own judgment.—Kimpton v. Mining Co., 22 Mont. 107; 55 Pac. 918.

2. Former decision as law of case, 821-827.

821. Questions decided on appeal are res judicata on a subsequent appeal, and throughout all subsequent stages of the action.

Creighton v. Hershfield, 2 Mont. 169.
Davenport v. Kleinschmidt, 8 Mont. 467; 20 Pac. 823.
Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

822. The appellate court is bound by its decision on a prior appeal in the same case, whether right or wrong.—Barkley v. Tieleke, 2 Mont. 433.

823. Questions decided on a former appeal in the same case are res judicata, and will not be reviewed on the second appeal, though reserved in a bill of exceptions taken on the trial of the case on its merits.—Palmer v. Murray, 8 Mont. 174; 19 Pac. 553.

824. Where, on appeal from an action to enforce a rescisson of a contract for the sale of property represented by corporate shares, it was determined that the identical shares originally owned by plaintiff need not be returned, but any shares representing the value of the property might be tendered, such determination is the law of the case on a subsequent appeal of a proceeding to restrain the enforcement of the judgment.—O'Rourke v. Schultz, 23 Mont. 285; 58 Pac. 712.

825. On a second appeal the appellate court is bound by a former decision on points necessarily determined, but on matters not essential, or questions not considered, it is not bound.—Wastl v. Montana Union, 24 Mont. 159; 61 Pac. 9.

826. Statement on a former appeal that it was not ultra vires for defendant corporation to purchase from plaintiff certain claims against a third party, constitutes the law of the case.—Mahoney v. Hardware Co., 27 Mont. 463; 71 Pac. 674.

827. Language used by this court in its opinion on a former appeal, which was not necessary to the decision, and was mere dictum, is not the law of the case.—Yank v. Bordeaux, 29 Mont. 74; 74 Pac. 77.

3. Persons and questions concluded, 828-831.

828. Where this court has entertained the appeal of an attaching creditor, from an order dissolving the attachment, a question of practice relating to the regularity of such appeal will not be reviewed, several years later, by such court, on an appeal by a judgment creditor, in a subsequent action by creditor's bill against the attaching creditor.—Martin v. Maxey, 14 Mont. 85; 35 Pac. 667.

829. Where, on a prior appeal defendants answer was held to state a defense, plaintiff can not subsequently raise the question that it does not.—Yellowstone Nat'l Bank v. Gagnon, 25 Mont. 268; 64 Pac. 664.

830. Where, in an opinion on a former appeal, the court said that they would treat only those points which appellant had taken up on his oral argument, and closed with the remark that "we have considered and treated all the errors assigned which we consider material," such decision could not be deemed as determining any questions in the case other than those discussed in the opinion.—Sweeney v. Montana Central, 25 Mont. 543; 65 Pac. 912.

831. A party appealing from a judgment is estopped from afterwards asserting, on a subsequent appeal, the incorrectness of the decision rendered.—Reynolds v. Fitzpatrick, 28 Mont. 170; 72 Pac. 510.

XVII. DETERMINATION AND DISPOSITION OF CAUSE, 832-873.

A. DECISION IN GENERAL, 832-833.
B. AFFIRMANCE, 834-839.
C. MODIFICATION, 840-842.
D. REVERSAL, 843-856.
E. RENDITION AND ENTRY OF JUDGMENT, 857-858.
F. MANDATE AND PROCEEDINGS IN LOWER COURT, 859-871.
G. JURISDICTION AND PROCEEDINGS OF APPELLATE COURT AFTER REMAND, 872-873.

A. DECISION IN GENERAL, 832-833.

832. On appeal, a divided court affirms the judgment.

Hassan v. Quigley, 17 Mont. 493; 43 Pac. 713.
Wilson v. Harris, 19 Mont. 60; 47 Pac. 1101.

833. Where a complaint is demurrable for ambiguity, and defectively states what may be a good cause of action, and counsel who drew it has been disbarred from practice after an appeal from an order of the district court sustaining the demurrer, the case will be remanded, and substituted counsel allowed to file an amended complaint, and proceed with the case.—Ryan v. Spieth, 18 Mont. 45; 44 Pac. 403.

B. AFFIRMANCE, 834-839.

834. Where appellants have filed no brief, nor presented any argument, and the record shows that the pleadings sustain the judgment, it will be affirmed.—Raymond v. Thexton, 7 Mont. 313; 17 Pac. 260.

835. An excessive judgment and verdict will be reversed, unless the party obtaining such judgment remits all in excess of the correct amount.—Kennon v. Gilmer, 9 Mont. 108; 22 Pac. 448.

836. Where there is nothing before this court except the judgment roll and a bill of exceptions, and appellant has filed no brief, made no argument, nor in any way suggested an error on the judgment roll, and the court, on inspection, discovers none, and the bill of exceptions is a mere skeleton, containing notes

to the effect, "Here insert," but the matter is not inserted, and is not in the record by reference, the judgment will be affirmed.—Adams v. Bankers Life Ass'n, 13 Mont. 222; 33 Pac. 192.

837. Where the statement of facts is, on motion of respondent, stricken from the record, and appellant's counsel concede that there is no error in the judgment roll, the judgment will be affirmed.—Montana Cattle Co. v. Forsythe, 16 Mont. 389; 41 Pac. 137.

838. Where, in an action for personal injuries, it is impossible, on appeal, to say that the substantial rights of defendant were affected, aside from the amount of the verdict, which is excessive, this court may reverse the case, unless plaintiff remits so much of the judgment as the court holds she is entitled to.—Hamilton v. Railroad Co., 17 Mont. 334; 42 Pac. 860; 43 Pac. 713.

839. Judgment below will be affirmed where the record, and appellant's brief, fail completely to comply with the requirements of the statutes and the rulings of this court.—Frederick v. McMahon, 28 Mont. 263; 72 Pac. 620.

C. MODIFICATION, 840-842.

840. Appellate courts can modify an erroneous judgment without granting new trial, when the facts are before it and justice can be done between the parties.—Gans v. Woolfolk, 2 Mont. 458.

841. The district court, being the appellate court of the probate court, and having general jurisdiction, has inherent power and authority to make any order in a case properly before it that the probate court itself could make.—Broadwater v Richards, 4 Mont. 52; 2 Pac. 544.

842. On appeal, by one of two sureties on a bond, from a judgment thereon against him alone, where it appears that the action was wrongfully dismissed as to the other surety, this court will modify the judgment, so as to provide that it shall not affect the latter's liability to plaintiff or appellant, that the dismissal shall be set aside, and that the case may be reopened to determine such other surety's liability on the bond.—Cockrill v. Davie, 14 Mont. 131; 36 Pac. 958.

D. REVERSAL, 843-856.

843. If the decision of a court is proper and correct, the fact that the court founded such decision upon incorrect or false theory will not operate to vitiate or impair the validity of the decision.—McMullen v. Armstrong, 1 Mont. 486.

844. A cause will not be reversed because the court rendered its judgment for erroneous reasons.—Thorp v. Freed, 1 Mont. 651.

845. A case will not be reversed and remanded to the lower court to direct a judgment for nominal damages in favor of appellant.—McCauley v. McKeig, 8 Mont. 389; 21 Pac. 22.

846. Though the contract sued on is void, this court, on reversing a judgment for plaintiff, can not order judgment for defendant, where it is uncertain whether the jury allowed part of a counterclaim, or reduced plaintiff's demand.—Lebcher v. Custer, 9 Mont. 315; 23 Pac. 714.

847. Comp. Stat., p. 89, § 119, provides that the court shall, "in every step of the action, disregard any error or defect in the pleadings or proceedings," which do not affect the substantial rights of the parties; and no "judgment shall be reversed or affected by reason of such error or defect." *Held*, not to apply to a defect in a summons consisting of the omission of the seal of the court, which the statute requires to be attached to such writ.—Choate v. Spencer, 13 Mont. 127; 32 Pac. 651.

848. Where, in an action by a grantor to have a deed declared a mortgage, the jury finds that it was intended as a mortgage, and the court allows the mortgagee certain items for improvements, on the erroneous theory that he was in the possession, in the bona fide belief that he was the owner in fee, the case must be remanded for an accounting on the correct theory.—Bateman v. Raymond, 15 Mont. 439; 39 Pac. 520.

849. Error of the court in setting aside a general verdict for plaintiff, adopting the special findings, and entering judgment on them for defendant when they warranted judgment for plaintiff, is not error occurring at the trial which will warrant a new trial, but may be corrected by ordering judgment for plaintiff.—Kimpton v Mining Co., 16 Mont. 379; 41 Pac. 137.

850. Where plaintiff demurs to the answer on the ground that it does not state facts constituting a defense, and on appeal from a judgment sustaining the demurrer counsel for respondent confesses error, a reversal will be granted.—O'Donnel v. Gainan, 17 Mont. 490; 43 Pac. 713.

851. Where a temporary restraining order was dissolved on insufficient evidence, this court, on appeal, will not direct the trial court to leave such order in force, but will order a new hearing.—Butte & B. C. M. Co. v. M. O. P. Co., 21 Mont. 539; 55 Pac. 112.

852. Where a corporation illegally transfers all its stock and property to another corporation, and a receiver is appointed at the suit of minority stockholders, and on motion to vacate the receivership the two corporations offer that the second shall convey to the first in such manner as to afford plaintiffs entire relief, and an order refusing to vacate is reversed on account of this offer, the motion to vacate will not be ordered to be reheard, but direction will be given to render judgment for plaintiffs in conformity to the offer, and thereupon to vacate the refusal to discharge the receiver.—Forrester v. Mining Co., 24 Mont. 148; 60 Pac. 1086; 61 Pac. 309.

853. Where the trial court erred in denying a motion to direct a verdict for defendant, this court, on appeal, could not direct judgment for defendant, since they could not know what exceptions, if any, were taken by respondent to the trial court's rulings on the evidence offered.—Nolan v. Montana Central, 25 Mont. 107; 63 Pac. 926.

854. Where, after an appeal from an order granting new trial, the parties, in pursuance of a settlement which they have reached, file a stipulation requesting a reversal of the order, that disposition of the case will be made, though it is not apparent that, upon an examination of the record, affirmance might not be proper.—Mantle v. Largey, 28 Mont. 38; 72 Pac. 303.

855. Where, in an action on an account, an error of a few dollars appeared to have been made by plaintiff in the account pleaded, and the verdict was the same in amount as the principal sum demanded in the complaint, but by reason of plaintiff's demand for interest it could not be determined whether or not the jury found for plaintiff for a principal sum less than that demanded, and then added interest, and interest on the amount demanded, computed at the legal rate, from the date the action was commenced until the rendition of the verdict, if allowed, would amount to more than the admitted error in the account, the error, if any, was harmless.—Stagg v. St. Jean, 29 Mont. 288; 74 Pac. 740.

856. Where an issue as to damages is clearly separable from the other issues in a case, this court, in order to correct a judgment including them, will order a new trial of such issues only. —Osmers v. Furey, 32 Mont. 581; 81 Pac. 345.

E. RENDITION AND ENTRY OF JUDGMENT, 857-858.

857. A judgment of this court, absolutely void, may be set aside and vacated on motion made at a subsequent term.—Harvey v. Whitlatch, 2 Mont. 55.

858. Where defendants had taken an appeal from a judgment, and afterwards abandoned such appeal, before it was perfected, and the plaintiffs procured a transcript and perfected an appeal, without notice to defendants, and the judgment was affirmed, such judgment of affirmance will, on motion of defendants, be set aside.—Id.

F. MANDATE AND PROCEEDINGS IN LOWER COURT, 859-871.

859. However much this court may be inclined to differ from its former opinion in the same case, that opinion is, and must be, the law of such case, until it is reversed by a higher tribunal.—Creighton v. Hershfield, 2 Mont. 169.

860. The entry of a judgment in this court, to the effect that the judgment rendered and entered in the cause below be reversed and the cause remanded, does not make it necessary that a new trial on the merits be had, when the trial court is warranted in entering a judgment without new trial.—Woolman v. Garringer, 2 Mont. 405.

861. A judgment decreeing absolute title in the party in whose favor this court directed that a perpetual injunction should issue, is not such error that this court will set aside such judgment. The finding in favor of the perpetual injunction presumes such title.—Barkley v. Tieleke, 2 Mont. 433.

862. The decision of this court on the first appeal of an action becomes the law of the case in its subsequent stages.—Daniels v. Andes Ins. Co., 2 Mont. 500.

863. Where the judgment had been reversed and the cause remanded for further proceedings, and it appeared from the opinion that the court below tried the cause upon a wrong theory, and must correct certain errors by determining the amounts due upon certain mortgages and their priorities, such errors arising upon the trial of the case, the effect of the order of this court was to grant a new trial.—Collier v. Ervin, 2 Mont. 556.

864. When a judgment is reversed for an error occurring subsequent to the trial, the effect is to put the parties back to the stage of the case where the error occurred, but does not warrant a trial de novo.—Ervin v. Collier, 3 Mont. 189.

865. Where an order of the district court vacating an execution sale has been affirmed on appeal, an order of such court granting an injunction to restrain the judgment creditor from disposing of property purchased at such execution sale will also be affirmed.—Herzog v. Bernard, 12 Mont. 523; 31 Pac. 78.

866. When an appeal is taken from the entire judgment, and order refusing new trial, a reversal of the judgment and order requires a new trial of all the issues, as if the case had never been tried.—Mattock v. Goughnour, 13 Mont. 300; 34 Pac. 36.

867. Where, on remittitur to the district court, the court declined to modify the judgment so as to include certain property, this court will, on appeal, direct such modification to be made forthwith.—M. L. & M. Co. v. Cattle Co., 16 Mont. 117; 40 Pac. 145.

868. The ruling on appeal is not res judicata on a second trial as to a state of material facts newly in evidence.—Maddox v. Teague, 18 Mont. 512; 46 Pac. 535.

869. Where, in an action by a judgment creditor to set aside a fraudulent conveyance by the debtor, a judgment for plaintiff is reversed because of the insufficiency of the complaint, the trial court should permit plaintiff to amend. —Wyman v. Jensen, 26 Mont. 227; 67 Pac. 114.

870. Where an appeal from an order vacating a restraining order in a trespass case was decided on the ex parte showing of defendant that a receiver had been appointed for plaintiff corporation, such decision did not become the law of the case so as to preclude a decision that plaintiff might prosecute the action, when other material facts in regard to the receivership were made to appear in subsequent proceedings.—Boston, etc. Min. Co. v. M. O. P. Co., 27 Mont. 431; 71 Pac. 471.

871. The decision of the supreme court upon a former trial is binding only upon points necessary to the determination of the case as then presented.—Id.

G. JURISDICTION AND PROCEEDINGS OF APPELLATE COURT AFTER REMAND, 872-873.

872. The justices of the supreme court in vacation, as in term time, can recall a mandate and remittitur, or stay the same until a rehearing can be had.—Columbia Min. Co. v. Holter, 1 Mont. 429.

873. On the going down of the remittitur application for reargument or rehearing will not be entertained by this court.—Id.

XVIII. LIABILITIES ON BONDS, 874-881.

874. Where the condition of a bond on appeal to this court is that the sureties will pay the judgment if affirmed, and the judgment is affirmed, the mere fact that an appeal from the judgment of affirmance to the United States supreme court is pending is not a defense to an action on the undertaking. (See 20 Wall. 571.)—Bullard v. Gilette, 1 Mont. 509.

875. Non-payment of the judgment is a breach of an appeal bond, and issue and return of execution is not necessary to enable the obligee to maintain an action on such bond. —Id.

876. Where the condition of an undertaking is that the sureties will pay the judgment if affirmed, any one of the sureties may be sued after the affirmance of the judgment.—Id.

877. An action for the non-payment of a judgment can not be brought upon an undertaking, providing for the payment of any deficiency arising upon the sale of mortgaged premises, if no judgment for such deficiency was rendered in the original suit.—Creighton v. Hershfield, 1 Mont. 639.

878. Where, in an action to recover on an undertaking, it apppears that the bond was signed by the sureties, and delivered to the probate judge, with express directions that the same be not filed until it was signed by the principal, and that the judge promised to obey these directions, but filed the bond without the signatures of the principal, which fact the sureties did not learn until the appeal had been determined, the sureties are not liable.—Ney v. Orr, 2 Mont. 559.

879. The sureties on a stay bond are estopped from contending, in an action on the

bond, that the judgment from which the appeal was taken had never been entered, and that, consequently, the bond was void, where both the bond itself, and the record on appeal, recite such entry, and where the cause was heard on the appeal as if entry of the judgment had been made, and for over two years the execution of the judgment was stayed by the appeal.—Parrott v. Kane, 14 Mont. 23; 35 Pac. 243.

880. Civ. Code, §§ 3681, 3682, provide that a surety can not be held beyond the express terms of his contract, in the interpretation of which the same rules shall govern as in other contracts. Code Civ. Proc., §§ 1726, 1730, provide that an appeal does not stay execution unless an undertaking be executed by appellant, with sureties, conditioned for payment of the judgment as affirmed, which appeal, thus perfected, shall stay all further proceedings in the court below. Sec. 1732 provides that where sureties fail to justify when excepted to, execution on the judgment shall be no longer stayed. *Held*, that sureties on such a bond were not liable, though they failed to justify as required, where respondent, before determination of the appeal, issued execution against appellant.—State v. District Court, 22 Mont. 449; 57 Pac. 89, 145.

881. Under such sections issuance of an execution, where sureties failed to justify, must be regarded as an election to release them, and a waiver of appellant's rights to thereafter insist on their liability, notwithstanding the execution was rendered nugatory in a proceeding to which the sureties were not parties, and with which they had nothing to do.—Id.

APPEARANCE.

1. Where the defendant, by his attorneys, gave a stipulation agreeing to withdraw all pleas and defenses, and to interpose no objections to the taking of judgment, *held* to be a general appearance.—Kleinschmidt v. Morse, 1 Mont. 100.

2. Respondent in certiorari could not be heard to say that the proceedings were defective, because the verified application for the writ was not served on him, where he appeared generally, and moved to dismiss the writ, since he thereby cured any defect in the service.—State v. Napton, 24 Mont. 450; 62 Pac. 686.

ARBITRATION AND AWARD.

1. In the submission of a controversy to arbitration, under a statute providing that all the arbitrators shall meet and act together during the entire investigation, but that a majority may decide any question, where one of the arbitrators was absent during part of the investigation, though he may have authorized one of the others to sign his name to such an award as they should agree upon, the award is null and void.—Dunphy v. Ford, 2 Mont. 300.

ARREST.

1. Where one who had aided another in escaping from arrest, while in company with such other, was approached by a posse of officers, one of whom he knew and recognized to be an officer, and when commanded by this officer to surrender, aimed his gun at them and prepared to shoot, the officers may arrest him without disclosing their official character, or the reason for the arrest.—State v. Gay, 18 Mont. 51; 44 Pac. 411.

ASSAULT AND BATTERY.

I. Civil Liability, 1-4.
II. Criminal Responsibility, 5-16.
  A. Offenses, 5-9.
  B. Prosecution and punishment, 10-16.

I. CIVIL LIABILITY, 1-4.

1. Where assault and battery were committed by several persons, they are jointly and severally liable.—Daily v. Redfern, 1 Mont. 467.

2. Several parties engaged in an assault and battery may be sued jointly or separately.—Id.

3. A complaint for an assault and battery committed by two persons need not allege that there was a conspiracy or collusion between the defendants.—Id.

4. If the offense was committed by one defendant at the instance of the other, who was absent at the time the injury was inflicted, the complaint should allege that there was a conspiracy between the parties, to make them liable.—Id.

II. CRIMINAL RESPONSIBILITY, 5-16.

A. Offenses, 5-9.
B. Prosecution and Punishment, 10-16.

A. OFFENSES, 5-9.

5. On the trial of a party accused of an assault with a deadly weapon, it is no defense that the person assaulted had wrongfully deprived defendant of the use of water, thereby depriving him of the means of working his mine.—Territory v. Drennan, 1 Mont. 41.

6. Upon a trial for an attempt to commit an assault with a deadly weapon, where it appeared that defendant pointed a rifle at complainant in a threatening manner, accompanying the act with threats to shoot, it is error for the court, in regarding the matter as a question of law, to instruct the jury to acquit defendant on the ground that the rifle was not a deadly weapon, in that it was not shown to be loaded, as under the circumstances the fact that the rifle was not loaded was a matter of defense.—State v. Herron, 12 Mont. 230; 29 Pac. 819.

7. Under Pen. Code, § 404, subd. 3, a person who has been forcibly ejected from his premises may enter and remove the trespasser with force.—State v. Howell, 21 Mont. 165; 53 Pac. 314.

8. One who unlawfully takes possession of premises by force acquires no lawful possession, and may be forcibly ejected by the owner.—Id.

9. To entitle a person to use force in defending the possession of premises, his possession need not be permanent, if lawful.—Id.

B. PROSECUTION AND PUNISHMENT, 10-16.

10. Upon a trial for assault with intent to commit murder, where the testimony is direct, and the defendant and injured party are witnesses, evidence that the injured party is a vicious and revengeful man, and in the habit of carrying and drawing a pistol and getting the drop on his adversary, is not admissible.—Territory v. Perkins, 2 Mont. 467.

11. Comp. Stat., p. 511, § 60, provides that "an assault with a deadly weapon, instrument or other thing, with an intent to inflict on the person of another a bodily injury, where no

considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant heart," shall subject the offender to punishment as for felony. *Held*, that on a trial of an information under the section, where the verdict found defendant guilty "of an assault with a deadly weapon," he could be sentenced only as for the misdemeanor, as the verdict lacked the elements of a felony. —State v. Eschbach, 13 Mont. 399; 34 Pac. 179.

12. An indictment for assault with a deadly weapon, under Comp. Stat., p. 511, § 60, is not rendered invalid by an omission to use "feloniously," in averring the assault itself, where the assault is charged to have been made with intent feloniously to inflict the injury. —State v. McCaffery, 16 Mont. 33; 40 Pac. 63.

13. An informantion under Pen. Code, § 401, subd. 3, without making a specific intent to wound or inflict grievous bodily harm on another an ingredient, need not aver such an intent.—State v. Broadbent, 19 Mont. 467; 48 Pac. 775.

14. A conviction of assault in the second degree, is supported by testimony of P, the person assaulted, that he was rendered unconscious by a blow from behind from an unseen person, and of a witness that he saw defendant, with a whipstock in his hand, dragging P, who was unconscious, and had a wound on his head, and that defendant said that he had hit P, though another witness for the state, who came to the scene of the alleged assault with defendant, and went away with him, testified that he did not see defendant holding the whipstock or dragging P.—Id.

15. An instruction that the jury might convict of either of two degrees of assault, defining them, sufficiently submits such degrees, no further instruction being requested.—Id.

16. On a prosecution under Pen. Code, § 401, for the unlawful wounding or infliction of grievous bodily harm on another, the specific intent not being essential, an instruction as to criminal intent in general is sufficient.—Id.

ASSIGNMENTS.

I. Requisites and Validity, 1-7.
II. Operation and Effect, 8.
III. Rights and Liabilities of Parties, 10-14.
IV. Actions, 15-16.

I. REQUISITES AND VALIDITY, 1-7.

1. Notice by an assignee of a debt, due to the assignor from a partnership, given to the person in charge of the partners' store, is sufficient to give the assignee's claim priority over the claim of a creditor of the assignor who garnishes the partners after such notice.—May v. Hill, 14 Mont. 338; 36 Pac. 877.

2. The law in relation to the acknowledgment and registration of chattel mortgages is not applicable to the assignment, as collateral security, of the moneys to become due under a building contract.—School District v. Whalen, 17 Mont. 1; 41 Pac. 849.

3. An order on an employer to pay a creditor of the employee money not yet due under the contract of employment operates as an equitable assignment of the fund as soon as it is earned, though the drawee did not accept the order.—Merchants & M. Nat'l Bank v. Barnes, 18 Mont. 335; 45 Pac. 218.

4. A cashier, to secure his indebtedness to the bank, executed a bill of sale of a building situated in another town, and occupied by a co-tenant. The bill of sale was duly delivered to and accepted by the bank. The cashier notified the co-tenant of the sale, directing him to pay the rent then due or to become due to the bank. *Held*, that the order to pay the rent to the bank was an assignment sufficient to give the bank an equitable interest in the fund as against a subsequent attachment, without an express assent to the transfer by the debtor.—State v. Conrow, 19 Mont. 104; 47 Pac. 640.

5. A bank deposit may be assigned by parol. —Oppenheimer v. Bank, 20 Mont. 192; 50 Pac. 419.

6. A debtor agreed with his creditor to transfer to him a sum it had on deposit in a bank, and on its books charged him therewith, and the creditor on its books credited it with said sum. The debtor then telegraphed the bank to charge its account "twenty-two eighty sixty-seven," and credit account of its said debtor. The bank, being uncertain as to the amount named in the telegram, made no entries in its books before it was garnished by another creditor of said debtor. *Held*, that the fund was assigned before said garnishment, said telegram being not of the nature of an unaccepted check, but merely a notice of assignment.—Id.

7. A bank deposit may be assigned without the bank's consent.—Id.

II. OPERATION AND EFFECT, 8.

8. A building contract, providing that it should not be assigned by the contractors without the assent of the other party, did not prevent its assignment as collateral security for a loan to complete the building, and especially will the creditors of said contractors not be heard to question the validity of said assignment.—School District v. Whalen, 17 Mont. 1; 41 Pac. 849.

III. RIGHTS AND LIABILITIES OF PARTIES, 10-14.

10. An assignee of a half interest in a contract to purchase land, not expressly assuming liability for the payments therein provided for, incurs no personal liability to the vendor of the land, and therefore the owner of the other half interest in the contract can not recover from the assignee any proportion of the payments made by him after the assignment, without the assignee's request.—Lavelle v. Gordon, 15 Mont. 515; 39 Pac. 740.

11. Where the terms of an assignment of a contract bound the assignee to perform all the conditions of the contract for and in the place of the assignor, the liability of the assignee relates back to the date of the contract, and not merely to the date of the assignment.—Bach v. Mining Co., 16 Mont. 467; 41 Pac. 75.

12. In an action on a contract, brought by the assignee thereof, who, by the terms of the assignment, had expressly agreed to carry out all the conditions of the assignment, "for and in the place and stead of" the assignor, the defendants set up a claim for certain goods delivered by them under the contract, an itemized list of such goods, together with proof that the goods were delivered to the assignor's predecessor under the same contract sued on, were admissible.—Id.

13. One who took a claim against a mining corporation for labor he performed while he was manager of the property, with knowledge that he had no authority to incur any expense beyond the value of the proceeds of the mining operations, is not entitled to recover thereon, in the absence of evidence of the amount of the proceeds of the mining operations.—Farrell v. Mining Co., 32 Mont. 416; 80 Pac. 1027.

14. Nor was such person a bona fide purchaser for value, so as to entitle him to recover, irrespective of the amount of the proceeds of the mining operations.—Id.

IV. ACTIONS, 15-16.

15. A special demurrer will lie to a complaint, in an action to recover a balance of account assigned to plaintiff by a corporation, for failure to allege the legal existence, and the nature thereof, of the assignor.—Herbst Imp. Co. v. Hogan, 16 Mont. 384; 41 Pac. 135.

16. In an action on an account, which plaintiff alleged was assigned to it in 1894 by the original creditor, the answer averred that the debt had been paid; that in 1890 the account sued on was assigned by the creditor to a certain company, and paid to it. The replication denied payment, and that the account was ever assigned to such company. *Held*, that it was error to submit only the issue whether the account was assigned as alleged in the answer.—General Electric Co. v. Black, 19 Mont. 110; 47 Pac. 639.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

I. **Requisites and Validity, 1-12.**
A. Nature and essentials of trusts for creditors, 1-3.
B. Form and requisites of instruments, 4-6.
C. Fraud, 7-12.
II. **Construction and operation, 13-16.**
III. **Bond of Assignee, 17.**
IV. **Administration of Assigned Estate, 18-25.**
V. **Rights and Remedies of Creditors, 26-33.**
VI. **Accounting and Settlement of Assignee, 34-35.**

I. REQUISITES AND VALIDITY, 1-12.

A. Nature and Essentials of Trusts for Creditors, 1-3.
B. Form and Requisites of Instruments, 4-6.
C. Fraud, 7-12.

A. NATURE AND ESSENTIALS OF TRUSTS FOR CREDITORS, 1-3.

1. Where the effect of an instrument conveying personal property is a transfer of a debtor's property to a creditor, with power to make an immediate sale of the same and render the overplus, after satisfying the debt therein described, to the debtor, which debt is made to be due at once, the transaction, though under the name and in the form of a chattel mortgage, will be regarded as an assignment and within the operation of Comp. Stat., p. 1230, § 2050, making the wages of an employee of the assignor a preferred claim, where the services were rendered within 60 days immediately preceding such assignment.—Marshall v. Bank, 11 Mont. 351; 28 Pac. 312.

2. Where an alleged chattel mortgage provided that the mortgagee take immediate possession of the property and sell the same to pay the debt, a part of which was not yet due, and the transaction was such that the defeasance provided was destroyed, such instrument was an assignment for the benefit of the assignee.—Id.

3. Where defendants gave a mortgage on all their property, which consisted of a stock of goods, they retaining possession and intending to continue the business, and having given the mortgage as a lien only, without intention to convey title or right to immediate possession, such mortgage will not operate as an assignment in favor of the mortgagee as a creditor.—Noyes v. Ross, 23 Mont. 425; 59 Pac. 367.

B. FORM AND REQUISITES OF INSTRUMENT, 4-6.

4. A deed of assignment of certain property, "except what are exempt" to the grantors, "or either of them, from execution by the laws," etc., is not void for uncertainty of description, though the exempt property is uncertain in amount, and the exception may be void for uncertainty.—McCulloh v. Price, 14 Mont. 320; 36 Pac. 149.

5. An assignment of "all and singular the lands" of the grantors, "or either of them," is sufficiently definite as a description to pass title to the assignee.—Id.

6. An assignment of certain property, "except what is exempt" to the grantors, "or either of them, from execution by the laws," etc., is not void for uncertainty of description.—Id.

C. FRAUD, 7-12.

7. A general assignment for benefit of creditors is not a conveyance to a purchaser for a valuable consideration, within Comp. Stat., p. 654, § 232, providing that statutes making conveyances to hinder creditors void shall not be held to impair the title of a purchaser for a valuable consideration, without notice of the intended fraud, so that fraud of the assignors will render such an assignment void.—Merchants Nat'l Bank v. Greenhood, 16 Mont. 395; 41 Pac. 250.

8. An assignment for benefit of creditors, which gives the assignee discretionary power to sell "either for cash or on time, or for credit," is fraudulent per se to creditors, though it also directs the assignee to use all diligence in disposing of and collecting the property and assets, to the end that the creditors "will not be hindered or delayed."—Rosenstein v. Coleman, 18 Mont. 459; 45 Pac. 1081.

9. Comp. Stat., p. 653, § 231, making the question of fraudulent intent on the part of the grantor one of fact, does not preclude the court from adjudging fraudulent an assignment for benefit of creditors, which authorizes the attorney to sell and dispose of the assigned property as he "may deem best, either for cash or on time, or for credit."—Id.

10. An assignment for benefit of creditors, giving the assignee power to sell, in his discretion, for cash or on credit, is void.—Willoughby v. Reynolds, 19 Mont. 421; 48 Pac. 743.

11. The mere fact that the relationship of parent and child exists between the assignor and a preferred creditor is not a badge of fraud.—Wilson v. Harris, 21 Mont. 374; 54 Pac. 46.

12. The good faith of an assignment for benefit of creditors is not impeached by contradictory testimony as to acts and declarations of others subsequent to the assignment, and not participated in by the assignor.—Id.

II. CONSTRUCTION AND OPERATION, 13-16.

13. A preferred creditor, after consenting to an assignment, can not attach the property of the insolvent without attacking the assignment for fraud or otherwise.—Elling v. Kirkpatrick, 6 Mont. 119; 9 Pac. 900.

14. An assignment of "all and singular, the lands," etc., of the grantors, or either of them, passes title to the lands of each to the assignee. —McCulloh v. Price, 14 Mont. 320; 36 Pac. 149.

15. An assignment by a firm for the benefit of creditors does not affect a bona fide purchaser of a note from a member of the firm, which had never been in the possession of the assignee, as required under Comp. Stat., p. 653, § 226, though such sale was not made until after the assignment.—Meadowcraft v. Walsh, 15 Mont. 544; 39 Pac. 914.

16. A transfer by a debtor of property not accompanied by change of possession is not void as against the assignee for the benefit of the debtor's creditors, under Civ. Code, § 4491, as the debtor's estate does not "devolve" upon such assignment, but is granted by it.—Babcock v. Maxwell, 29 Mont. 31; 74 Pac. 64.

III. BOND OF ASSIGNEE, 17.

17. Where a complaint contains no allegation whatever of the assignee's financial condition, nor any statement that he is not able to account for all of the assets of the assignment, plaintiff is not entitled to an order requiring the assignee to give bond.—Kleinschmidt v Steele, 15 Mont. 181; 38 Pac. 827.

IV. ADMINISTRATION OF ASSIGNED ESTATE, 18-25.

18. A complaint which merely alleges that a certain bank is a large creditor of the assignors, and offers to remit certain interest on their account if the assignee will deposit his collections in such bank, and does not allege that he is depositing the funds in such bank, does not authorize a decree requiring him to so deposit them.—Kleinschmidt v. Steele, 15 Mont. 181; 38 Pac. 827.

19. While statements of an assignor for benefit of creditors, made after the assignment, may be incompetent to impeach its validity, in claim and delivery by his assignee against a third person, they are admissible for the purpose of impeaching the assignor's testimony.—Vogt v. Baldwin, 20 Mont. 322; 51 Pac. 157.

20. An assignee for benefit of creditors, or his successor, under Civ. Code, div. 4, pt. 2, tit. 3, may be sued without leave of court, since they are not receivers in insolvency.—Babcock v. Maxwell, 21 Mont. 507; 54 Pac. 943.

21. An assignee for benefit of creditors may redeem property pledged by the assignor.—Durfee v. Harper, 22 Mont. 354; 56 Pac. 582.

22. An assignee for benefit of creditors, in making a sale announced to be for cash only, may set aside a sale to one who could pay but a small part of the amount bid, and may resell the property on a smaller cash bid.—Id.

23. The fact that the attorney for the assignee for benefit of creditors was a bidder in behalf of a third person at a sale of the debtor's property by the assignee, where known to both the persons bidding and the persons selling, and no injury resulted therefrom, is not, per se, sufficient to warrant the cancellation of the purchase by the attorney for the third person.—Id.

24. Under Civ. Code, § 4521, the assignee can not attack a previous transfer by the assignor as in fraud of creditors.—Babcock v. Maxwell, 29 Mont. 31; 74 Pac. 64.

25. In an action for the conversion of lumber, defendant, having alleged that he claimed as assignee for the creditors of the original owner, could not interpose the defense that he was a creditor of the assignor.—Id.

V. RIGHTS AND REMEDIES OF CREDITORS, 26-33.

26. Under Comp. Stat., p. 1230, § 2050, providing that, in all assignments for benefit of creditors, the wages of laborers, clerks, etc., for services rendered within 60 days previous to the assignment, not to exceed $200 to each person, shall be preferred, a laborer whose employer is attached, and then transfers his property directly to a creditor in payment of the debt, is entitled to preference out of the goods thus transferred.—Flanders v. Murphy, 10 Mont. 398; 25 Pac. 1052.

27. Where the effect of an instrument conveying personal property is a transfer of a debtor's property to a creditor, with power to make an immediate sale of the same and render the overplus, after satisfying the debt therein described, to the debtor, which debt is made to be due at once, the transaction, though under the name and in the form of a chattel mortgage, will be regarded as an assignment, and within the operation of Comp. Stat., p. 1230, § 2050.—Marshall v. Bank, 11 Mont. 351; 28 Pac. 312.

28. In an action to set aside an assignment for benefit of creditors, on the ground of fraud of the assignor, the complaint is not demurrable because there is no allegation that the assignee was implicated in the fraud, since the fact that he is an assignee, and has possession of the property, makes him a proper party defendant. —Stevenson v. Matteson, 13 Mont. 108; 32 Pac. 291.

29. An intervening creditor who, in his petition of intervention, fails to attack an assignment made by the debtor prior to intervenor's attempt to attach property covered thereby, is not entitled to an attachment on such property. —First Nat'l Bank v. Boyce, 15 Mont. 162; 38 Pac. 829.

30. The fact that the assignment was made with preferences, a reference to "Schedule A," annexed, as containing the preferences, when in fact the schedule of preferences annexed is called "B," does not entitle plaintiff to an order requiring the assignee to pay the creditors pro rata, instead of by preferences, where there is only one schedule annexed to such statement. —Kleinschmidt v. Steele, 15 Mont. 181; 38 Pac. 827.

31. Where a creditor asks the court to enforce an assignment in all particulars except as to preferences, he can not claim that the assignment is fraudulent as to creditors.—Id.

32. The burden of proving that a preference in a deed of assignment is fraudulent rests on the party so charging.—Wilson v. Harris, 21 Mont. 374; 54 Pac. 46.

33. An assignee for the benefit of creditors, to whom is assigned the title to stock pledged by the assignor,—notice of the assignment being given to the pledgee,—stands in the shoes of his assignor, in so far as his rights as a pledger are concerned.—Durfee v. Harper, 22 Mont. 354; 56 Pac. 582.

VI. ACCOUNTING AND SETTLEMENT OF ASSIGNEE, 34-35.

34. In an action against an assignee and his assignors, a complaint which merely alleges that plaintiff is informed and believes that the assignee has not made an inventory does not entitle plaintiff to a decree requiring the assignee to make such inventory.—Kleinschmidt v. Steele, 15 Mont. 181; 38 Pac. 827.

35. Where a complaint simply alleges that plaintiff is informed that the assignee stated that he accepted the assignment for the pur-

pose of making such profits as were possible, it does not entitle plaintiff to an order fixing the assignee's compensation.—Id.

ASSISTANCE, WRIT OF.

1. An entry is not given by law until there has been an adjudication of the right; in such case a writ of assistance will issue, but until then a party entering in the absence of another, is guilty of a forcible entry under the laws of 1872, pp. 163, 164.—Boardman v. Thompson, 3 Mont. 387.

ASSUMSIT, ACTION OF.

1. If no time is fixed for the payment of money acknowledged to be owing, it is due at once, or at any time the payee may chance to demand it.—Sweetland v. Barrett, 4 Mont. 217; 1 Pac. 745.

2. There is no variance between a declaration on a contract of sale and proof disclosing a tortius detention, and a refusal to deliver the goods to plaintiff on demand.—Galvin v. Mining Co., 14 Mont. 508; 37 Pac. 366.

3. An allegation that plaintiff's assignor furnished to employees of defendant, at its special instance and request, certain board and lodging, was not sufficient to support a judgment therefor, as the furnishing to a third person on such request does not imply an undertaking by defendant to pay, and the complaint is insufficient as not alleging such a promise.—Conrad v. Great Northern, 24 Mont. 178; 61 Pac. 1.

4. In an action in assumpsit, a complaint contains all the averments necessary to the creation of a legal liability on the part of defendant, which alleges ownership of the land in plaintiff, ownership of the sheep in defendant, the fact that the sheep were herded and pastured on plaintiff's land during a stated period, and that such pasturage was worth a stated sum; for from these facts, if proved, the law creates an implied promise and legal liability, although defendant's sheep were "wrongfully" on plaintiff's land.—Monroe v. Cannon, 24 Mont. 316; 61 Pac. 863.

ASYLUMS.

1. Under Code Civ. Proc., § 745, a complaint in an action for the death of plaintiff's intestate, alleged to have been caused by defendant's negligent acts, alleged that an insane person was "so declared by a court of competent jurisdiction," and "was duly committed to the insane asylum," does not show the duty of the keeper of the asylum to receive and keep such person, under Pol. Code, § 2308, since the allegation does not show the name of the court or that any order was made or delivered to the keeper.—Walter v. Mitchell, 25 Mont. 385; 65 Pac. 5.

ATTACHMENT.

I. Nature and Grounds, 1-3.
II. Property Subject to Attachment, 4-5.
III. Proceedings to Procure, 6-16.
A. Affidavits, 6-13.
B. Security, 14-16.
IV. Writ, 17-19.
V. Levy, Lien, and Custody and Disposition of Property, 20-34.
A. Levy in general, 20
B. Successive writs under same levy, 21.
C. Service of writ and notice of levy, 22-23.
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A. Grounds for dissolving, 36.
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VIII. Claims by Third Persons, 46-49.
IX. Return, 50-52.
X. Liabilities on Bonds or Undertaking, 53-58.
XI. Wrongful Attachment, 59-65.

I. NATURE AND GROUNDS, 1-3.

1. An attachment on goods in the hands of a surviving partner should not be dissolved on account of the provisions of Comp. Stat., p. 103, § 181, that "no writ of attachment shall be issued until the plaintiff * * * shall file * * * an affidavit showing that defendant is indebted to plaintiff upon a contract, * * * which is not secured by a mortgage lien or pledge, * * * or is so secured that the security has become insufficient," a creditor of a partner not having such a "lien" on partnership effects as is here contemplated.—Krueger v. Speith, 8 Mont. 482; 20 Pac. 664.

2. Where a creditor has returned, and the debtor has retained, the collateral securities for the debt, the creditor is entitled to have attachment issue in aid of an execution on the debt.—Parberry v. Woodson, 18 Mont. 317; 45 Pac. 278.

3. An action against sureties on a bond, conditioned to be void if the principal perform his contract, is not an action on a contract for the "direct payment" of money, within Code Civ. Proc., § 890.—A. O. H. v. Sparrow, 29 Mont. 132; 74 Pac. 197.

II. PROPERTY SUBJECT TO ATTACHMENT, 4-5.

4. Civ. Pr. Act, § 141, which provides that "all debts due such defendant" may be attached, does not include judgments or promissory notes not due.—Perkins v. Guy, 2 Mont. 15.

5. Comp. Stat., p. 110, c. 5, providing that any boat found within the waters of the territory is liable for certain debts and demands, and authorizing attachment of such boat therefor, does not include a steam dredge, with an amalgamator attached, used in mining, though termed in plaintiff's complaint a "boat"; and hence where plaintiff recovered judgment in attachment under such statute against such

boat, which was retaken by defendant on a redelivery bond, plaintiff can not afterwards recover on such bond, since the court was without jurisdiction to render the original judgment.—Dietrich v. Martin, 24 Mont. 145; 60 Pac. 1087.

III. PROCEEDINGS TO PROCURE, 6-16.

A. AFFIDAVITS, 6-13.
B. SECURITY, 14-16.

A. AFFIDAVITS, 6-13.

6. An affidavit for an attachment which sets forth that the amount is due "upon any part of both an express and implied contract" is sufficient, without stating how much is due on each contract.—Cope v. Prospecting Co., 1 Mont. 53.

7. An affidavit for attachment, which sets forth, in the language of the statute, fraudulent intent in disposing of property, may be amended on the trial so as to set forth the facts relied on.—Josephi v. Clothing Co., 13 Mont. 195; 33 Pac. 1.

8. An attachment will not be quashed on the ground that the complaint or affidavit does not show that the receiver (plaintiff) was duly authorized to bring the action, by the court appointing him, since the defect is subject to an amendment.—Muth v. Erwin, 14 Mont. 227; 36 Pac. 43.

9. An affidavit that defendants are indebted to plaintiffs upon an express or implied contract for the purchase price of goods, which is due and payable, is sufficient, under Comp. Stat., p. 103, § 181, requiring an affidavit in attachment to show that the debt sued on is upon contract.—Newell v. Whitwell, 16 Mont. 243; 40 Pac. 866.

10. Under Code Civ. Proc., § 916, it is within the power of the court to permit an amendment to the affidavit for attachment, where a person has, in good faith, made a mistake in the amount of indebtedness to secure which the attachment was issued.—Id.

11. Where an affidavit in attachment is not properly entitled, it may be cured by amendment.—Herbst Imp. Co. v. Hogan, 16 Mont. 384; 41 Pac. 135.

12. Failure of an affidavit to allege whether the contract sued on is express or implied is a defect which may be cured by amendment.—Id.

13. Under Code Civ. Proc., §§ 914, 916, where the complaint comprised several distinct causes of action, separately stated, and the affidavit for attachment was sufficient as to some of them, but insufficient as to the remainder, the writ issued thereon will not be discharged on motion.—Wilson v. Barbour, 21 Mont. 176; 53 Pac. 315.

B. SECURITY, 14-16.

14. Under a statute requiring that in attachment an undertaking "on the part of plaintiff, with two or more sufficient sureties," shall be furnished, it is not necessary to the validity of such undertaking that it be signed by the plaintiff.—Pierse v. Miles, 5 Mont. 549; 6 Pac. 347.

15. Under Code Civ. Proc., § 180, as amended Feb. 23, 1881, requiring the bond in attachment to be conditioned that plaintiff pay "all damages," a bond conditioned that plaintiff pay all damages caused by the "wrongful" suing out of the attachment is insufficient.—Id.

16. An attachment should not be dissolved, because of a defect in the undertaking, without giving plaintiff an opportunity to give such undertaking as the statute requires.—Id.

IV. WRIT, 17-19.

17. Under Code Civ. Proc., § 890, a writ of attachment issued before summons is void.—Sharman v. Huot, 20 Mont. 555; 52 Pac 558.

18. Being void, the attachment cannot be given effect by the subsequent issuance of the summons.—Id.

19. Under Code Civ. Proc., § 893, a writ containing the amount of each of separate causes of action pleaded, based on an affidavit stating a cause of attachment as to all, was not invalidated because it alleged the amount demanded as the aggregate of all the claims.—Wilson v. Barbour, 21 Mont. 176; 53 Pac. 315.

V. LEVY, LIEN, AND CUSTODY AND DISPOSITION OF PROPERTY, 20-34.

A. LEVY IN GENERAL, 20.
B. SUCCESSIVE WRITS UNDER SAME LEVY, 21.
C. SERVICE OF WRIT AND NOTICE OF LEVY, 22-23.
D. INVENTORY AND APPRAISEMENT, 24-25.
E. PRIORITIES BETWEEN ATTACHMENTS, 26.
F. WAIVER, RELEASE, OR EXTINGUISHMENT OF LEVY OR LIEN, 27-30.
G. DELIVERY OF PROPERTY ON DELIVERY BOND, 31.
H. EXPENSE OF KEEPING PROPERTY, AND COMPENSATION OF CUSTODIAN, 32-33
I. SALE OR OTHER DISPOSITION OF PROPERTY, 34.

A. LEVY IN GENERAL, 20.

20. An officer attaching goods in a building may, without liability to the debtor, enter and have possession of the premises a reasonable time for taking and removing the goods.—Ramsey v. Burns, 27 Mont. 154; 69 Pac. 711.

B. SUCCESSIVE WRITS UNDER SAME LEVY, 21.

21. An attaching creditor, who releases his lien, under an agreement that the debtor shall make an assignment, may afterwards, for want of good faith in the assignment, retake the goods by a second levy under the writ, if there is no fraud or any intervening interest.—First Nat'l Bank v. Boyce, 15 Mont. 162; 38 Pac. 829.

C. SERVICE OF WRIT AND NOTICE OF LEVY, 22-23.

22. Under Comp. Stat., p. 113, c. 6, relating to the attachment of range stock between November 1 and May 15, and requiring certain notices to be filed with the recorder, a filing made at 10:30 p. m. of May 14 is sufficient.—Harmon v. Comstock, 9 Mont. 243; 23 Pac. 470.

23. Comp. Stat., p. 108, § 181, which provides for the attachment of the property of defendant "as security for the satisfaction of any judgment that may be recovered in the action, unless defendant give good and sufficient security to secure the payment of said judgment," does not require the writ of attachment to be served on defendant, and an opportunity to be given to give a bond or make a deposit of money, prior to the levy on his property.—Hoffman v. Imes, 13 Mont. 428; 34 Pac. 728.

D. INVENTORY AND APPRAISEMENT, 24-25.

24. The provisions of the attachment law as to the sheriff's return after seizure, and the inventory therein, contemplates a full inventory; that is, a reasonably brief and certain naming of the articles.—Silver Bow M. & M. Co. v. Lowry, 5 Mont. 618; 6 Pac. 62.

25. As to what constitutes a full inventory in attachment cases depends upon the nature of the matters which are included therein.—Id.

E. PRIORITIES BETWEEN ATTACHMENTS, 26.

26. Among attaching creditors, the first in point of time is the first in point of right, and is entitled to the preference.—Steinhart v. Fyhrie, 5 Mont. 463; 6 Pac. 367.

F. WAIVER, RELEASE, OR EXTINGUISHMENT OF LEVY OR LIEN, 27-30.

27. Under Comp. Stat., p. 267, §§ 802, 803, prescribing the contents of an execution, but not providing that in case of attachment it shall describe the attached property; and §§ 194, 319, providing that the execution shall be satisfied out of the attached property, and that all property seized under attachment shall be liable to execution,—the lien of an attachment is not lost by taking a simple money judgment; and the attached property may be subjected under a general execution.—State v. Eddy, 10 Mont. 311; 25 Pac. 1032.

28. The lien of an attachment is lost by the sale of the attached property under an execution based upon a judgment which is void.—Palmer v. McMaster, 10 Mont. 390; 25 Pac. 1056.

29. An attaching creditor does not waive his lien by taking judgment and selling the property attached under execution, while an appeal from an order dissolving the attachment is pending and undetermined.

Ryan v. Maxey, 14 Mont. 81; 35 Pac. 515.

Martin v. Maxey, 14 Mont. 85; 35 Pac. 667.

30. The fact that the sheriff's return to the writ of execution issued on the judgment was not filed within 60 days did not destroy the lien created by a levy of an attachment.—Holter v. Mining Co., 24 Mont. 184; 61 Pac. 3.

G. DELIVERY OF PROPERTY ON DELIVERY BOND, 31.

31. Under the amendment to Civ. Pr. Act, § 137, approved Jan. 15, 1869, requiring the conditions for an undertaking for the release of attached property to provide that "in case the plaintiff recovers judgment in the action the defendant will on demand deliver such attached property so released to the proper officer to be applied to the payment of the judgment," the officer to whom the undertaking is given is the proper person to make the demand for the redelivery of the property.—Driggs v. Harrington, 2 Mont. 30.

H. EXPENSE OF KEEPING PROPERTY, AND COMPENSATION OF CUSTODIAN, 32-33.

32. A sheriff, being responsible for the preservation of attached property, has power to choose his own custodian, and the attaching creditors are not relieved from liability for the reasonable cost of his services by reason of the sheriff having rejected one appointed by them.—McDermott v. Murphy, 11 Mont. 122; 27 Pac. 334.

33. Where a sheriff, at the request of an attaching creditor's attorney, employed a custodian for the goods attached, the fact that the attaching creditor paid several hundred dollars as compensation to the custodian raises the presumption that he authorized such employment, and the sheriff can recover the balance of compensation paid the custodian.—Id.

I. SALE OR OTHER DISPOSITION OF PROPERTY, 34.

34. Possession of land by parties at the time of levy of an attachment is notice of their rights and equities in the premises to the purchaser at a sale under such levy, and he takes the property subject to all the rights and equities which are capable of being enforced by them against the judgment debtor.—Story v. Black, 5 Mont. 26; 1 Pac. 1; 51 Am. Rep. 37.

VI. PROCEEDINGS TO SUPPORT OR ENFORCE, 35.

35. An attachment can not be maintained on a complaint which does not state facts sufficient to constitute a cause of action.—Porter v. Mining Co., 29 Mont. 347; 74 Pac. 938.

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT, 36-45.

A. Grounds for Dissolving, 36.
B. Time for Attacking Attachment, 37-39.
C. Proceedings on Motion to Dissolve or Order to Show Cause, 40-43.
D. Abandonment, 44-45.

A. GROUNDS FOR DISSOLVING, 36.

36. The defective or improper statement of a cause of action is no ground for dissolving an attachment.—Cope v. Placer Co., 1 Mont. 53.

B. TIME FOR ATTACKING ATTACHMENT, 37-39.

37. Under Rev. Stat., p. 76, § 198, a motion to discharge an attachment is too late, if made after the expiration of the time to answer, and calling it a "substituted motion" will not help it.—Magee v. Fogerty, 6 Mont. 237; 11 Pac. 668.

38. Under Comp. Stat., p. 109, § 200, requiring a motion to set aside an attachment to be made before the expiration of the time to answer, such motion made after the time mentioned in § 68, which provides that the summons shall contain a direction to defendant to answer within a certain time after service, comes too late, although made before the expiration of further time granted for answering after the overruling of the demurrer.—Vaughn v. Dawes, 7 Mont. 360; 17 Pac. 114.

39. Under Comp. Stat., p. 109; § 200, which provides that defendant, on whose property an attachment has been levied, may, at any time before the time for answering expires, move that the attachment be discharged, an order denying the motion, without prejudice to its renewal before another court to which the cause is removed, does not extend the time within which the motion may be made.—Wallace v. Lewis, 9 Mont. 399; 24 Pac. 22.

C. PROCEEDINGS ON MOTION TO DISSOLVE OR ORDER TO SHOW CAUSE, 40-43.

40. Upon motion to dissolve an attachment, under Comp. Stat., p. 109, §§ 200-202, providing

that the attachment may be discharged for improper issuance of the writ, and allowing defendants to support the motion and plaintiffs to oppose it by affidavits or other evidence, the merits of the main action can not be tried.—Newell v. Whitwell, 16 Mont. 243; 40 Pac. 866.

41. Where, on motion for dissolution, the affidavits presented no substantial conflict with the statements of the plaintiffs justifying the attachment, it should not be dissolved.—Id.

42. Under Comp. Stat., p. 109, § 200, providing that defendant may move, on notice, that an attachment be discharged on the ground that the writ was improperly issued, the notice and motion should specify the grounds on which the motion is based. It is not enough to state that the motion would be made on the ground that the writ was improperly issued, or to refer to the affidavits filed for the grounds.—Omaha Upholstering Co. v. Chauvin-Faut, 18 Mont. 468; 45 Pac. 1087.

43. Upon a motion to discharge an attachment on the ground that the writ was improperly issued, the question whether defendant owed a part of the amount claimed, and whether another portion of the indebtedness claimed was due, which go to the merits of the main action, can not be tried.—Id.

D. ABANDONMENT, 44-45.

44. An entry of a personal judgment and levy of execution are not an abandonment or waiver of the attachment lien.

State v. Eddy, 10 Mont. 311; 25 Pac. 1032.

Ryan v. Maxey, 14 Mont. 81; 35 Pac. 515.

Martin v Maxey, 14 Mont. 85; 35 Pac. 667.

45. Levy of execution is not an abandonment of an attachment levied in the suit, where it is shown that there was no intent to abandon such execution.—Merchants Nat'l Bank v. Greenhood, 16 Mont. 395; 41 Pac. 250.

VIII. CLAIMS BY THIRD PERSONS, 46-49.

46. Before an attaching creditor can assail the title of a third party in possession of the attached property, claiming ownership, the pleadings must show that the attachment was issued by a court having jurisdiction, and upon a proper and sufficient affidavit; the want of such a showing is a fatal defect, and the refusal of the court below to allow the filing of such a pleading, after the evidence had been submitted, was not error.—Hootman v. Bray, 3 Mont. 409.

47. An intervening creditor, who, in his petition of intervention, fails to attack an assignment made by the debtor prior to the intervenor's attempt to attach the property covered thereby, is not entitled to an attachment, or to intervene in any suit by a prior attaching creditor.—First Nat'l Bank v. Boyce, 15 Mont. 162; 38 Pac. 829.

48. Under Code Civ. Proc., §§ 2153, 2154, where a claimant for services failed to sue within 10 days after notice that his claim to priority was disputed, he waived his right to a lien.—Shea v. Regan, 29 Mont. 308; 74 Pac. 737.

49. And where the claimant sues to establish a disputed claim, as required by such sections, neither the sheriff holding the attached property, nor the attaching creditors, were necessary or proper parties thereto.—Id.

IX. RETURN, 50-52.

50. A writ of attachment was served on certain persons, who answered that they had no goods or credits belonging to C. The answers were not contradicted and no property of C was found in the territory. *Held*, that the answers of the garnishees must be considered true. —Haase v. Corbin, 2 Mont. 409.

51. In an action for wrongfully attaching property in the hands of bailees, as the latters' property, an instruction to find for the defendant in case the bailees "had an undivided interest in the property at the time of the levy," *held* to be erroneous, as there was no evidence that they had any such interest, and as the attachment of an undivided interest in the property of a stranger is, pro tanto, a trespass.—Brownell v. McCormick, 7 Mont. 12; 13 Pac. 651.

52. In such action, there being no evidence that the property had been concealed to hinder and defraud the creditors of the bailees, *held*, to be error for the court, at the request of defendant, to instruct the jury that, if the property had been covered up, they should find for defendant..—Id.

X. LIABILITIES ON BONDS OR UNDERTAKING, 53-58.

53. In an action against the sureties on an attachment bond to recover damages caused by the wrongful suing out of the writ, the complaint must allege that the principal had not paid the damages.—Pinney v. Hershfield, 1 Mont. 367.

54. An action for damages against the sureties on a replevin bond, which has been executed and delivered to the sheriff, can be maintained by and in the name of the creditor that caused the officer to attach the property that has been replevied.—Lomme v. Sweeney, 1 Mont. 584.

55. In an action against the sureties on a statutory bond for the redelivery of attached property, no demand is required for the redelivery of the property which has been released, where it has been removed from the territory by the defendant, who is insolvent, and has also left the territory.—Driggs v. Harrington, 2 Mont. 30.

56. Sureties on a bond authorized by amendment Jan. 15, 1869, to Civ. Pr. Act, § 137, for the delivery of attached property on demand of the officer, are not released because of a failure to make demand of defendant in attachment, where he has left the territory, taking the property with him.—Id.

57. In an action against a surety on a bond to prevent an attachment under Rev. Stat., p. 73, § 182, it is no defense that defendant in the action did not sign the bond as principal.—McIntosh v. Hurst, 6 Mont. 287; 12 Pac. 647.

58. In an action for wrongful attachment the principals in the attachment bond are proper parties, though the bond was signed only by the sureties.—Hoskins v. White, 13 Mont. 70; 32 Pac. 163.

XI. WRONGFUL ATTACHMENT, 59-65.

59. The measure of damages was the value of the goods at the time of the levy of the attachment, and not what they brought at auction by the sheriff. (See 111 U. S. 775.)—Randall v. Greenhood, 3 Mont. 506.

60. In an action to recover damages against a subsequent attaching creditor for wrongful attachment, an allegation that "plaintiff commenced a suit, * * * and procured from the court a writ of attachment in said cause," does not show a valid attachment; the court being of limited jurisdiction.—Harmon v. Comstock, 9 Mont. 243; 23 Pac. 470.

61. Under an allegation in an action for damages for wrongful attachment that the levying of the attachment injured plaintiff's business and credit, evidence that the news of the attachment was published by a mercantile agency is admissible, without being more specifically pleaded.—Hayes v. Mercantile Co., 27 Mont. 464; 70 Pac. 975.

62. In an action for wrongful attachment, defendants having pleaded that, when the claim was settled and the attachment vacated, the plaintiff released them from all liability, evidence of such release should have been admitted, though the complaint showed that the attachment was vastly in excess of the amount due, so as to suggest duress.—Id.

63. Injury to plaintiff's credit being relied on, evidence that the news of the attachment was published by a mercantile agency is properly admitted in proof of such injury, though the defendants are not shown to have been directly responsible for the publication.—Id.

64. In an action for damages from a wrongful and malicious attachment of plaintiff's goods, where injury to his credit is alleged, evidence of the amount of his business, his profits and credit, and the effect of the attachment upon the latter, is admissible.—Id.

65. In an action for wrongful attachment, an instruction that for a wrongful levy "any damages" resulting to the attachment defendant during the reasonable detention of property may be recovered, is properly refused as too broad.—Id.

ATTORNEY AND CLIENT.

I. **Suspension and Disbarment of Attorney, 1-39.**
- A. In general, 1.
- B. Grounds for suspension or disbarment, 2-16.
- C. Proceedings, 17-39.

II. **Retainer and Authority, 40-41.**

III. **Compensation and Lien of Attorney, 42-52.**
- A. Fees and other remuneration, 42-47.
- B. Lien, 48-52.

I. SUSPENSION AND DISBARMENT OF ATTORNEY, 1-39.

A. In General, 1.
B. Grounds for Suspension or Disbarment, 2-16.
C. Proceedings, 17-39.

A. IN GENERAL, 1.

1. Under Code Civ. Proc., § 402, subd. 5, it is discretionary with the court whether it will exercise its jurisdiction to remove or suspend an attorney in case of deceit, malpractice, crime or misdemeanor, and, where accused is charged with bribery and conspiracy, the court will refuse to inquire into the truth of the charges, unless cogent reasons be furnished by the accusation, or by a showing in support of it, why jurisdiction should be entertained in advance of a criminal prosecution and conviction.—In re Wellcome, 23 Mont 140; 58 Pac. 45.

B. GROUNDS FOR SUSPENSION OR DISBARMENT, 2-16.

2. In proceedings to disbar an attorney, it appeared that he was admitted to practice law in Montana upon his petition stating that he was a regularly licensed and practicing attorney of New York, and had been such for 22 years, and upon his original certificate of admission thereto, together with the certificate of a justice of the supreme court of that state that he had practiced in the highest courts of the state, and was then in good standing in his profession. The complaint charged that respondent had been disbarred in New York, and exhibited certified copies of charges preferred against him, the testimony taken and the referee's report thereon; and it further appeared that it was decided by a divided court to disbar him, and that, before judgment, proceedings were stayed pending an appeal, but no appeal was ever perfected or other steps taken. *Held*, that respondent had not been disbarred in New York.—In re Baum, 10 Mont. 223; 25 Pac. 99.

3. The court will not examine the evidence taken in the New York proceeding to determine whether respondent should be disbarred upon the case there presented.—Id.

4. It was further specified that, after the disbarment alleged, respondent had gone to a distant part of the state, and procured a certificate from a justice of the supreme court by fraud, and had fraudulently presented it to this court. The answer specifically denied these allegations, gave a history of respondent's practice in New York, and stated that the justice was well acquainted with him from boyhood, and was thoroughly conversant with his whole career at the bar in New York. There was no evidence on this issue. *Held*, that fraud could not be presumed, and that the denial met all the charges.—Id.

5. Respondent was retained to bring an action in a justice's court, receiving $25 therefor, and got judgment for $60. The case having been appealed by the defendant, he received $25 more, and on the appeal the judgment was reduced to $30. Respondent then offered to prosecute an appeal to the supreme court, and received $25 more therefor. He allowed the time for appeal to expire, collected the amount of the judgment, and converted it. *Held*, sufficient ground for disbarment, within Comp. Stat., p. 621, § 107, providing that, where an attorney refuses to pay over to his client money collected on demand, he may be disbarred.—State v. Baum, 14 Mont. 12; 35 Pac. 108.

6. An attorney altering a decree, with a corrupt purpose, after it has been signed by the court, should be disbarred.—State v. Cadwell, 16 Mont. 119; 40 Pac. 176.

7. An attorney will be disbarred for negotiating notes belonging to a client, and left with him for safe keeping.—Id.

8. Under Code Civ. Proc., § 402, subd. 5, the jurisdiction of the court is not confined to crimes or misdemeanors committed by an attorney while acting in his official capacity.—In re Wellcome, 23 Mont 140; 58 Pac. 45.

9. In disbarment proceedings based on alleged bribery of a legislator, it appeared that a grand jury had been called to investigate the bribery by accused; that they had examined witnesses, and failed to find an indictment; that thereupon the attorney general stated to the court that there were grounds for indictment, and asked for another grand jury, which was refused. No further criminal proceedings were instituted. *Held*, that this attempt at criminal prosecution was sufficient to justify the investigation of the charges by the supreme court as grounds for disbarment.—In re Wellcome, 23 Mont. 213; 58 Pac. 47.

10. Where evidence tends to show that an attorney has been guilty of bribing a legislator, it is sufficient to justify disbarment proceed-

ings, although the act was done in his private, not in his official, capacity.—Id.

11. Comp. Stat., p. 556, § 200, declaring that any person disposing of land, and thereafter knowingly "or" fraudulently again disposing of it to another person, shall be guilty of a felony, being designed only to prevent the defrauding of one or the other purchaser, should be read as if "and" instead of "or" were used; and a petition in disbarment proceedings, alleging that respondent sold lands to petitioner, agreeing to convey on payment of the price in installments, after payment of part of which respondent deeded the land to another party, and subsequently refused to convey to petitioner, but not alleging that respondent intended to defraud anyone; that the second transfer was for value; that petitioner had tendered the amount still due, or that the subsequent transfer was such that respondent was unable to procure the title for petitioner upon tender of the remainder of the price,—did not charge a violation of the statute rendering respondent liable to disbarment, under Code Civ Proc., § 402.—In re Weed, 26 Mont. 241; 67 Pac. 308.

12. The fact that respondent received payments after having conveyed to the third party, and did not inform petitioner of such conveyance, did not show that he was guilty of deceit; such action being entirely inconsistent with a purpose to obtain title for petitioner on payment of the full purchase price.—Id.

13. An attorney who, having been employed to collect claims against a corporation, represented to his client's attorney in fact that the corporation was settling on a basis of 50% only, and that he would retain 10% as his fee, and obtained authority to settle on such terms, and who, notwithstanding, collected 75% on one claim and 60% on another, and turned over to the attorney in fact only 45% of each claim, and afterwards permitted judgment to go against him by default for the balance, taking no steps to have it set aside, was guilty of malpractice and deceit as an attorney, and liable to disbarment proceedings.—In re Weed, 26 Mont. 507; 68 Pac. 1115.

14. An attorney who, after having entered into a contract to sell land to a third party, and after having received a part of the purchase price, deeded the land to a mortgagee thereof, the latter having threatened foreclosure, and having no knowledge of the agreement to sell, and who afterwards, notwithstanding that he had thus parted with all title, accepted further payments on the contract from the third party, without informing him of the actual situation, and later falsely representing to him that the title was involved in an estate in another state, but that he would be able soon to convey, was guilty of acts necessarily involving deceit, and, though a criminal prosecution was barred by lapse of time, was liable to disbarment proceedings.—Id.

15. Under Code Civ. Proc., § 394, and sup. ct. rule 22, it was ground for the disbarment of an attorney that, coming from another state and applying for admission, he presented with his application a letter of recommendation to which he had forged the name of a legal firm, though he testified that he was so well acquainted with the firm that he had no doubt of their approving his action, and that as soon as he met the senior member he told him of the forgery, and was astonished that the desired ratification was withheld.—In re Woodward, 27 Mont 355; 71 Pac. 161.

16. A retention by an attorney for an administratrix, from funds collected by him, of an amount claimed to be due him from her decedent, does not merit the penalty of disbarment.—In re Thresher, 29 Mont. 11; 73 Pac. 1109.

C. PROCEEDINGS, 17-39.

17. When, in a proceeding to disbar an attorney, the court is satisfied, after a thorough examination of the evidence, as taken before a referee, that the charges against him are groundless, the proceeding will be dismissed.—In re Haldorn, 10 Mont. 222; 25 Pac. 101.

18. Conviction of a crime is not a prerequisite to the disbarment of an attorney.—State v. Cadwell, 16 Mont. 119; 40 Pac. 176.

19. Where a complaint alleges that an attorney is guilty of professional misconduct "in the following particulars," but the charges set out do not relate to professional misconduct, a demurrer will be sustained.—Id.

20. The fact that respondent in disbarment proceedings was enabled to defraud his client by reason of a corrupt scheme entered into by them to defraud the county does not prevent the client from testifying as to such scheme.—Id.

21. On an issue, in disbarment proceedings, as to whether the defendant changed a decree after it was signed, two opposing counsel in the case in which the decree was rendered testified that there were no interlineations therein when it was presented to the court. Respondent denied this, and another attorney testified that he advised certain changes, which respondent interlined, and that respondent then went to the judge's office, and returned, saying that the decree was signed; but there was evidence that this witness stated, on learning that the decree was rendered in open court, that he could do nothing for defendant. Defendant retained the decree for two years, and only filed it in response to a peremptory order. *Held*, that a finding that respondent inserted the interlineation after the decree was signed was proper.—Id.

22. A client of respondent, in order to avoid costs in a criminal case against him, at respondent's suggestion, made to him certain notes secured by mortgage, and these notes, with the exception of one for $600, were deposited with a bank by respondent. The client testified that when he asked for the notes respondent promised to return them when he got them from the bank, but that he thereafter failed to do so, and subsequently claimed that the $600 note was given him for his services, and respondent so testified, though he had given to said client a receipt in full for his services at the time of the receipt of the notes. *Held*, that a finding that none of the notes were delivered to respondent in payment of his services was proper.—Id.

23. Where the attorney of a party is disbarred pending an appeal to the supreme court, his brief therein will not be considered; but in cases where deemed advisable by the court a further opportunity to be heard may be granted his client.—Engesser v. Northern Pacific, 18 Mont. 31; 44 Pac. 279.

24. This court will decline to consider a brief filed by an attorney who has been disbarred since the taking of the appeal.—Stebbins v. Morris, 18 Mont. 32; 44 Pac. 280.

25. Under Code Civ. Proc., §§ 417, 402, 418, in disbarment proceedings in the supreme court, there need be no written accusation against defendant, nor citation to him.—In re Bloor, 21 Mont. 49; 52 Pac. 779.

26. The evidence of unprofessional conduct against an attorney should satisfy the court to a reasonable certainty that the charges are true, before judgment of disbarment will be entered.—State v. Wines, 21 Mont. 464; 54 Pac. 562.

27. Where an accusation, preferred by a private person in a disbarment proceeding, is for a cause named in Code Civ. Proc., § 402,

subd. 5, an objection that such accusation is preferred by a person not authorized by law to inform the court of the matters therein charged is without merit.—In re Wellcome, 23 Mont. 140; 58 Pac. 45.

28. Under Code Civ. Proc., § 420, an accusation in disbarment proceedings wherein some of the charges are verified only on information and belief, and others are positively verified, is partially valid, and will stand against an objection aimed at the entire accusation.—In re Wellcome, 23 Mont. 213; 58 Pac. 47.

29. In disbarment proceedings grounded on an alleged bribery, an affidavit stating the existence of prejudice in favor of the accused in the county where criminal proceedings were attempted against him is immaterial, when it does not state that the failure of the criminal proceedings was due to this prejudice.—Id.

30. A disbarment proceeding is not a criminal prosecution, so as to entitle respondent to be confronted personally by the witnesses against him, under Const., art. 3, § 16.—In re Wellcome, 23 Mont. 259; 58 Pac. 711.

31. The rule in criminal prosecutions that the guilt of the accused must be proved beyond a reasonable doubt, does not apply to proceedings for disbarment.—In re Wellcome, 23 Mont. 450; 59 Pac. 445.

32. In disbarment proceedings, where accused did not testify in his own behalf, the presumption of his innocence remains until it appears to the court, with reasonable certainty, that he is guilty, and then it is incumbent on him to prove the contrary.—Id.

33. A proceeding for disbarment is not a criminal prosecution, nor in aid of criminal investigation, and Pen. Code, § 2442, has no application to such proceedings.—Id.

34. A mere petition of attorneys and others for the reinstatement of a disbarred attorney will not be considered, such attorney not being before the court in person or by petition by him subscribed, asking for reinstatement, and giving his reasons therefor.—In re Wellcome, 25 Mont. 131; 63 Pac. 836.

35. Under Code Civ. Proc., § 420, charges verified on information and belief will not be considered.—In re Weed, 26 Mont. 241; 67 Pac. 308.

36. Where an attorney has been disbarred, an application for his reinstatement must be verified, and must set forth the facts touching the proceedings in disbarment, with the reasons why petitioner should be reinstated, and should comply in all respects with the rules applicable to the admission of attorneys to practice in the first instance.—In re Newton, 27 Mont. 182; 70 Pac. 510, 982.

37. An application by an attorney, disbarred for larceny, for reinstatement, showed that before the larceny he had not been convicted of crime; that the laceny was committed while he was intoxicated; that since the disbarment he had become sober, and had lived an upright life; that in the estimation of the people in the community where he lived, together with reputable attorneys, he was a fit person to be permitted to practice law in the state. *Held* sufficient to authorize reinstatement.—Id.

38. An attorney who has been suspended for two years for malpractice and criminal deceit, whereby he obtained money from a client, will not be reinstated at the end of one year on a petition signed by lawyers and citizens, reciting that he was suspended because he was indebted to the client, and which does not express any regret for his culpable acts, nor contain any assurance from him or the other petitioners that his future conduct will be upright.—In re Weed, 28 Mont. 264; 72 Pac. 653.

39. Where an attorney was suspended for a specified time, with a provision that he might at the expiration of that time be restored to the privileges of an attorney, on proper petition, supported by satisfactory evidence of good conduct meantime, and at the expiration of that time he petitioned reinstatement, filing a certificate, signed by nearly every member of the bar of the city where he resided, to the effect that he had conducted himself as, and was, a man of good moral character, he will be reinstated.—In re Weed, 30 Mont. 456; 77 Pac. 50.

II. RETAINER AND AUTHORITY, 40-41.

40. When an attorney has once appeared for a party in an action, he will be presumed to be the attorney of such party until he makes a withdrawal of record.—Roush v. Fort, 3 Mont. 175.

41. After an action to restrain defendant from interfering with plaintiff's water right had been begun, plaintiff's attorney advised him that defendant had made a proposition to settle. Plaintiff wrote in reply: "We shall be willing to dismiss the suit, so long as we get a satisfactory guaranty from them, or such guaranty as you think necessary. I do not want the case dismissed, and then have the same performance to go through with next, or any, year. * * * Please have it so fixed that we will have no further trouble." *Held*, that the letter did not authorize plaintiff's attorney to stipulate a decree.—Jubilee Placer Co. v. Horsfeld, 20 Mont. 234; 50 Pac. 716.

III. COMPENSATION AND LIEN OF ATTORNEY, 42-52.

A. Fees and Other Remuneration, 42-47.
B. Lien, 48-52.

A. FEES AND OTHER REMUNERATION, 42-47.

42. The testimony of an attorney stating for what compensation a competent lawyer could be procured to conduct a certain action for his own client is admissible to show the value of an attorney's services in conducting such action.—Opera House Co. v. Maguire, 14 Mont. 558; 37 Pac. 607.

43. Where one proposes to assist a school board in the trial of a suit for a certain fee, and renders his services therein with the knowledge and consent of the board, such proposition can not be withdrawn after the services are completed.—Walsh v. School District, 17 Mont. 413; 43 Pac. 189.

44. A complaint alleging a co-partnership between plaintiffs, and that they, on or about a certain date, performed certain services as attorneys, reasonably worth $500, for defendants, at their special instance and request, and that defendants have not paid the same, is good against general demurrer.—Sanford v. Newell, 18 Mont. 126; 44 Pac. 522.

45. A contract for the professional services of an attorney in contesting a will provided that "your fee, in case the will is defeated and our clients get their shares, shall be $100,000," etc. Afterwards a compromise was effected—the attorney taking part therein—and the contest was dismissed. *Held*, that by the terms of the contract the attorney was only entitled to the stipulated fee in the event the will was actually defeated, and in compromising the case the contract was abandoned, and recovery by the attorney, if at all, must be on a quantum meruit.—Harris v. Root, 28 Mont. 159; 72 Pac. 429.

46. Where an attorney contracts to perform

services in suits on contracts for a certain sum, a portion of which is to be paid in installments upon their favorable termination, and sues upon the contract, the fact that adverse judgments were rendered will defeat his recovery, though the client, on the advice of another attorney, dismissed appeals therefrom; the proper remedy being to sue on quantum meruit.—Foley v. Kleinschmidt, 28 Mont. 198; 72 Pac. 432.

47. An attorney for an administratrix had no right to retain from funds collected for her an amount claimed by him to be due him from her decedent.—In re Thresher, 29 Mont. 11; 73 Pac. 1109.

B. LIEN, 48-52.

48. A complaint in an action to enforce an attorney's lien alleged the employment of plaintiffs, and a recovery of judgment in favor of their client and alleged that a certain sum was reasonable compensation, and that the same had not been paid. *Held*, that it was not essential to the existence of the lien that the amount of the fee should be definitely fixed, but the allegation as to reasonable value was sufficient, under Code Civ. Proc., § 430.—Coombe v. Knox, 28 Mont. 202; 72 Pac. 641.

49. An attorney seeking to enforce his lien may bring an independent action against his client or the adverse party, or both.—Id.

50. In an action to enforce an attorney's lien on a judgment in favor of his client, it is proper to make the judgment debtor a party. —Id.

51. A complaint in an action to enforce an attorney's lien alleged the employment of plaintiffs and recovery of a judgment in favor of their client, and alleged that a certain sum was reasonable compensation, and that the same had not been paid. *Held*, that the complaint showed facts sufficient to show that plaintiffs had a lien on the judgment, under Code Civ. Proc., § 430.—Id.

52. Where, at the time of the insanity of a client, he was indebted to his attorney who had charge of his interests, the appointment of a guardian for the client did not divest the attorney of any lien or security which he had at the time to secure payment of his fees.—State v. District Court, 30 Mont. 8; 75 Pac. 516.

BAIL.

I. Jurisdiction and Authority to Admit to Bail, 1.
II. Bond, Undertaking, Recognizance, and Deposits, 2-9.
III. Bond, 10.
IV. Breach or Performance of Undertaking, 11-12.
V. Actions, 13-24.

I. JURISDICTION AND AUTHORITY TO ADMIT TO BAIL, 1.

1. It is not necessary that a recognizance should show the jurisdiction of the officer taking it, or any cause for its execution.—Territory v. Hildebrand, 2 Mont. 426.

II. BOND, UNDERTAKING, RECOGNIZANCE, AND DEPOSITS, 2-9.

2. It is not necessary that the seal of a probate court should be affixed to a recognizance, justification of the sureties or approval. —Territory v. Hildebrand, 2 Mont. 426.

3. It was recited in the recognizance that defendant should appear on the first day of the next October term, "it being the second Monday in October," whereas the term was fixed by law to open on the first Monday. *Held*, that the recital was sufficient, and that the erroneous portion should be rejected as surplusage.—Id.

4. If a recognizance is conditioned to answer to an offense different from that specified in the order of the committing magistrate, it is without consideration and void.—Id.

5. A recognizance filed in a justice's court before any written complaint had been made was void, and the sureties as well as the principal can plead the defense of duress and want of jurisdiction.—Deer Lodge v. At, 3 Mont. 168.

6. Under Comp. Stat., p. 496, § 504, providing that, in case of breach of a recognizance entered into in a justice's court, it shall be certified and returned to the district court, to be proceeded on as recognizances certified to such court by magistrates, where money is deposited in lieu of a bail bond the justice has no authority to turn it over to the county treasurer on declaring it forfeited.—State v. Evans, 13 Mont. 239; 33 Pac. 1010.

7. Under Const. art. 3, §§ 19, 20, and Pen. Code, §§ 2350, 1693, though a committing magistrate has made his return to the clerk of the district court, he still has power and authority to accept and approve the bail undertaking required by his order until the district court obtains final jurisdiction on the filing of an information or the presentation of an indictment, or until a district judge or justice of the supreme court has fixed anew defendant's bail—State v. Lagoni, 30 Mont. 472; 76 Pac. 1044.

8. The fact that a magistrate accepting a bail bond failed to comply with the statute requiring it to be filed in the district court was no defense to the sureties in an action on the bond.—Id.

9. Though a defendant is released on bail, if the bond was not lawfully required, it is nudum pactum.—Id.

III. BOND, 10.

10. Comp. Stat., p. 478, § 407, providing that an appeal shall not be dismissed for any informality or defect in its taking, authorizes the amendment of a defective appeal bond by the substitution of one with the conditions prescribed by law.—Territory v. Milroy, 7 Mont. 559; 19 Pac. 209.

IV. BREACH OR PERFORMANCE OF UNDERTAKING, 11-12.

11. Comp. Stat., p. 441, § 200, provides that, if defendant is charged with a misdemeanor, he may appear, be arraigned, and plead by counsel. Sec. 478, especially pertaining to prosecutions in justices' courts, provides that defendant must be personally present before the trial can proceed. *Held*, that where, in a misdemeanor case before a justice, defendant had given bail, his non-appearance at the trial, when represented there by counsel, did not authorize a forfeiture of his bail; the provision that he should be present being one merely for his benefit.—State v. Evans 13 Mont. 239; 33 Pac. 1010.

12. Under Pen. Code, § 2400, where, in an action on a bail bond, it was shown that an information was filed against the defendant, charging him with a crime, and that he failed to appear and answer, and that the court thereupon ordered the bond forfeited, a contention

that the state did not prove that an order of forfeiture was made was without merit.—State v. Lagoni, 30 Mont. 472; 76 Pac. 1044.

V. ACTIONS, 13-24.

13. An action on a forfeited undertaking, given to secure appearance in a criminal case, is a civil action, to which Civ. Pr. Act applies, where a district court of the territory exercises the jurisdiction of a United States court, and the United States is a party.—United States v. Ensign, 2 Mont. 396.

14. The penalties recovered on a forfeited recognizance go to the county, but suit thereon should be brought in the name of the territory, which is not forbidden by the statute providing that actions are to be brought in the name of the real party in interest.—Territory v. Hildebrand, 2 Mont. 426.

15. In an action on a bail bond to secure a fine and costs, it is not necessary to aver in the complaint that a demand for payment was made on the sureties.—State v. Biesman, 12 Mont. 11; 29 Pac. 534.

16. That the complaint in an action on a bond to appear and answer an information did not allege that it was certified by the sheriff, who took it, to the clerk, who filed and recorded it, did not relieve the sureties from their liability thereon under Comp. Stat., p. 451, § 258.—State v. Wrote, 19 Mont. 209; 47 Pac. 898.

17. Under Comp. Stat., p. 451, § 258, providing that an action on a recognizance shall not be defeated for any defect in form, an averment that defendant was called and failed to appear was sufficient, though it alleged that the judge, instead of the court, declared the bond forfeited.—Id.

18. Where the complaint on a bail bond alleged that defendant was duly called and failed to appear, it is sufficient, though it does not allege that he made default without excuse.—Id.

19. In an action to forfeit a bail bond given for an appearance to answer an information for grand larceny, a complaint is sufficient which alleges that the information charged grand larceny, though it also states that it was committed "by unlawfully taking one cow."—Id.

20. Under Pen. Code, § 2354, the fact that a magistrate made a verbal order of release, instead of complying with the statute, was no defense to a surety in an action on the bail bond.—State v. Lagoni, 30 Mont. 472; 76 Pac. 1044.

21. A complaint in an action on a bail bond is fatally defective where it fails to state that the amount due by the terms of the bond has not been paid.—Id.

22. In an action on a bail bond the complaint alleged that a certain person was ordered by a certain justice of the peace to be held to answer on a charge of burglary, on which he was admitted to bail, the justice then and there having full authority and power to accept and approve the bond; and that he duly approved it, and ordered the release of defendant. *Held*, that, under Const. art. 8, § 20, and Code Civ. Proc., § 745, the complaint was insufficient for failing to allege the jurisdictional facts that the defendant was charged by a complaint filed with the justice, and examined upon the charge, etc., or to state the judicial capacity of the justice, and that the order holding defendant to answer was "duly given" or "duly made" or "duly given and made."—Id.

23. Under Code Civ. Proc., § 3266, subd. 26, in an action on a bail bond it appeared that the principal was charged with a felony about the middle of June, and that the case came on for trial in the following November, and defendant sureties offered to prove, in order to establish the death of their principal, that he was an old man, that on two or three occasions he had attempted suicide, that he lived in a place the surroundings of which were such that a body might lie for weeks, months and even years without discovery; that he had never been seen or heard of since about a week before the forfeiture of the bond, and that no trace had ever been found of him. *Held*, that the offer was properly denied.—Id.

24. In an action on a bail bond defendant sureties pleaded that the principal in the bond, who had disappeared, was dead, when the bond was declared forfeited, and a witness testified for defendants that he knew of the principal having attempted to commit suicide on two different occasions *Held*, that the testimony was properly stricken out as immaterial.—Id.

BAILMENT.

1. Ordinary care only is required of a bailee for hire by Civ. Code, § 2491.—Shropshire v. Sidebottom, 30 Mont. 406; 76 Pac. 941.

2. In an action against a bailee for hire for failure to redeliver the article as agreed, it having been lost, he has the burden of showing that he used ordinary care.—Id.

BANKRUPTCY.

I. Preferences and Transfer by Bankrupt, and Attachments and Other Liens, 1-7.

II. Actions, 8-13.

I. PREFERENCES AND TRANSFER BY BANKRUPT, AND ATTACHMENTS AND OTHER LIENS, 1-7.

1. Bankr. Act (30 Stat. 565), 67f, provides that certain liens, including judgment liens obtained through legal proceedings against an insolvent within four months prior to the filing of a bankruptcy petition against him, in case he is adjudged a bankrupt, shall be void, and the property affected shall pass to the trustee. *Held*, that such action affects only the lien of a judgment recovered within four months before the filing of a bankruptcy petition, and not the judgment itself, and hence, where property had been sold under execution, and the judgment satisfied, before the filing of the petition, there was no judgment lien which could be released, within such section, and the trustee was not entitled to recover against the creditor thereunder the proceeds of the property so sold.—Greene v. Brewing Co., 28 Mont. 380; 72 Pac. 751.

2. Under Bankr. Act (30 Stat. 564), providing that transfers or encumbrances of property made by a debtor within four months prior to the filing of the petition against him, and "while insolvent," which are void as against creditors of such debtor by the laws of the state in which the property is situated, shall be deemed void if the debtor be adjudged a bankrupt, the insolvency, to avoid a transfer, must be one existing at the date thereof, and not one arising thereafter.—Schilling v. Curran, 30 Mont. 370; 76 Pac. 998.

3. Under Bankr. Act (30 Stat. 564), a sale by a bankrupt, though made to hinder and defraud creditors, is not void as against a purchaser who did not participate in the fraudulent act of the bankrupt, or have knowledge of such intent or of the bankrupt's insolvency, and who bought not for a cancellation of an antecedent debt or a payment of a merely nominal price, but one which, under the circumstances, was present and fair.—Id.

4. Where, at the time of a sale of property, debtors were solvent, and a person, in good faith and for a valuable consideration, purchased certain property of them, and possession was turned over to him, as required by the state statutes, the sale was not null and void as against the creditors of the debtors by the laws of the state; and hence the property could not be recovered under Bankr. Act (30 Stat. 564), for the benefit of the debtors' creditors, on the debtors being subsequently adjudged bankrupt.—Id.

5. In an action by a trustee in bankruptcy to recover property of the bankrupt alleged to have been fraudulently transferred to defendant, where it appeared that the transfer was made within four months of the time the debtor was adjudged to be a bankrupt, and under a chattel mortgage having no validity under the laws of the state where the transfer was made, the trustee was entitled to judgment under 30 Stat. 562, providing that a person shall be deemed to have given a preference if, being solvent, he has made a transfer of any of his property, and the effect of the enforcement of the transfer will be to enable anyone of his creditors to obtain a greater percentage of his debt than any other creditor of the same class; that if a bankrupt shall give a preference within four months before the filing of a petition, and the person receiving it shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person; it appearing that the transfer was not to secure a present loan or advance, but one to pledge the payment of an old obligation, the effect of which was to enable defendant to obtain a greater proportion of his debt than any other creditor of the bankrupt.—Stewart v. Hoffman, 31 Mont. 184; 77 Pac. 689; 81 Pac. 3.

6. Under Civ. Code, § 4491, a mortgage of personalty and transfer thereunder are void against a trustee in bankruptcy, where the mortgage was made more than 14 months prior to the transfer.—Id.

7. A principal debtor executed an instrument giving to his surety the right at any time before full payment of the debt by the principal to take immediate possession of certain described personalty, to be sold, and the proceeds applied to the payment of the debt. This agreement was not formally executed, and was not filed. Afterward, and within four months before he was declared a bankrupt, the principal regularly executed a chattel mortgage conveying the same property to the surety, and the latter siezed the property, claiming to be acting under the first instrument. *Held*, that the execution of the formal mortgage was merely a continuation of the original security, and did not constitute a preference, within Bankr. Act (30 Stat., 562).—Stewart v. Hoffman, 31 Mont. 190; 81 Pac. 3.

II. ACTIONS, 8-13.

8. The district courts have jurisdiction of an action brought by an assignee in bankruptcy to recover the possession or value of property from a person who has received it in violation of Act March 2, 1867. The jurisdiction of the district and circuit courts over these actions is not exclusive.—McKiernan v. King, 2 Mont. 72.

9. Bankr. Act (30 Stat., 565), § 60b, provides that if a bankrupt shall have given preference within four months before the filing of the petition, or after filing the petition and before adjudication, and the person receiving it shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, etc. *Held*, that where a petition to avoid an alleged preference failed to allege that the preferred creditor had reasonable cause to believe that the bankrupt by suffering judgment to be recovered intended to give such creditor a preference, within the meaning of the bankruptcy act, it was insufficient.—Greene v. Brewing Co., 28 Mont. 380; 72 Pac. 751.

10. In proceedings by a trustee in bankruptcy to recover from the purchaser property sold by the bankrupt within four months prior to the filing of the petition, testimony that the bankrupt secreted the money he received from the sale for the purpose of defrauding his creditors, being in reference to a transaction occurring after the sale, and payment of the money, in which it was not claimed that the purchaser participated, was not competent for the purpose of showing any participation by him in the fraudulent intent of the bankrupt, or that he had knowledge of such fraudulent intent at the time of the sale.—Schilling v. Curran, 30 Mont. 370; 76 Pac. 998.

11. In such proceedings a finding of fact as to whether the property was sold within four months preceding the date of the adjudication in bankruptcy was unnecessary, where it was undisputed on the trial that the sale was made on June 2, and that the adjudication was made on July 18 of the same year.—Id.

12. Where the court found that the property was purchased in good faith, without any intent to hinder, delay or defraud creditors of the bankrupt, the purchaser paying therefor in cash a certain sum, and found, as a conclusion of law, that he was a bona fide purchaser for a present fair consideration, a further finding of fact as to whether the purchase was made for a present fair consideration was unnecessary.—Id.

13. Where the pleadings contained no allegation of insolvency at the time of the transfer of the property, and the record did not disclose any facts tending to show the same, this court will presume that on the date of the transfer the debtor, subsequently adjudged a bankrupt, was solvent.—Id.

BANKS AND BANKING.

I. Control and Regulation in General, 1.
II. Insolvency, 2.
III. Functions and Dealings, 3-10.
IV. Insolvent National Banks, 11.

I. CONTROL AND REGULATION IN GENERAL, 1.

1. Pol. Code, § 4061, imposing a license on banks, is not in conflict with Const., art. 15, § 11, providing that "no company or corporation formed under the laws of any other country, state or territory, shall have * * * any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state," though the national banks organized under the United States laws are not subject to the payment of such license.—State v. Bank, 21 Mont. 50; 52 Pac. 733.

II. INSOLVENCY, 2.

2. Where a collection, made by a bank's correspondent, and paid to a receiver subsequently appointed for the bank, is followed into the receiver's hands as a trust fund, the owner is not entitled to interest thereon.—Guignon v. Bank, 22 Mont. 140; 55 Pac. 1051, 1097.

III. FUNCTIONS AND DEALINGS, 3-10.

3. Where a bank accepts a draft from a customer for collection, without any special con-

tract as to its liability, and transmits it for collection to an agent, who collects it, but fails to account for the proceeds, the bank is liable for the amount collected.—Power v. Bank, 6 Mont. 251; 12 Pac. 597.

4. A bank ordered certain goods from plaintiff on behalf of third parties. These parties, being unable to pay at the time, the cashier of the bank took their paper, and sent to the plaintiffs a certificate of deposit, payable in three months, with interest, and in regular form, except that it was signed by him in his name alone, and not as cashier. *Held*, that the transaction was in the ordinary course of business, that the cashier did not exceed his authority, and that the bank was liable.—Crystal Plate Glass Co. v. Bank, 6 Mont. 303; 12 Pac. 678.

5. Authority given to a bank, by one who has borrowed money from it on certain notes, to apply deposits, thereafter to be made, upon such notes before their maturity, at the option of the bank, is a naked power not coupled with an interest, and therefore can not be exercised by the bank after notice of the death of the depositor.—Gardner v. Bank, 10 Mont. 149; 25 Pac. 29.

6. Where a bank receives a draft, with directions to collect, and notify the owner, and its correspondent collects the fund, the mere crediting to the principal bank by the correspondent upon its own books, of the proceeds, the principal bank not being at the time indebted to the correspondent, does not change the relation of the principal bank to the owner from that of agent to that of debtor. Hence, the bank having failed, and the fund having been paid by the correspondent to the receiver, the owner might follow the fund.—Guignon v. Bank, 22 Mont. 140; 55 Pac. 1097.

7. Where a debtor of a bank has deposits, the certificates of which have not yet matured, the fact that the bank is insolvent will not give the debtor the right to have such deposits set off against his debt.—Stadler v. Bank, 22 Mont. 190; 56 Pac. 111.

8. The fact that if, at a particular time, a bank should close, its liabilities would exceed its assets, will not make due and payable, without demand, a deposit on open account, or one the certificate of which has matured, so as to give the depositor the right to set off such deposits against his debt to the bank, but the depositor has such right, in the absence of fraud, only in case of the declared insolvency of the bank.—Id.

9. Plaintiffs agreed to sell a mine to M, and the deeds were placed in escrow in defendant bank until payment of $47,000 as a balance of the purchase price. M sold the mine to Scottish purchasers, and the 7th paragraph of the contract provided that the £20,000 should be deposited with defendant bank to pay plaintiffs the balance of the purchase price in full, and other charges against the mine, and that amount and a copy of the contract were forwarded to the bank, and the cashier's attention was called to the 7th paragraph. Plaintiff, without knowledge of such contract, agreed to deliver the deeds on receipt of $22,000 in cash out of the first payment by the foreign purchasers, and to accept M's notes for the balance until the second payment. Defendant, without informing plaintiffs of the provision of the contract between M and the foreign purchasers, paid plaintiffs $22,000 The foreign purchasers never made any further payments. *Held*, that plaintiffs were not entitled to recover the balance of the purchase price from defendant, as money had and received.—McDonald v. Bank, 25 Mont. 456; 65 Pac. 896.

10. Defendant's acceptance of the notes did not constitute an implied promise to the foreign purchasers for the benefit of plaintiffs that defendant would pay plaintiffs the balance of the purchase price in full.—Id.

IV. INSOLVENT NATIONAL BANKS, 11.

11. U. S. R. S., § 5242, which requires a pro rata distribution of the assets of an insolvent national bank, and forbids preferences, does not prevent a debtor of the bank from setting off against his indebtedness the amount of a claim he held against the bank; and it is immaterial whether or not the debt due to the bank had matured at the time of its insolvency.—Mercer v. Dyer, 15 Mont. 317; 39 Pac. 314.

BASTARDS.

1. In a prosecution for bastardy, declarations made by the prosecutrix, while in travaille, that defendant was the father of her child, are incompetent.—State v. Tipton, 15 Mont. 74; 38 Pac. 222.

2. In a prosecution for bastardy, it is error to charge the jury that the testimony of the prosecutrix must be sustained by facts and circumstances corroborating it, since, under Comp. Stat., p. 223, § 616, the direct evidence of one witness, who is entitled to full credit, is sufficient for proof of any fact except perjury and treason.—Id.

BILLS AND NOTES.

I. Requisites and Validity, 1-15.
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- B. Form and contents of promissory notes and due bills, 5-6
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I. REQUISITES AND VALIDITY, 1-15.

A. Form and Contents of Bills of Exchange, Checks, and Orders, 1-4.

B. Form and Contents of Promissory Notes and Duebills, 5-6.
C. Execution and Delivery, 7.
D. Consideration, 8-11.
E. Validity, 12-15.

A. FORM AND CONTENTS OF BILLS OF EXCHANGE, CHECKS, AND ORDERS, 1-4.

1. An order directing a firm designated as bankers to pay a certain amount to the payee named is a check, and not a bill of exchange, within a statute requiring demand and notice in order to charge an endorser on the latter instrument, and disallowing days of grace on such checks.—McDonald v. Stokey, 1 Mont. 388.

2. A bank check is always drawn on a bank, is an absolute appropriation of a certain sum in the hands of the bank, and is payable on presentation, is presented for payment only, and is not entitled to grace.—Id.

3. A check is not an inland bill of exchange.—Id.

4. The rule requiring the payee of a check to stand the loss occasioned by his failure to present it until the bank on which it is drawn suspends payment, applies to checks drawn by a treasurer to pay a warrant issued on a claim against a county.—Greeley v. Cascade, 22 Mont. 580; 57 Pac. 274.

B. FORM AND CONTENTS OF PROMISSORY NOTES AND DUEBILLS, 5-6.

5. A certificate of deposit, issued in ordinary form, is, in effect, a promissory note.—Fultz v. Walters, 1 Mont. 165.

6. The maker of a promissory note is estopped from denying his name, or that of the payee, as it is written in the note.—Kemp v. McCormick, 1 Mont. 420.

C. EXECUTION AND DELIVERY, 7.

7. The maker of a note, whose christian name is "John," is estopped to deny that "Jno." is a known and accepted abbreviation thereof; where he signed it "Jno."—Kemp v. McCormick, 1 Mont. 420.

D. CONSIDERATION, 8-11.

8. In an action to recover on a note, the maker does not show a failure of consideration by alleging that the payee had no title to the property in payment for which it was made, if it appears that the maker had delivered to a claimant, without any legal necessity, the property which he had bought and received from the payee.—First Nat'l Bank v. How, 1 Mont. 604.

9. An agreement not to file a lien on an owner's lot is a good consideration for his acceptance of an order.—Lavell v. Frost, 16 Mont. 93; 40 Pac. 146.

10. The expression "value received" is not essential to the validity of a note, where no statute requires its use, as such paper at common law implies a consideration where none is expressed.—Clarke v. Marlow, 20 Mont. 249; 50 Pac. 713.

11. Where plaintiff believed that certain property had been stolen from him, and that defendant was connected with the theft, and the latter gave a note to plaintiff for the damages occasioned by the theft, there was a sufficient consideration for the note.—Bullard v. Smith, 28 Mont. 387; 72 Pac. 761.

E. VALIDITY, 12-15.

12. It is legal to affix United States revenue stamps to a note, or the mortgage executed to secure its payment, or both, if the amount on both is sufficient.—Griffith v. Hershfield, 1 Mont. 66.

13. Fraud that impeaches the consideration of a note is a defense to an action at law thereon.—First Nat'l Bank v. How, 1 Mont. 604.

14. A stipulation in a bill of exchange for the payment of all attorney's fees in case of a suit thereon is valid.—Bank v. Fuqua, 11 Mont. 285; 28 Pac. 291.

15. A note payable to plaintiff was delivered to the president of a bank, by the makers, to enable him to borrow money thereon for the bank. He obtained a loan from plaintiff on his individual note, with this note as collateral, and gave his check on plaintiff for the proceeds to the bank's cashier, who transferred the account to the credit of the bank, and afterwards, by a transaction with the cashier, the president obtained the proceeds and misappropriated them. *Held*, that there was no misappropriation of the note.—American Exch. Nat'l Bank v. Ulm, 21 Mont. 440; 54 Pac. 563.

II. CONSTRUCTION AND OPERATION, 16-21.

16. In an action against a person who signed a promissory note "Jas. Stuart Gen. Manag. & Supt. St. L. & M. M. Co.," the defendant's personal liability will not be presumed, and he can introduce evidence showing that he made the note for the mining company, of which he was the agent, and that it was the intention of all the parties that the company should pay the note, and that he was not to be held liable thereon.—Gerber v. Stuart, 1 Mont. 172.

17. A stipulation in a promissory note, by which the maker agrees to pay "interest after maturity, at the rate of 4% per month until paid," is an agreement between the parties to liquidate the damages for breach of contract. This interest is not fixed as a penalty for breach of contract, and the agreement may be enforced.—Davis v. Hendrie, 1 Mont. 499.

18. Where an order directs payment, subject to a deduction for differences, if no differences are shown, plaintiff is entitled to recover.—Gillett v. Clark, 6 Mont. 190; 9 Pac. 823.

19. Attorney's fees provided for in a note, in case its payment be enforced by an action at law, are not recoverable in an action by the maker to compel payment of the amount of the note by one who had assumed and agreed to pay it after the commencement of such suit.—Galvin v. Mac M. & M. Co., 14 Mont. 508; 37 Pac. 306.

20. Under Civ. Code, § 3996 as amended by Laws 1899, p. 124, and Laws 1903, p. 237, § 2, a note made payable with reasonable attorney's fees entitled the holder to collect such fees, where the note is not paid at maturity, and it is placed in the hands of attorneys for collection though it is not sued.—Morrison v. Ornbaum, 30 Mont. 111; 75 Pac. 953.

21. The right to collect attorney's fees pursuant to the provisions of a mortgage note, where the note is not paid and is placed in the hands of attorneys for collection, though the note is not sued, is not controlled by a stipulation in the mortgage for such fees in case of suit.—Id.

III. MODIFICATION AND RENEWAL, 22-26.

22. Where the payee of a note agrees, after it becomes due, to extend the time of payment, such agreement is collateral to the note, but

will not operate as a merger thereof.—Creighton v. Vanderlip, 1 Mont. 400.

23. An agreement to pay interest at a fixed rate, if payment of a note is extended to a definite period, is a good consideration for the extension.—Hale v. Forbis, 3 Mont. 395.

24. A mortgage secures a debt, and not the evidence thereof, and no change in the form of the evidence or renewal thereof can operate to discharge the mortgage, in the absence of an express agreement, or a plain manifestation of intention, that it shall do so.—Wilson v. Pickering, 28 Mont. 435; 72 Pac. 821.

25. The maker of a note secured by mortgage, who renews the note, has the burden of proving that it was the intention of the parties that such renewal should not extend the mortgage.—Id.

26. The maker of a note executed a mortgage to secure it. After maturity of the note it was renewed. After maturity of the renewal note it was again renewed, and a mortgage was given by the maker on other land than that covered in the first mortgage. The maker, at the time of executing the second mortgage, was requested to execute a new mortgage covering the property described in the first, but this he declined to do, requesting, however, that the mortgagee bring suit to foreclose the first mortgage. *Held*, insufficient to overcome, as a matter of law, the presumption that the renewal of the note extended the first mortgage.—Id.

IV. NEGOTIABILITY AND TRANSFER, 27-36.

A. Instruments Negotiable, 27-34.

B. Transfer Without Endorsement, 35-36.

A. INSTRUMENTS NEGOTIABLE, 27-34.

27. A certificate of deposit in the usual form, payable to order of the depositor, is in the nature of commercial paper, and negotiable by endorsement, and the payee is chargeable upon his endorsement thereof.—Fultz v. Walters, 2 Mont. 165.

28. A stipulation in a bill of exchange for the payment of all attorney's fees, in case of suit thereon, is valid, and the negotiability of the instrument is not thereby destroyed.—Bank v. Fuqua, 11 Mont. 285; 28 Pac. 291.

29. Under Civ. Code, §§ 3991, 3992, 3994, 3996, 3997, an instrument stipulating for payment of attorney's fees in case of suit is not negotiable.—Stadler v. Bank, 22 Mont. 190; 56 Pac. 111.

30. Under Civ. Code, §§ 2204, 4240, 4604, a provision in a note that it is negotiable at a particular bank is not a waiver of the effect of a stipulation for payment of attorney's fees in case of suit, which, under other statutory provisions, renders the note non-negotiable.—Id.

31. Though a negotiable note is made negotiable and payable at a particular bank, it is still negotiable elsewhere.—Id.

32. Under Civ. Code, §§ 3991, 3993, 3996, 3997, a note providing that, if not paid when due, both principal and interest shall bear an increased rate of interest, is not negotiable.—Cornish v. Woolverton, 32 Mont. 456; 81 Pac. 4.

33. A note stated that it was secured by mortgage of even date, and the mortgage provided that the mortgagor should pay the taxes and insurance, and keep the property in repair, committing no waste, etc., and that, in default of performance of any covenant, the principal and interest should become due, and the mortgage subject to foreclosure, at the option of the mortgagee, and that, if foreclosure proceedings were commenced, $150 should be allowed as an attorney's fee. *Held*, that under Civ. Code, § 2207, the note and mortgage were parts of the same contract, and must be read together, so that the entire contract contained conditions not certain of performance, rendering the note non-negotiable, under Civ. Code, §§ 3991, 3992, 3996, 3997.—Id.

34. Where a note payable to order is assigned, without endorsement, its negotiable character is destroyed.—Id.

B. TRANSFER WITHOUT ENDORSEMENT, 35-36.

35. W. as agent of F. deposited money in a bank and took a certificate of deposit, payable to his own order, three months after date. W delivered the certificate to F, but refused to make a written endorsement thereon, and the bank refused to pay F. *Held*, that said certificate was negotiable, and might be assigned by delivery, without any writing.—Fultz v. Walters, 2 Mont. 165.

36. Claims against the United States, such as the so-called Montana militia vouchers, are not negotiable paper and can not be transferred by mere delivery.—Creighton v. Black, 2 Mont. 354.

V. RIGHTS AND LIABILITIES ON ENDORSEMENT OR TRANSFER, 37-50.

A. Endorsement for Transfer, 37-38.

B. Assignment or Sale, 39-40.

C. Bona Fide Purchasers, 41-50.

A. ENDORSEMENT FOR TRANSFER, 37-38.

37. Plaintiff sold and transferred a note, of which he was payee, to defendant's testator, after maturity, by endorsement to his order, and testator thereafter delivered it to plaintiff, bearing the endorsement, signed by him, "I hereby assume and agree to pay the principal of the within note." *Held*, to be the promissory note of such testator, payable on demand, such endorsement being his own promise in writing to pay absolutely and at all events the sum specified in the instrument therein referred to as the "within note" to the payee designated in such instrument.—Clarke v. Marlow, 20 Mont. 249; 50 Pac. 713.

38. The fact that such note had been negotiated and sold, and was payable to defendant's testator or order at the time of his endorsement thereof, was immaterial, as he delivered the note, with his own promise in writing thereon, to plaintiff, and then parted with whatever ownership he might have had therein.—Id.

B. ASSIGNMENT OR SALE, 39-40.

39. Parties receiving vouchers, declared by statute to be non-negotiable, from a party not legally entitled to them, or authorized to dispose of same for the lawful owner, and without the formalities that the law requires, can acquire no title thereto, but are rightly chargeable with a knowledge of the statute, and the lawful owner does not lose his right thereto by neglect to enjoin transfer of same.—Creighton v Black, 2 Mont. 354.

40. Where the maker of a non-negotiable contract for payment of money, without notice of an assignment, and in good faith, pays the assignor the amount of the debt, this constitutes a complete defense to the suit with the assignee, under Code Civ. Proc., §§ 571, 570, and Civ. Code, § 1982.—Cornish v. Woolverton, 32 Mont. 456; 81 Pac. 4.

C. BONA FIDE PURCHASERS, 41-50.

41. A party who buys and receives from the possessor property, the title to which is in litigation, and makes his promissory note in payment, commits a fraud on the vendor by delivering possession of the property and executing a conveyance of his right thereto to another claiming the same, upon a demand without any legal compulsion, and can not afterward plead as a defense, in an action brought on the note, the fraudulent conduct of the vendor in selling the property.—First Nat'l Bank v. How, 1 Mont. 604.

42. In an action on a promissory note the maker does not show a failure of consideration by alleging that the payee had no title to the property, in payment of which it was made, if it appears that the maker had delivered to a claimant, without any legal necessity, the property which he had bought and received from the payee.—Id.

43. Where a negotiable note was endorsed before maturity to a church society, without notice of any defense thereto, in consideration of the surrender of the indorser's individual note previously given as a subscription, the indorsee is a bona fide holder for value.—Grace M. E. Church v. Rickards, 16 Mont. 70; 40 Pac. 73.

44. The endorsee before maturity of a negotiable note, who takes it as security for a debt of the endorser, is a bona fide holder only to the extent of the debt secured, and the note, as to the excess, if any, is subject to equities in favor of the maker against such endorser.—Yellowstone Nat'l Bank v. Gagnon, 19 Mont. 402; 48 Pac. 762.

45. Instructions that, if plaintiff received in good faith a check endorsed to him, he was entitled to recover the amount which he paid for it, is erroneous, where there is evidence from which it might be found that he paid part of the amount of the check without notice of an advance, and the balance with such notice, since the instruction does not state that he could recover only the amount paid without notice.—Harrington v. Mining Co., 19 Mont. 411; 48 Pac. 758.

46. A person taking a note as collateral from one of the makers is not put on inquiry as to an agreement limiting its use, by the fact that it is made payable to him.—American Exch. Nat'l Bank v. Ulm, 21 Mont. 440; 54 Pac. 563.

47. Discounters of commercial paper, regular on its face, are not required to ascertain conditions limiting the use of its proceeds, of which the paper itself gives no informaton.—Id.

48. The purchaser of a negotiable note before maturity, for value and without notice, from one to whom it was delivered for a specific purpose, and who has misappropriated it, acquires a good title against the makers.—Id.

49. The rule that where a bank discounts a note payable to a third person, and negotiable in bank, the maker is estopped to set up set-offs against it, applies only to a note negotiable at the bank discounting it.—Stadler v. Bank, 22 Mont. 190; 56 Pac. 111.

50. Where defendant assigned notes given as consideration on the sale of a business, which he induced by fraud, to a third person as security for a pre-existing debt, such third person was not a bona fide holder, and the notes were subject to all the defenses which might have been urged against them in the hands of defendant.—Sathre v Rolfe, 31 Mont. 85; 77 Pac. 431.

VI. PRESENTMENT, DEMAND, NOTICE, AND PROTEST, 51-56.

51. The presence of one of the endorsers of a note, when the holder presents it to the maker at maturity for payment, does not waive a regular notice of its non-payment to the endorsers.—Grant v. Spencer, 1 Mont. 136.

52. The presence of one of the endorsers when the holder presents the note for payment does not waive formal notice of dishonor.—Id.

53. A note payable on demand admits a present debt to be due, is payable absolutely and at all events, and requires no other or previous demand than institution of suit thereon.—McFarland v. Cutter, 1 Mont. 383.

54. It is not necessary, before suing on a note payable on demand, to make demand of payment; the action is a sufficient demand.—Id.

55. Notice of demand and non-payment is waived by the endorser of a note who, at the time of endorsing it, stated to the payee that he was to look to him and to no one else to pay the note, and that he would pay it promptly, and on the last day of grace and at other times after maturity promised to pay it and asked not to be pressed.—Quaintance v. Goodrow, 16 Mont. 376; 41 Pac. 76.

56. Payment of a demand note must be demanded within a reasonable time before the right of action is barred.—Oleson v. Wilson, 20 Mont. 544; 52 Pac. 372.

VII. PAYMENT AND DISCHARGE, 57-59.

57. B executed and delivered a note to A, and gave him an order on C for payment of the note, but C refused to accept the order. *Held*, that the acceptance of the order by A did not extinguish the note, unless there was an express agreement between A and B that it should be received in payment.—Knox v. Gerhauser, 3 Mont. 267.

58. Where the payee of a note receives a check or draft drawn in favor of the maker, and properly endorsed by him, and agrees to collect and apply the proceeds to payment of the note, he is bound to allow the credit, though the draft was not collected, unless he gives the endorser due notice of dishonor on failure of the obligor to pay.—Murphy v. Phelps, 12 Mont. 531; 31 Pac. 64.

59. Defendant accepted M's offer to sell him a note of plaintiff for $550, its face value, and sent M a check in payment, and requested him to forward the note. M's offer was never rescinded, nor the mode of payment objected to, but he did not collect the check nor send defendant the note. Defendant sued on the note, and on the same day plaintiff paid him the amount of the note, with interest. On the day after the note was sent for collection to a bank in the town where plaintiff and defendant lived, and, though defendant advised plaintiff that he owed the note, and that he would give plaintiff a bond to protect him, plaintiff paid the amount of the note, with interest, to M. *Held*, that it was error to direct a verdict for plaintiff on the ground that defendant did not own the note when the payment was made to him.—Wetzstein v. Joy, 13 Mont. 444; 34 Pac. 876.

VIII. ACTIONS, 60-93.

A. Right of Action, 60-61.
B. Title to Maintain Action, and Parties Plaintiff, 62.
C. Pleadings, 63-70.
D. Presumptions and Burden of Proof, 71-77.
E. Admissibility of Evidence, 78-81.
F. Weight and Sufficiency of Evidence, 82-86.
G. Trial, 87-91.
H. Judgment, 92.
I. Review, 93.

A. RIGHT OF ACTION, 60-61.

60. Tender of indemnity before suit is not necessary to entitle plaintiff to judgment in an action upon a lost negotiable instrument.—Schuttler v. King, 13 Mont. 226; 33 Pac. 938.

61. The consent by defendant in an action on a note, commenced before its maturity, to the filing of a substituted complaint, after the maturity of the note and the filing of an answer, does not estop him from relying on the premature bringing of the action as a defense.—Radue v. Pauwelyn, 27 Mont. 68; 69 Pac. 557.

B. TITLE TO MAINTAIN ACTION, 62.

62. The holder of a note is presumptively the owner, and is the real party in interest, with a right to sue thereon.—Meadowcraft, v. Walsh, 15 Mont. 544; 39 Pac. 914.

C. PLEADINGS, 63-70.

63. A claim, due to one of several defendants, can not be set up as a counterclaim in a suit against such defendants upon a joint debt or liability.—Kemp v. McCormick, 1 Mont. 420.

64. A general plea that the note in suit was obtained from the defendant by fraud, without setting out facts constituting the fraud, is bad.—First National Bank v. How, 1 Mont. 604.

65. An averment in a complaint to recover on a promissory note, that the amount thereof is "due and payable," states only a conclusion of law, and does not allege a breach of the contract.—Hershfield v. Aiken, 3 Mont. 442.

66. The complaint alleged that two payments on a note were made, respectively, on Apr. 13, 1885, and Sept. 29, 1886. The answer denied that the first payment was made on Apr. 13, 1885, and averred that it was made on Apr. 11, 1885; and denied that the second payment was made on Sept. 29, 1886, but averred that it was made on Sept. 8, 1886. *Held*, that these pleadings brought the question of dates to an issue, and no reply was required.—Anderson v. Perkins, 10 Mont. 154; 25 Pac. 92.

67. Under Comp. Stat., p. 80, § 85, requiring a complaint to contain "a statement of the facts constituting a cause of action in ordinary and concise language," a complaint averring that, on a certain date, defendant, for a valuable consideration, executed and delivered to plaintiffs his note of that date for the sum of $679.74, due at a certain date now passed, with interest, etc.; that there is due and unpaid from defendant the sum of $977.47 to this date; and that plaintiffs are now the owners of the note,—is not bad for failure to aver that defendant ever made any promise to pay any money to plaintiffs, nor any facts implying such a promise, nor when, according to such promise, payment should be made.—Schuttler v. King, 13 Mont. 226; 33 Pac. 938.

68. The transferee of a check lawfully obtained by the transferer sufficiently pleads his good faith, in an action thereon, by replication denying any fraud or collusion with the transferer, and alleging that he purchased the check for its face value, in due course of business, without any knowledge of a defense to it.—Harrington v. Mining Co., 19 Mont. 411; 48 Pac. 758.

69. In an action upon an endorsement on a promissory note agreeing "to pay the principal of the within note," the sufficiency of the complaint, as stating a cause of action on such new and independent promise, was not affected by recitals setting out the matters which constituted the consideration of such promise.—Clarke v. Marlow, 20 Mont. 249; 50 Pac. 713.

70. In an action on a note, defendant alleged by way of counterclaim that she had purchased a boiler of plaintiff, which was to be of a certain heating capacity, and that on testing the boiler it was found to be insufficient and otherwise defective. The only allegation that the seller made any representations as to the boiler, or that the buyer relied upon any such statements in making the purchase, was that the buyer was deceived by false representations that the boiler was a first class boiler and sufficient, but there was no direct allegation that any such statements were made or relied on by the purchaser. It was alleged that the note in suit was given to settle the balance of account, but there was no statement that this account represented the balance due on the boiler. *Held*, not to state facts constituting a defense or counterclaim.—Butte Hdw. Co. v. Knox, 28 Mont. 111, 72 Pac. 301.

D. PRESUMPTIONS AND BURDEN OF PROOF, 71-77.

71. Parol evidence of an agreement that the acceptance of a bill of exchange should not be a waiver of counterclaims which the acceptor then held against the drawer is admissible in an action on the bill, as such evidence contradicts not the instrument, but merely the presumption of waiver which arises from the fact of its acceptance.—Bohn Mfg. Co. v. Harrison, 13 Mont. 293; 34 Pac. 313.

72. A plea of fraud in the inception of a promissory note constitutes a prima facie defense to an action by an endorser against the maker, and places upon plaintiff the burden of proving, and therefore of pleading bona fides, which includes a want of knowledge of the alleged fraud.—Thamling v. Duffey, 14 Mont. 567; 37 Pac. 363.

73. The holder of a note is not required to prove in the first instance that he was an innocent purchaser for value before maturity, but his bona fides will be presumed until it is impeached by evidence showing illegal considerations or fraud in the inception of the note—Rossiter v. Loeber, 18 Mont. 372; 45 Pac. 560.

74. In an action on a note, where defendant pleads want of consideration and duress, it was error to charge that it was incumbent on defendant to prove both defenses by a preponderance of testimony, either defense, if established, being sufficient to defeat a recovery on the note.—Id.

75. In an action on a bank check, where the answer claims that it was obtained from the payee by fraud, of which plaintiff had notice, the burden is on defendant to show fraud, and then on plaintiff to show himself a bona fide holder.—Harrington v. Mining Co., 27 Mont. 1; 69 Pac. 102.

76. When negotiable paper is shown to have been obtained from the owner or maker by fraud, a subsequent transferee must, before he is entitled to recover, show that he is a bona fide purchaser.—Id.

77. In an action on a note the burden of proving duress is on the defendant.—Bullard v. Smith, 28 Mont. 387; 72 Pac. 761.

E. ADMISSIBILITY OF EVIDENCE, 78-81.

78. In an action against a person who signed a promissory note "J. S., Gen. Manag. & Supt. St. L. & M. M. Co.," his evidence aliunde may be introduced to show that he made the note for the company of which he was agent, and that it was the intention of all the parties that the company should pay the note.—Gerber v. Stuart, 1 Mont. 172.

79. Where an endorsement on a note shows that there was an agreement to extend the time of payment, it may be shown by parol to what time the extension was made, if it was for a definite period.—Hale v. Forbis, 3 Mont. 395.

80. An order was drawn by a firm of contractors, in favor of plaintiffs, on defendants' intestate, for $428. Defendants, to disprove an oral acceptance thereof, offered to show that the order was given to plaintiffs in liquidation of an indebtedness of the contractors to plaintiffs, which plaintiffs claimed was due for materials furnished by them in a house built by the contractors for defendants' intestate; that the materials so furnished did not exceed $150; that the amount had been paid; and that the balance claimed was for materials furnished by plaintiffs to the contractors for houses other than defendants'. *Held*, that the evidence was competent to establish the fact that no acceptance was made.—Lavell v. Frost, 16 Mont. 93; 40 Pac. 146.

81. On an issue whether plaintiff was a transferee in good faith of a check won by the transferer in gambling, cross examination of plaintiff as to whether he had not gambled in his saloon with the person from whom the check was won is proper.—Harrington v. Mining Co., 19 Mont. 411; 48 Pac. 758.

F. WEIGHT AND SUFFICIENCY OF EVIDENCE, 82-86.

82. In an action to recover the amount of an order given by a sub-contractor on his principals, and accepted by them, payable when the principal contract is paid, where it appears from the transactions under the principal contract that, at the time of acceptance, and after the acceptors had reecived sums in payment of their contract, exceeding the amount of the order, and that articles included in said contract, and paid for, were of the same class as those supplied by the sub-contractor, it will be assumed, in the absence of explanation by defendant, that the sum for which the order was given and accepted was for such articles, and that defendants had received the money for them,—at least, to the extent of making such prima facie case as will relieve the plaintiff from a nonsuit.—Garver v. Lynde, 7 Mont. 108; 14 Pac. 697.

83. One of defendants testified that he "remembered the circumstances of the payment of $250, as stated in the complaint, on Apr. 13, 1885." Plaintiff testified that "the memorandum on the note, 'paid Apr. 13, 1885, $250, on interest,' was made on that day, and in his own handwriting." This was all the evidence on the point. The payments were endorsed on the note as made on the 13th and 29th, respectively. *Held*, to be sufficient evidence to support a finding of payment on those dates.—Anderson v. Perkins, 10 Mont. 154; 25 Pac. 92.

84. Where one of the makers of a note testified that he remembered the payment as made on the date alleged in the complaint, and the payee testified that he endorsed such payment on the note on that date, and another payment on another date, as alleged, the evidence is sufficient to sustain a finding of payment on those dates.—Id.

85. The holder of a note is presumptively the owner thereof.—Meadowcraft v. Walsh, 15 Mont. 544; 39 Pac. 914.

86. Evidence considered, and *held* sufficient to sustain a jury finding that the note sued on was executed under duress.—Bullard v. Smith, 28 Mont. 387; 72 Pac. 761.

G. TRIAL, 87-91.

87. In an action on a note, the question as to whether an order given for its payment was given in absolute payment or as collateral security, is for the jury.—Knox v. Gerhauser, 3 Mont. 267.

88. It is error to instruct that "it is admitted by the pleadings" that a check transferred to plaintiff was duly endorsed in blank by the original holder, though the denial in the answer is only of the legal conclusion that it was "duly endorsed," where the legality of the endorsement, under the facts, is at issue.—Harrington v. Mining Co., 19 Mont. 411; 48 Pac. 758.

89. Such an instruction is not rendered harmless by the fact that the original holder of the check admitted in his testimony that he endorsed it, where he testified that he was then too drunk to know what he was doing.—Id.

90. An instruction that if a check won in gambling was taken by plaintiff for value, and without notice of the manner in which it was procured, or of any defense, he was entitled to recover, is erroneous, as tending to convey the idea that, if plaintiff had any actual notice, he was necessarily acting in good faith.—Id.

91. Where, in an action on negotiable paper, it is shown to have been obtained from the owner or maker by fraud, the question whether the plaintiff has shown himself a bona fide holder for value is for the jury.—Harrington v. Mining Co., 27 Mont. 1; 69 Pac. 102.

H. JUDGMENT, 92.

92. In an action on a note the answer alleged that, as collateral, defendant assigned to plaintiff bonds of a value exceeding the amount of the note, and that plaintiff, with intent to defraud defendant, converted them, and allowed a credit less than their market value. The reply denied that the bonds were worth what defendant claimed, and any conversion of them, and that plaintiff disposed of said bonds in any manner except as he was authorized by virtue of law "and of his contract with defendant, and by the direction of defendant, at public auction, after due and legal notice, to the highest and best bidder for cash, at which sale said bonds, and everyone of them, were sold at their full market value, and the proceeds of said sale were duly credited on said note by plaintiff." *Held*, that the pleadings supported a judgment for plaintiff.—Boscovitz v. Cooper, 20 Mont. 197; 50 Pac. 412.

I. REVIEW, 93.

93. An averment in a complaint to recover on a promissory note, that the amount thereof is "due and payable," is bad on demurrer, but when the defendant has answered and a trial has been had on the merits, from which it appears that the note was not only due, but wholly unpaid, a judgment thereon will not be disturbed for such mere technical defect.—Hershfield v. Aiken, 3 Mont. 442.

BONDS.

I. Construction and Operation, 1.
II. Actions, 2-6.
A. Right of action and defenses, 2-3.
B. Pleading, 4-6.

I. CONSTRUCTION AND OPERATION, 1.

1. A bond conditioned that the principal shall furnish all material and labor needed for a building, "as specified and shown on plans as furnished by" the architect, may be read in the light of the plans and specifications.—Watson v. O'Neill, 14 Mont. 197; 35 Pac. 1064.

II. ACTIONS, 2-6.

A. Right of Action and Defenses, 2-3.
B. Pleading, 4-6.

A. RIGHT OF ACTION AND DEFENSES, 2-3.

2. Where the condition of an undertaking on appeal to this court is that the sureties will pay the judgment if affirmed by such court, and the judgment is affirmed, the mere fact that an appeal from the judgment of affirmance to the United States supreme court is pending is not a defense to an action on the undertaking.—Bullard v. Gilette, 1 Mont. 509.

3. An action on a forfeited undertaking, though given to secure appearance in a criminal case, is itself a civil action on a contract with liquidated damages.—United States v. Ensign, 2 Mont. 396.

B. PLEADING, 4-6.

4. In an action against the sureties on an attachment bond, to recover the damages caused by the wrongful suing out of the attachment writ, plaintiff must allege that the principal has not paid the damages.—Pinney v. Herschfield, 1 Mont. 367.

5. In an action against several obligors on a bond, conditioned that one of them will pay a certain sum, plaintiff must allege that the amount has not been paid by such obligor.—Id.

6. A complaint on a bond need not allege demand of payment from the principal. (See 171 U. S. 650.)—Montana Min. Co. v. Milling Co., 19 Mont. 313; 48 Pac. 305.

BOUNDARIES.

1. Where the surveyor appointed to survey and plat a townsite, granted to the probate judge as trustee, under the provision of the law relating to that subject, undertakes to establish a western boundary of the townsite, and the plat falls short of the government section line, which in fact bounds on the west the land granted for townsite purposes, the holder of adjacent land can not shift his boundary line from that fixed by the government survey down to the so-called boundary line of the townsite fixed by the townsite surveyor, and claim the intervening land. The townsite surveyor does not act officially in platting the townsite, in the sense that the boundaries fixed by him must be regarded as final.—Neill v. Jordan, 15 Mont. 47; 38 Pac. 223.

2. The boundary of land on a non-tidal navigable river, whenever another intent is not expressed, extends to the ordinary low water mark.—Gibson v. Kelley, 15 Mont. 417; 39 Pac. 517.

BOUNTIES.

1. Where no part of the appropriation of funds by the state for the payment of bounties for the destruction of stock-destroying animals is unappropriated or available, mandamus to compel the board of examiners to transmit an allowed claim to the auditor to authorize him to draw his warrant in payment thereof, will be dismissed.—State v. Rickards, 17 Mont. 440; 43 Pac. 504.

BREACH OF MARRIAGE PROMISE.

I. Evidence, 1.
II. Damages, 2-5.

I. EVIDENCE, 1.

1. Where a man and woman have unlawfully cohabited together for a long time, a statement by the man that he would sell his property and go to another country and live with her the rest of his days, would not raise a presumption of a promise of marriage.—Dupont v. McAdow, 6 Mont. 226; 9 Pac. 925.

II. DAMAGES, 2-5.

2. In an action by a woman for a breach of promise to marry, where no special damages are alleged, the jury may take into consideration the money value or worldly advantages of the marriage, which would have given her a permanent home and an advantageous establishment; and if her affections were implicated, the injury to them may be considered as an additional element of damage.—Id.

3. In an action by a woman for a breach of promise to marry, evidence that the plaintiff, at the time of the commencement of the action, was living as the mistress of another man, is admissible in mitigation of damages.—Id.

4. Punitive damages are not recoverable in an action for breach of promise to marry, unless it is shown that the breach of the contract was wanton or malicious, or that the defendant wounded the feelings or injured the reputation of the plaintiff.—Id.

5. Punitive damages in an action by a woman for breach of promise to marry can not be recovered unless pleaded.—Id.

BRIBERY.

1. That accused has always borne an excellent reputation for integrity is in his favor during the trial, but is no defense to the crime if actually committed.—In re Wellcome, 23 Mont. 450; 59 Pac. 445.

2. The testimony of two credible witnesses as to acts by accused constituting bribery was a relation involving much detail and many incidents, and was given by both on three separate occasions without material variation, and was corroborated by the production by one of them of a large sum of money which they claimed to have received as a bribe from accused, and the witness producing the money was a man of small means. Accused failed, without reason, to testify in his own behalf, and his attorneys answered on information and belief only. *Held*, there being no evidence to the contrary, that the evidence was sufficient to establish the guilt of accused.—Id.

BROKERS.

I. Duties and Liabilities to Principal, 1.
II. Compensation and lien, 2-4.
III. Actions for Compensation, 5-10.

I. DUTIES AND LIABILITIES TO PRINCIPAL, 1.

1. Defendant telegraphed plaintiff in October: "Sell, my account, 500 shares E. at market price. Wire price sold." Plaintiff next day wrote defendant that E stock was dull, and impossible to sell at any reasonable price, and that he would continue the order until countermanded. Plaintiff kept defendant informed as to the market till the close of the year, but received no further instructions, and the stock continued to decline. Plaintiff thought that defendant's telegram meant to sell at the highest market price at the date it was received, and acted accordingly, while defendant contended

that it meant to sell at the highest price when the sale was made. *Held*, that even if plaintiff acted on an erroneous construction of the telegram, defendant, by her conduct, discharged him from liability.—Coquard v. Weinstein, 16 Mont. 312; 40 Pac. 696.

II. COMPENSATION AND LIEN, 2-4.

2. In an action for broker's commissions on a sale of cattle, it appeared that plaintiff, who had no authority to act for defendant, submitted to it a proposition from a purchaser, which defendant refused to agree to, because it called for cattle of only one brand, while defendant's were of several brands, and because it allowed plaintiff a commission. Plaintiff replied that there would be no trouble about the brands, which was not the case, and thereupon defendant wired plaintiff to the effect that he would stand by the contract, and allow commission. Subsequently defendant's agent met a proposed vendee, and, on the latter's refusal to sign a contract including all the brands owned by the vendor, the contract of sale was destroyed. *Held*, that defendant's agreement to stand by the contract and pay commission, being made on the strength of plaintiff's false statement as to the brands, was not in ratification of the contract offered by plaintiff.—Courtney v. Cattle Co., 17 Mont. 394; 43 Pac. 185.

3. Where a broker's contract to procure a purchaser at a specified price simply requires him to bring his principal and purchaser together, so that they themselves can make their contract, he may recover commission from both parties on separate contracts with each.—Childs v. Ptomey, 17 Mont. 502; 43 Pac. 714.

4. Where a broker was told by the principal that he must look to the intending purchasers for his compensation for making the sale, and nothing else was ever said about compensation, he can not recover his commissions from the principal.—King v. Benson, 22 Mont. 256; 56 Pac. 280.

III. ACTIONS FOR COMPENSATION, 5-10.

5. Where, in an action for money paid, defendant pleads as setoff that plaintiff should have sold certain stock for defendant at a certain price, which plaintiff denies, the burden of proof is on defendant.—Coquard v. Weinstein, 16 Mont. 312; 40 Pac. 696.

6. In an action by a broker for commission due by virtue of the ratification by a vendor of the contract of sale, a letter written by plaintiff to defendant after the alleged consummation of the contract, stating that he was legally acting as agent for both defendant and vendee, is admissible as bearing on the good faith of plaintiff in the transaction.—Courtney v. Cattle Co., 17 Mont. 394; 43 Pac. 185.

7. In an action by a broker for commissions, the defense that plaintiff was employed by both parties, and his double employment not disclosed, must be pleaded.—Childs v. Ptomey, 17 Mont. 502; 43 Pac. 714.

8. Where a contract with a broker for procuring a sale specifies a fixed price, and, in an action on the contract for commissions, there is evidence that plaintiff procured a purchaser, with whom defendant personally negotiated a sale for a less sum, but none to show that the purchaser was willing to pay the specified price, or why he did not pay it, a nonsuit should be directed.—Id.

9. In an action by a broker for commissions, it is competent for the purchaser to testify that it was through plaintiff's efforts that he bought. —Id.

10. In an action by a broker for commissions, the opinion of witnesses as to whether they considered plaintiff defendant's agent in the sale in question is properly excluded.—Id.

BUILDING AND LOAN ASSOCIATIONS.

I. Statutory Provisions, 1-5.
II. Stock, 6-7.
III. Loans, 8.
IV. Mortgages, 9-11.
V. Actions, 12-13.
VI. Termination of Association, 14-18.

I. STATUTORY PROVISIONS, 1-5.

1. Act Mar. 4, 1897, to regulate building and loan associations, by § 28, repealed Civ. Code, §§ 770-845, relating thereto, and by § 2 prescribed the manner in which an association incorporated under the Code might re-incorporate, and by § 25 prescribed certain penalties for non-compliance therewith, providing that the act should not affect, except as to taxation, any associations previously organized, unless it elected to come under its provisions. *Held*, that the Code was continued in force as to associations not electing to re-incorporate, but otherwise repealed.—Home B. & L. Ass'n v. Nolan, 21 Mont. 205; 53 Pac. 738.

2. Act Mar. 4, 1897, in its title made no specific reference to associations then existing, but in its body provided that it should not be applicable to existing associations unless they elected to come under its provisions. *Held*, not repugnant to Const., art. 5, § 23.—Id.

3. Act Mar. 4, 1897, being general in its terms, is not obnoxious to Const., art. 5, § 26. —Id.

4. Under Act Mar. 4, 1897, § 491, subd. 5, amending Pol. Code, tit. 1, c. 3, art. 11, all building and loan associations are subject to the supervision of the state.—Id.

5. Act Mar. 4, 1897, providing for the regulation of building and loan associations, by § 25, prescribing certain penalties for failure to comply therewith, excepted from its operation all associations previously organized, unless they elected to come under its provisions. *Held*, that associations not accepting the new law would not be affected by it.—Id.

II. STOCK, 6-7.

6. Where the contract between a borrowing member and a building and loan association has been completed, and the member has withdrawn, it is immaterial whether the contract was one which the association had power to make.—Floyd-Jones v. Anderson, 30 Mont. 351; 76 Pac. 751.

7. Where a member of a building and loan association has made full settlement, and withdrawn therefrom, such settlement and withdrawal can not be set aside by the association without showing fraud or bad faith in some form.—Id.

III. LOANS, 8.

8. Where a certificate of stock in a building and loan association provided that the association would pay to the shareholder the sum of $100 for each share represented thereby at the end of five years, on condition that the shareholder complied with the terms and conditions thereof, and other literature provided that the stock at maturity should cancel the

mortgage, the debt of a borrowing member, who complied with all the terms and conditions of his contract, was cancelled, and the mortgage which he executed to secure his loan released, at the expiration of five years.—Id.

IV. MORTGAGES, 9-11.

9. The by-laws of a building and loan association made the secretary the custodian of its books and records, and charged him with the transaction of business relative to the issue and cancellation of stock. About the time of the maturity of A's stock, the secretary wrote to B, acknowledging the receipt of dues, and stated in the letter that the five-year stock (which was the kind that A had) contained certain burdensome conditions, and that other longer term stock had been issued, which was more advantageous to the shareholders, all but six of whom had made the exchange. *Held*, in an action to set aside a release of A's mortgage and to foreclose, that the letter was admissible to show that the company was at the time transacting business, and that a distinct five-year contract existed between the association and its original shareholders.—Id.

10. In an action to foreclose a building and loan association mortgage it was immaterial, on the question of the admissibility of matter which purported to be the by-laws of the association, whether it in fact constituted such by-laws or not, where it stated a part of the written contract existing between the shareholder and the association, and was given to him by the association as the by-laws.—Id.

11. In an action to foreclose a building and loan association mortgage the member's certificate of stock, and the by-laws and statements printed thereon, constituting the contract between the association and such member, were properly admitted in evidence.—Id.

V. ACTIONS, 12-13.

12. In an action by a withdrawing member of a building and loan association, under Comp. Stat., p. 800, § 648, to recover the amount paid in on his share, with interest thereon at such rate as the profits or by-laws may have determined, a complaint is not subject to general demurrer because it demands a recovery of interest on the amount, without showing the rate of interest or proportion of profits which the by-laws had determined, but merely prevents recovery of such interest.—Whitefoot v. Loan Ass'n, 18 Mont. 164; 44 Pac. 514.

13. In an action against a building and loan association by a withdrawing member to recover the amount paid upon his share, under Comp. Stat., p. 800, § 648, authorizing such a recovery against associations formed under that chapter, a complaint failing to allege that the association was formed under such chapter, so as to subject it to such provision, is demurrable.—Id.

VI. TERMINATION OF ASSOCIATION, 14-18.

14. Insolvency is a question of fact to be proved by the evidence, and is not presumed.—Floyd-Jones v. Anderson, 30 Mont. 351; 76 Pac. 751.

15. Since building and loan associations do not ordinarily have outside creditors, as do general corporations, a deficiency of assets does not render them insolvent, in the proper sense of the word, but merely indicates a loss of capital and security, and depreciation of the stock held by members.—Id.

16. Where the charter of a building and loan association expired before its stock matured, the borrower should be credited with the accrued value of his shares of stock and the unearned portion of the bonus, computing to the time the charter expired, less his share of expenses of administering the affairs of the association.—Ferrell v. Evans, 25 Mont. 444; 65 Pac. 714.

17. Plaintiff, a stockholder in a building and loan association, borrowed therefrom, giving a bonus. Before the stock matured the charter expired. *Held*, that plaintiff should be credited with so much of the bonus as was unearned, computed by dividing the amount of bonus by the number of months which would be required to mature the stock, and multiplying the quotient by the number of months still to lapse before such maturity.—Id.

18. Where the charter of a building and loan association having expired, the borrowers, as trustees in winding up its affairs, collected from a borrower interest and dues on shares of stock, on foreclosure of his mortgage the sums so collected should be credited on the mortgage debt.—Id.

BURGLARY.

I. Offenses and Responsibility Therefor, 1.
II. Prosecution and Punishment, 2-7.

I. OFFENSES AND RESPONSIBILITY THEREFORE, 1.

1. Under Comp. Stat., p. 281, § 69, burglary is of but one kind and has no degrees.—Territory v. Fox, 3 Mont. 440.

II. PROSECUTION AND PUNISHMENT, 2-7.

2. Under a statute defining burglary as breaking and entering with intent to commit a felony, an indictment charging a breaking and entry with the intent of committing grand larceny, was defective, when such charge was not based on a sufficient showing of facts as to the value of the property.—Territory v. Duncan, 5 Mont. 478; 6 Pac. 353.

3. On trial for burglary with intent, as charged in the indictment, to steal an overcoat, that particular intent must be proved.—State v. Carroll, 13 Mont. 246; 33 Pac. 688.

4. The words "box car," used in an information for burglary, are equivalent to the words "rail car," used in the statute defining burglary.—State v. Green, 15 Mont. 424; 39 Pac. 322.

5. It was error to charge, on a trial for entering a box car with intent to steal, that a "mere entering is sufficient," without expressly charging that the entry must have been made with such intent—Id.

6. Where an information for burglary charges the willful entry of a certain house in the rear of No. 111 East Broadway St., owned by J K, and it appears that the house burglarized was No. 111, and occupied by M K, but was situated on the rear of the lot, and there was no other house thereon, accused was not prejudiced by the description or the evidence of ownership.—State v. Rodgers, 31 Mont. 1; 77 Pac. 293.

7. Under Pen. Code, § 1842, a conviction for burglary will not be disturbed because it appears that it was committed on the day prior to that alleged in the information, where defendant was not prejudiced.—Id.

CANCELLATION OF INSTRUMENTS.

1. In an action in equity to set aside a chattel mortgage, where there was a material issue as to who was in possession of the mortgaged property, a motion for judgment on the pleadings on the ground that plaintiff had an adequate remedy at law should be refused.—Leopold v. Silverman, 7 Mont. 266; 16 Pac. 580.

2. An action to rescind a deed, on the ground of fraud and inadequacy of consideration, brought three days after the execution thereof, is not barred by the fact that plaintiff made no prior offer to return the consideration.—Maloy v. Berkin, 11 Mont. 138; 27 Pac. 442.

3. One can not sue to set aside a sale of firm property by his partner, in which he did not concur, when the property was sold for an adequate price, and the proceeds were used to pay firm debts, unless he tenders to the purchaser the amount paid by him.—Waite v. Vinson, 14 Mont. 405; 36 Pac. 828.

4. Where a bill to set aside a note, secured by a chattel mortgage, on the ground of fraud, alleged facts showing a mere failure of consideration for the note, and did not allege either that defendant was insolvent, that plaintiff did not have an adequate remedy at law, or that defendant had threatened to dispose of the note before maturity to a bona fide purchaser, but alleged that defendant was in possession thereof and refused to deliver the same to plaintiff, it was insufficient.—Handley v. Sprinkle, 31 Mont. 57; 77 Pac. 296.

CARRIERS.

I. Control and Regulation of Common Carriers, 1-2.
II. Carriage of Goods, 3-5.
III. Carriage of Live Stock, 6-15.
A. Delay in transportation, 6.
B. Loss or injury, 7.
C. Limitation of liability, 8.
D. Actions, 9-15.
IV. Carriage of Passengers, 16-32.
A. Personal injuries, 16-30.
1. Degree of care required of carrier in general, 16-19.
2. Acts of carrier's employees, 20.
3. Actions for injuries, 21-30.
B. Contributory negligence of person injured, 31-32.

I. CONTROL AND REGULATION OF COMMON CARRIERS, 1-2.

1. A railway company can not grant to one hack owner the exclusive right to use its platform for receiving and discharging passengers.—Montana Union v. Langlois, 9 Mont. 419; 24 Pac. 209.

2. A contract entered into prior to the passage of the interstate commerce law (Act Feb. 4, 1887), for the carriage of freight by a railway company at rates contrary to the provisions of that law, can not be enforced after its passage, and the shipper can not recover any rebates stipulated for in such contract.—Bullard v. Northern Pacific, 10 Mont. 168; 25 Pac. 120.

II. CARRIAGE OF GOODS, 3-5.

3. P made a contract with the United States to transport certain supplies to Montana. The contract provided: "No river risk on the part of the contractor for unavoidable accidents." While P was conveying a cargo of such supplies up the Missouri river the steamer took fire and, with the cargo, was burned, without any fault or neglect on the part of P's agents in charge of the steamer. *Held*, that he was not liable for the loss, being a private carrier and required to use only ordinary care.—United States v. Power, 6 Mont. 271; 12 Pac. 639.

4. Since Civ. Code, § 2912, is a legislative declaration as to when a carrier shall be liable for delay, and is a limitation on the general power to contract given by § 2876, a common carrier can not by special contract limit its liability for delay in the transportation of property arising from its own or its servants' negligence.—Nelson v. Great Northern, 28 Mont. 297; 72 Pac. 642.

5. Where a common carrier, accepting property for transportation, commits a breach of its common law duties, the shipper may maintain an action in tort therefor, though the carrier receives the property under a special contract limiting its liability; the carrier in accepting the shipment accepting it with the obligations imposed by law, and the special contract merely constituting a defense insofar as the exemptions from liability which it creates are valid.—Id.

III. CARRIAGE OF LIVE STOCK, 6-15.

A. Delay in Transportation, 6.
B. Loss or Injury, 7.
C. Limitation of Liability, 8.
D. Actions, 9-15.

A. DELAY IN TRANSPORTATION, 6.

6. A common carrier receiving property for transportation with knowledge of the existence of an obstruction on its road, and without informing the shipper, can not offer the obstruction as an excuse for not making a delivery thereof, though the obstruction is the act of God; and it is bound to take notice of the signs of approaching danger liable to create obstructions, if any are known to it.—Id.

B. LOSS OR INJURY, 7.

7. Where property delivered to a carrier for transportation is injured as a result of negligent delay on the carrier's part, the shipper, free from negligence on his part, is entitled to compensation for the damages sustained by reason of such delay.—Id.

C. LIMITATION OF LIABILITY, 8.

8. A special contract with a railroad company for the transportation of property required that in case of loss or claim for damages the shipper should give notice in writing to it. The railroad received information of the injury to the property by letter, and the railroad department called for information regarding the same shortly after the shipment was made. *Held*, a sufficient notice when not objected to. —Id.

D. ACTIONS, 9-15.

9. The complaint in an action against a carrier for violations of a special contract of shipment must set out the contract either in substance or in hæc verba, and must declare upon it.—Id.

10. The complaint in an action in tort against a carrier for breach of its common law duties in the shipment of live stock must allege facts which will show, not only the rights of the shipper, but the duties of the carrier as well.—Id.

11. A complaint which alleges that defendant, a common carrier, promise to provide cars for the transportation of plaintiff's sheep, and to transport them with due and reasonable speed; that it, in disregard of its duties as a common carrier, negligently delayed the commencement of the transportation until a certain date, when it wilfully, negligently and wrongfully loaded the sheep, and commenced their transportation, though it had knowledge that a violent storm was then prevailing along its road; and that it, in disregard of its duties as a common carrier, wilfully, negligently and carelessly delayed the sheep along the road, and exposed them to severe weather, and negligently refused to protect them—states a cause of action in tort. —Id.

12. Where animals delivered to a common carrier for transportation are injured during the transportation, and there is no evidence to show that the animals were injured from an inherent want of vitality, or by reason of injuries inflicted on each other, or by unavoidable accident, the carrier has the burden of proving that the injuries were occasioned by some other cause than its own negligence, though the shipper accompanies the shipment.—Id.

13. In tort against a common carrier for delay in the transportation of sheep the shipper could show the condition of the sheep at the time of their shipment, and, whether evidence of the treatment and food received by the sheep immediately prior to the shipment was a correct way to show this condition or not, defendant was not prejudiced by such evidence, admitted without objection, where the court charged the jury not to consider any damages sustained prior to the loading of the sheep on the carrier's cars.—Id.

14. In an action against a common carrier for injuries to sheep transported by it, caused by negligent delay in their transportation and by exposing them to severe weather, the shipper testified that there was a shrinkage of the sheep during the transportation of 33 pounds per head, or 25 pounds in excess of a reasonable shrinkage; that it was necessary to feed them four days at the place of delivery before selling them, while feeding them once only might have been necessary if they had been delivered in good condition; that the cost of so feeding them was $240, and the cost of one feeding was $40; that the sheep were weighed before and after they were fed this extra $200 worth of food. It did not appear which of these weights was taken as the basis of calculation in ascertaining the shrinkage. *Held*, that an instruction authorizing a recovery of the expenses for feeding rendered necessary by reason of the condition of the sheep at the place of delivery was erroneous, as allowing double damages.—Id.

15. In such action defendant's witnesses testified that they informed plaintiff at the time of the shipment that the worst blizzard ever known was prevailing along its line. Plaintiff denied receiving this information. *Held*, that the evidence warranted an instruction that if the carrier, at the time of accepting the shipment, knew of the storm along its line, and did not inform plaintiff thereof, it could not excuse the delay by showing that its track was obstructed by snow blockades.—Id.

IV. CARRIAGE OF PASSENGERS, 16-32.

A. PERSONAL INJURIES, 16-30.

B. CONTRIBUTORY NEGLIGENCE OF PERSON INJURED, 31-32.

A. PERSONAL INJURIES, 16-30.

1. DEGREE OF CARE REQUIRED OF CARRIER IN GENERAL, 16-19.
2. ACTS OF CARRIER'S EMPLOYEES, 20.
3. ACTIONS FOR INJURIES, 21-30.

1. Degree of care required of carrier in general, 16-19.

16. In the absence of a contract limiting a carrier's liability, it is required to carry passengers as safely as human foresight and reasonable care will permit.—Ryan v. Gilmer, 2 Mont. 517.

17. Carriers of passengers by sleighs are bound to use the utmost human care foresight and skill in the selection of drivers, horses, harness and conveyances.—Id.

18. A common carrier of passengers is bound to exercise only ordinary care toward trespassers and persons refusing to pay fare.—Higley v. Gilmer, 3 Mont. 90.

19. In an action for injuries to a passenger, it was error to instruct that the carrier covenants that he will insure the safe carriage of passengers, but the court should have charged, on request of defendant, that, while the carrier is charged with the highest degree of care, he is not an insurer of the personal safety of his passengers.—Taillon v. Mears, 29 Mont. 161; 74 Pac. 421.

2. Acts of carrier's employees, 20.

20. Under Civ. Code, § 2790, which is merely declaratory of the common law, a carrier is liable for injuries to a passenger caused by the negligent acts of his servants, even though the acts complained of were not within the scope of the servant's employment.—Id.

3. Actions for injuries, 21-30.

21. A prima facie case of negligence is made out against a carrier by proof that its sleigh, while in control of the driver, with the horses traveling six miles an hour on a level road, turned to one side and upset, injuring the plaintiff.—Ryan v. Gilmer, 2 Mont. 517.

22. Where plaintiff was injured by the overturning of defendant's sleigh, in which she was being conveyed for hire, on a level road, and without any apparent cause, proof of the accident and the infliction of the injury establishes a prima facie case against the carrier.—Id.

23. In an action to recover for injuries occasioned by the overturning of defendant's coach, evidence of former accidents occurring under the same driver, is admissible to prove the bad nature of the roads or want of familiarity with them, but not as proof of the negligence of the

driver at the time of the accident.—Higley v. Gilmer, 3 Mont. 90.

24. Where the pleadings in an action for injuries to a passenger in a collision put in issue both the negligence of the company and of its servants, it was proper to charge that a carrier is bound to use the utmost care in transferring passengers, and that for any neglect thereof, either by itself or through its servants, causing injury to a passenger, it is liable.—Hamilton v. Railroad Co., 17 Mont. 334; 42 Pac. 860; 43 Pac. 713.

25. In an action by a passenger for injuries received in a collision, where there was evidence that plaintiff was standing up in the car when the accident happened, and the court had charged that she was guilty of contributory negligence if, in standing, she was not acting as an ordinary prudent person, it was proper to charge that, if she was not guilty of contributory negligence, the fact of the collision raised a presumption of negligence, casting on defendant the burden of showing absence of negligence in itself and employees, and that ordinary foresight could not have avoided the collision.—Id.

26. Where, in an action against a railroad company, plaintiff alleges that he is damaged as the result of specific acts of negligence, he can not recover for negligence outside of such acts, since he must stand on the cause of action stated.—Pierce v. Railway Co., 22 Mont. 445; 56 Pac. 867.

27. A judgment for defendant in an action against a railroad company for damages for negligently running its train through a wind storm, resulting in its derailment, is proper, where there is a mere scintilla of evidence of such negligence, and the prima facie inference arising from the fact of derailment is rebutted.—Id.

28. In an action for injuries by a passenger against a carrier, where an act of plaintiff was the proximate cause of injury, the burden is on plaintiff to prove actionable negligence on the part of defendant.—Taillon v. Mears, 29 Mont. 161; 74 Pac. 421.

29. In an action for injuries to one while a passenger in a stage, it was error to refuse to instruct that, unless the negligent act complained of was the direct and proximate cause of the runaway which resulted in the injury, plaintiff could not recover.—Id.

30. In an action for injuries to one while a passenger in a stage, an instruction that the defendant covenants that he would insure the safe carriage of passengers by the exercise of extraordinary diligence, and was responsible for any neglect, was error, in that it excluded from the jury the inquiry whether or not the runaway which resulted in the injury was accidental, and could have been avoided by the exercise of the utmost care.—Id.

B. CONTRIBUTORY NEGLIGENCE OF PERSON INJURED, 31-32.

31. In an action for damages for personal injuries, when the complaint shows that the proximate cause was plaintiff's own act, in jumping from a coach, "being actuated by just fear of bodily injury by longer remaining therein," it further devolves upon him to allege and prove that in thus acting he exercised that degree of care and prudence that a reasonable person would have used in like circumstances.—Kennon v. Gilmer, 4 Mont. 433; 2 Pac. 21.

32. In an action for injuries by a passenger against a carrier, where an act of plaintiff was the proximate cause of the injury, the burden is on plaintiff to prove want of contributory negligence.—Taillon v. Mears, 29 Mont. 161; 74 Pac. 421.

CERTIORARI.

I. **Nature and Grounds, 1-16.**
- A. Nature and propriety of remedy in general, 1-9.
- B. Particular proceedings in civil actions, 10-12.
- C. Grounds for review in general, 13-14.
- D. Right of review, 15-16.

II. **Proceedings and Determination, 17-32.**
- A. Proceedings to procure review, 17-19.
- B. Review, 20-26.
- C. Appeal or other proceedings for review, 27-28.
- D. Costs, 29-32.

I. NATURE AND GROUNDS, 1-16.

A. Nature and Propriety of Remedy in General, 1-9.
B. Particular Proceedings in Civil Actions, 10-12.
C. Grounds for Review in General, 13-14.
D. Right of Review, 15-16.

A. NATURE AND PROPRIETY OF REMEDY IN GENERAL, 1-9.

1. Under Comp. Stat., p. 205, § 555, providing that the writ of certiorari may be issued where there is no appeal, and §§ 421, 444, providing that an appeal may be taken from the district to the supreme court from any special order made after final judgment, appeal, and not certiorari, is the proper remedy where, in proceedings supplemental to execution, an order is made commanding the clerk to pay to the plaintiff in one action money which had been paid into court in another action in which judgment had been recovered by the plaintiff therein, who was one of the defendants in the first action, against whom judgment was there recovered.—Hayes v. District Court, 11 Mont. 225; 28 Pac. 259.

2. An order for payment of counsel fees and alimony in an action for divorce is an appealable order, and therefore certiorari will not lie to review the action of the lower court in committing defendant for refusing to obey such order.—In re Finkelstein, 13 Mont. 425; 34 Pac. 847.

3. Certiorari will not lie to correct errors committed within the court's jurisdiction, though relator avers inability to furnish an appeal bond.—State v. District Court, 24 Mont. 238; 61 Pac. 309.

4. Where a district court erroneously made an order that appellee in an appeal from a justice's court give bond as a non-resident, or that the action would be dismissed at his cost, a writ of certiorari to review such order would not be dismissed on the ground that plaintiff had a plain, speedy and adequate remedy other than certiorari.—State v. Napton, 24 Mont. 450; 62 Pac. 686.

5. Under Code Civ. Proc., § 1941, certiorari can not issue where there is an appeal, on the ground that the appeal is not a plain, speedy and adequate remedy.—State v. District Court, 24 Mont. 494; 62 Pac. 820.

6. Certiorari will not be granted to review an order for the partial distribution of the estate of a decedent, since Code Civ. Proc. §§ 1721, 1722, give an appeal from such order.—State v. District Court, 26 Mont. 378; 68 Pac. 411.

7. Under Code Civ. Proc., § 1742, an intermediate order substituting a claimant of prop-

erty for defendant in a claim and delivery action may be reviewed on appeal from the final judgment, on exception reserved, and hence certiorari will not lie to have the order annulled as in excess of jurisdiction.—State v. District Court, 28 Mont. 445; 72 Pac. 867.

8. Under Code Civ. Proc., § 1941, to entitle one to a writ of review from the district court, it must appear that the inferior tribunal was performing some judicial act, that such tribunal exceeded its jurisdiction, and that there is no appeal or other speedy and adequate remedy.—State v. Justice Court, 31 Mont. 258; 78 Pac. 498.

9. Where appeal lies, certiorari will not lie.—Id.

B. PARTICULAR PROCEEDINGS IN CIVIL ACTIONS, 10-12.

10. Where sureties on a bond given to obtain stay of execution on appeal fail to justify when excepted to, as required by statute, and respondent thereafter, and before the appeal is determined, obtains an order authorizing execution against appellant, and levies on and sells the latter's property, thereby releasing the sureties, the entry of judgment against them by the lower court, after affirmance on motion of respondent, is in excess of jurisdiction, and reviewable on certiorari.—State v. District Court, 22 Mont. 449; 57 Pac. 89, 145.

11. Rulings of the trial court sustaining defendant's objections to the introduction of evidence on the ground that the complaint failed to state a cause of action, dismissing the complaint, discharging the jury, and entering judgment for defendant, are not reviewable by certiorari, the court having jurisdiction to make the rulings.—State v. District Court, 27 Mont. 280; 70 Pac. 981.

12. Where the court makes an order for the examination of defendant's books and papers without a proper showing, or makes an order which embraces the inspection of papers which, under the circumstances, could contain no evidence relative to the issue, or fails to limit the time within which the inspection should be made, it exceeds its jurisdiction, and certiorari will lie.—State v. District Court, 27 Mont. 441; 71 Pac. 602.

C. GROUNDS FOR REVIEW IN GENERAL, 13-14.

13. Where the court had jurisdiction of the subject matter and of the parties, its action in refusing an injunction and dismissing the action can not be reviewed by certiorari, since the remedy can only be employed to determine whether a tribunal has exceeded its authority.—State v. District Court, 24 Mont. 494; 62 Pac. 820.

14. Under Code Civ. Proc., § 1763, as the district court has jurisdiction of a motion to dismiss an appeal in which the sureties have not justified, certiorari to review an order refusing to dismiss such an appeal will be denied, as not the proper remedy; it being limited to proceedings in which the court has exceeded its jurisdiction.—State v. District Court, 27 Mont. 179; 70 Pac. 516.

D. RIGHT OF REVIEW, 15-16.

15. Code Civ. Proc., § 1942, does not require that the interest of one making affidavit for a writ of certiorari shall be distinguishable from the mass of the community, where the matter sought to be reviewed affects the people generally.—State v. Ravalli, 21 Mont. 469; 54 Pac. 939.

16. The fact that one is an agent or attorney of a party beneficially interested in an application for certiorari does not attract to him the beneficial interest of his principal, so as to enable him to make the application under Code Civ. Proc., § 1942, requiring the application to be made by the party beneficially interested.—State v. Napton, 24 Mont. 450; 62 Pac. 686.

II. PROCEEDINGS AND DETERMINATION, 17-32.

A. Proceedings to Procure Review, 17-19.
B. Review, 20-26.
C. Appeal or Other Proceedings for Review, 27-28.
D. Costs, 29-32.

A. PROCEEDINGS TO PROCURE REVIEW, 17-19.

17. Under Code Civ. Proc., §§ 1942, 774, 778, where it appeared from an application for certiorari that the application was not made by the one beneficially interested, but by another on his behalf, and the defendant had not been misled or jeopardized by reason of the error, an amendment substituting the real party in interest as plaintiff should be allowed.—State v. Napton, 24 Mont. 450; 62 Pac. 686.

18. Code Civ. Proc., § 1942, requires an application for certiorari to be made on affidavit by the party beneficially interested. Sec. 731 declares that all complaints required to be verified may be sworn to by the agent of the party beneficially interested having knowledge of the facts. *Held*, that § 1942 should be construed as meaning that the application should be made by the party beneficially interested, but that the affidavit in support thereof might be made by anyone conversant with the facts.—Id.

19. Where an affidavit applying for a writ of review does not set forth a copy of the order complained of, as required by rule 2, nor state any reason for such non-compliance, the application will be denied.—State v. District Court, 26 Mont. 224; 67 Pac. 114.

B. REVIEW, 20-26.

20. On certiorari to review the proceedings of the county commissioners in removing a county officer from office, the court will inquire whether the board, by the removal, exceeded its jurisdiction.—Carland v. Commissioners, 5 Mont. 579; 6 Pac. 24.

21. Under Comp. Stat., p. 205, § 561, providing that the review on certiorari shall not be extended further than to determine whether the inferior tribunal has regularly pursued its authority, this court, on certiorari to the district court, will only inquire whether the application is properly before it, and, if so, whether the district judge exceeded his jurisdiction.—State v. Judge, 10 Mont. 401; 25 Pac. 1053.

22. On certiorari brought to review the order of the district court imposing costs as a condition of a continuance for absence of evidence, this court will merely inquire whether the district court exceeded its jurisdiction in making such order.—State v. District Court, 10 Mont. 456; 26 Pac. 182.

23. On certiorari this court can not consider an abuse of discretion by the board of equalization in increasing, without sufficient evidence, a valuation of property assessed for taxes.—State v. Ellis, 15 Mont. 224; 38 Pac. 1079.

24. On certiorari to review the appointment

of a receiver of a corporation, the only question to be considered is the jurisdiction of the court to make the appointment, and not whether it properly exercised its discretion in so doing.—State v. District Court, 15 Mont. 324; 39 Pac. 316.

25. Where defendant asked leave to amend his answer, and consented to a setting of the case for trial, and demanded a jury after a motion for new trial had been granted, he can not, by a subsequent attempt to appeal from the order granting said motion, deprive the court of its jurisdiction to proceed with the case; and, to ascertain such facts, the affidavit of the trial judge in return to a writ of certiorari, together with the minutes of the clerk, may be looked to.—State v. District Court, 17 Mont. 329; 42 Pac. 850.

26. On certiorari to determine the propriety of the appointment of a receiver, the court can not consider the weight of the evidence, and the propriety of such appointment, but the review is limited to determining whether the court has regularly pursued its authority.—State v. District Court, 22 Mont. 241; 56 Pac. 281.

C. APPEAL OR OTHER PROCEEDINGS FOR REVIEW, 27-28.

27. So far as certiorari proceedings are concerned there is no distinction between the justice's court of a township presided over by S, justice of the peace, and S, justice of the peace of the township, so that notice of appeal in the name of the justice is sufficient to give jurisdiction; the authority of the "justice of the peace" and the "justice of the peace court" being identical.—State v. Justice Court, 31 Mont. 258; 78 Pac. 498.

28. Under the provisions of Code Civ. Proc., §§ 1944, 1947, 1948, 1950, an appeal from the judgment of the district court on a writ of review to a justice of the peace brings up for review only such questions as appear on the judgment roll, and other papers are not before the court.—Id.

D. COSTS, 29-32.

29. Under Code Civ. Proc., § 1866, and rule 10, the cost of printing briefs in a certiorari proceeding in this court, which was dismissed, will be allowed the defendant on his application.—State v. District Court, 24 Mont. 425; 62 Pac. 688.

30. Under Code Civ. Proc., § 1852, costs will be allowed to a defendant where a certiorari is dismissed, though the judgment awards no costs, and judgment for costs will be entered on application.—Id.

31. Since, under Code Civ. Proc., § 1943, the clerk of a court to which a writ of certiorari is directed must return the transcript required by the writ to the court out of which the writ issued, the outlay incident to the carriage of the return, maps, etc., should be ultimately borne by the party whose fault occasioned the expense.—State v. District Court, 25 Mont. 1; 63 Pac. 402.

32. The fee bill of the clerk of this court, as provided by Pol. Code, § 872, making no provision for an appearance fee in special proceedings, none can be charged by the clerk in a certiorari proceeding.—Id.

CHAMPERTY AND MAINTENANCE.

1. Where as assignor of an interest in a mining claim retained a contingent interest in the property, his agreement, which was a part of the assignment, to prosecute a suit in his own name against an alleged trespasser, for the benefit of the assignee, at the latter's expense, was not champertous.—Finlen v Heinze, 28 Mont. 548, 73 Pac. 123.

CHATTEL MORTGAGES.

I. Requisites and Validity, 1-29.
- A. Nature and essentials of transfers of chattels as security, 1-6.
- B. Form and contents of instruments, 7-10.
- C. Execution and delivery, 11-28.
  1. Execution in general, 11.
  2. Acknowledgment, 12.
  3. Affidavits accompanying instrument, 13-28.
     - (a) Necessity of affidavit, 13-17.
     - (b) Form and sufficiency, 18-21.
     - (c) Who may make, 22-27.
     - (d) Execution and verification, 28.
- D. Validity, 29.

II. Renewal, 30.

III. Construction and Operation, 31-36.

IV. Rights and Liabilities of Parties, 37-50.
- A. Possession or control of property, 37-38.
- B. Conversion of property or proceeds, 39-40.
- C. Actions for possession or value of property, 41-47.
- D. Actions for damages, 48-50.

V. Rights and Remedies of Creditors, 51-60.
- A. In general, 51.
- B. Retention of property, 52-60.

VI. Removal or Transfer of Property by Mortgagor, 61-63.

VII. Foreclosure, 64-66.

VIII. Redemption, 67.

I. REQUISITES AND VALIDITY, 1-29.

A. NATURE AND ESSENTIALS OF TRANSFERS OF CHATTELS AS SECURITY, 1-6.
B. FORM AND CONTENTS OF INSTRUMENTS, 7-10.
C. EXECUTION AND DELIVERY, 11-28.
D. VALIDITY, 29.

A. NATURE AND ESSENTIALS OF TRANSFERS OF CHATTELS AS SECURITY, 1-6.

1. A pre-existing debt is sufficient consideration for a chattel mortgage executed a year afterwards.—Laubenheimer v. McDermott, 5 Mont. 512; 6 Pac. 344.

2. An instrument reciting that in consideration of $500 paid and $450 rent due and goods described "are sold and assigned" to the assignee, and that he shall sell them, retain expenses, fees, etc., and the amount due, and shall pay the balance to the assignor, and which is executed and recorded as a mortgage, and is spoken of as such by the parties, will be treated as a chattel mortgage.—Schwab v. Owens, 10 Mont. 381; 25 Pac. 1049.

3. A bill of sale of personal property, absolute on its face, given as security for the payment of a debt, is in effect a chattel mortgage. —Story v. Cordell, 13 Mont. 204; 33 Pac. 6.

4. A deed conveying property absolutely to a trustee, with directions to sell it, and out of the proceeds to pay certain preferred debts of the grantor, is an assignment for the benefit of creditors, and not a mortgage.—Tuttle v. Bank, 19 Mont. 11; 47 Pac. 203.

5. Civ. Code, § 4652, providing that statutes in derogation of the common law should be liberally construed, does not apply to Comp. Stat., p. 1068, § 1538, requiring chattel mortgages to be duly verified and acknowledged.—Westheimer v. Goodkind, 24 Mont. 90; 60 Pac. 813.

6. Comp. Stat., p. 1068, § 1538, providing that a mortgagee should have a lien on the mortgaged property in possession of the mortgagor, when the mortgage was duly verified and acknowledged, is to be strictly construed, as it is in derogation of the common law.—Id.

B. FORM AND CONTENTS OF INSTRUMENTS, 7-10.

7. A mortgage upon merchandise which describes the property as "stock on hand" is void for uncertainty of description.—Rocheleau v. Boyle, 11 Mont. 451; 28 Pac. 872.

8. A chattel mortgage described the property as "the freight outfit of B, F and P, consisting of 16 head of horses, all freight wagons and harness, being same property described in mortgage given to First National Bank of N, and bearing same description," etc., the bank mortgage referred to containing a detailed description of the property. *Held*, sufficient, not only between the parties, but as to third persons.—Chicago T. & T. Co. v. O'Marr, 18 Mont. 568; 46 Pac. 809.

9. A verbal mortgage of chattels is as binding between the parties thereto as it would be if expressed in writing.—Reynolds v. Fitzpatrick, 23 Mont. 52; 57 Pac. 452.

10. Where a chattel mortgage was given to secure a note, and a part of the sum secured was for future advances, the mortgage was not fraudulent as to creditors, as it was not necessary that the mortgage should show the amount of the intended advances.—Westheimer v. Goodkind, 24 Mont. 90; 60 Pac. 813.

C. EXECUTION AND DELIVERY, 11-28.

1. EXECUTION IN GENERAL, 11.
2. ACKNOWLEDGMENT, 12.
3. AFFIDAVITS ACCOMPANYING INSTRUMENT, 13-28.

1. Execution in general, 11.

11. A county recorder is not authorized to determine the value of gold dust described in a mortgage which is presented to him for recording, and can not know what stamp should be affixed thereto before he records it.—Griffith v. Hershfield, 1 Mont. 66.

2. Acknowledgment, 12.

12. Comp. Stat., p. 1068, § 1538, provided that a chattel mortgage should not be valid, except as between the parties, when the property remained in the possession of the mortgagor, unless it was duly verified and acknowledged. Civ. Code, § 3861, declares that a mortgage defective in form is good against all persons not acquiring rights in good faith. Sec. 1625 provides that the Code shall not affect the validity of former conveyances; and § 4651 provides that it shall not be retroactive. *Held*, that a defectively verified and acknowledged chattel mortgage on property in possession of mortgagor, made while the Compiled Statutes were in force, was determined by such law, and that one who purchased the property after the adoption of the Civil Code, with notice of the mortgage, acquired a title superior to the lien of the mortgage, and the mortgagee could not take the property thereunder.—Westheimer v. Goodkind, 24 Mont. 90; 60 Pac. 813.

3. Affidavits accompanying instrument, 13-28.

13. Under Comp. Stat., p. 1068, § 1538, providing that a mortgage of personal property, allowing the property to remain in possession of the mortgagor, is void as to third parties, unless accompanied by an affidavit of all the parties, or if one is absent, of his attorney or agent, that it is given in good faith, and with no intent to hinder creditors, a mortgage, with an affidavit sworn to by the agent of the mortgagees, but not setting forth their absence, is void as to third parties. (Criticised in Rocheleau v. Boyle, 11 Mont. 451; 28 Pac. 872.)—Leopold v. Silverman, 7 Mont. 266; 16 Pac. 580.

14. Where a note secured by a chattel mortgage includes a sum due to a third person, the goods remaining in the possession of the mortgagor, and the accompanying affidavit of good faith not being sworn to for such third person, the mortgage is void, under Comp. Stat., p. 1068, § 1538.—Id.

15. Under Comp. Stat., p. 1068, § 1538 (see par. 13), a mortgage, with an affidavit sworn to by the agent of the mortgagees, but not setting forth their absence, is void; but this objection can not be considered on a motion for judgment on the pleadings, where the question of possession is in dispute and undetermined.—Id.

16. Under Comp. Stat., p. 1068, § 1538, providing that, where personal property mortgaged remains in the hands of the mortgagor, the mortgage shall be accompanied by an "affidavit of all the parties thereto * * * that the same is made in good faith. * * * and be acknowledged and filed as hereinafter provided," where the mortgage purports to be given to several individuals described as members of a partnership firm, the affidavit is insufficient, if made by one only of such individuals.—Butte Hardware Co. v. Sullivan, 7 Mont. 307; 16 Pac. 588.

17. Under such section, where the mortgage purports to be given to a partnership in the firm name, the affidavit made by one of the

partners in his individual name, but without identifying him as a member of the firm, is insufficient.—Baker v. Power, 7 Mont. 326; 16 Pac. 589.

18. Under Comp. Stat., p. 1068, § 1538, where the mortgage purports to be given to a firm in the firm name, an affidavit made by one partner in his individual name, without identifying him as a member of the firm, is insufficient. —Id.

19. A chattel mortgage, the affidavit to which is defective, and which is not filed in the proper county, if void at all, is void only as to attaching and execution creditors of and purchasers from the mortgagor, and not as to third persons having no rights against the mortgagor.—Marcum v. Coleman, 8 Mont. 196; 19 Pac. 394.

20. Under Comp. Stat., p. 1068, § 1538, providing that no chattel mortgage shall be valid, as against the rights of any other person than the parties thereto, unless the possession of the chattels is delivered to the mortgagee, or that the mortgage provides that the property may remain in the possession of the mortgagor, and is accompanied by an affidavit of all the parties thereto that the same is made in good faith, and is acknowledged and filed, a chattel mortgage is void, as against a subsequent mortgagee, when the affidavit is omitted, though he had actual knowledge of the existence and good faith of the debt attempted to be secured by the prior mortgage.—Milburn v. Johnson, 9 Mont. 537; 24 Pac. 17.

21. An affidavit to a chattel mortgage must be complete in itself as to the facts required by Comp. Stat., p. 1063, § 1538, and its terms can not be aided by reference to the mortgage, but it may be compared with the mortgage to ascertain if all the parties joined in making it. —Marcum v. Coleman, 10 Mont. 73; 24 Pac. 701.

22. A mortgage under which the mortgagor remained in possession of the mortgaged chattels purported to be made between "S W of the first part. * * * and M & L of the second part." *Held*, that an affidavit was sufficient, under Comp. Stat., p. 1068, § 1538, which recited that "S W and M & L, the parties to the foregoing chattel mortgage, being severally and duly sworn, each for himself," made oath to the required facts.—Id.

23. The affidavit of good faith required to be made by the parties to a chattel mortgage (Comp. Stat., p. 1068, § 1538) may be made by one named therein as a party, though he is trustee for another, without the beneficiary joining therein, where the mortgage does not disclose the trusteeship.—Cope v. Foundry Co., 20 Mont. 67; 49 Pac. 387.

24. The requirement that the affidavit of good faith to be attached to a chattel mortgage not accompanied by delivery of the goods shall show the absence of parties making the same by agent (Comp. Stat., p. 1068, § 1538), is not complied with by a statement in the mortgage that a party making affidavit by agent is a foreign corporation, since the mortgage can not be looked to in aid of the affidavit; nor does the statement exclude the idea that the corporation has a local domicile for business purposes. —Id.

25. A chattel mortgage made by "R, F and E, composing" a certain firm, is the mortgage of such persons individually, and hence an affidavit of the good faith thereof, made in the name of the firm, "per" such persons, is insufficient.—Id.

26. A statement signed by all the parties to a chattel mortgage, but the jurat of which does not bear the signature or seal of the officer before whom it was sworn to, is not a sufficient compliance with Civ. Code, § 3861, providing that chattel mortgages shall be void unless accompanied by an affidavit of all the parties thereto, or their agents or attorneys in fact, stating that the mortgage was made in good faith, and without any design to hinder, delay or defraud creditors.—Reynolds v. Fitzpatrick, 23 Mont. 52; 57 Pac. 452.

27. A chattel mortgage of property left in the possession of the mortgagor is void as against attaching creditors where it is not accompanied by the affidavit of the mortgagee required by Civ. Code, § 3861.—First Nat'l Bank v. Beley, 32 Mont. 291; 80 Pac. 256.

28. Under Civ. Code, § 3866, an affidavit of renewal, stating the requisite facts, including the averment of good faith, does not validate a mortgage originally void as to attaching creditors because of the want of the accompanying affidavit of good faith required by § 3861.—Id.

D. VALIDITY, 29.

29. A defect in the affidavit to a chattel mortgage will not invalidate the mortgage as against third persons if the mortgagee takes actual possession thereunder before their rights accrue.—Chicago T. & T. Co. v. O'Marr, 18 Mont. 568; 46 Pac. 809.

II. RENEWAL, 30.

30. The affidavit by filing which a chattel mortgage may be renewed (Comp. Stat., p. 1069, § 1542) is required to state the time to which the debt, not the mortgage, is extended, the provision being that it state "the amount of the debt justly owing at the time of filing such affidavit or the conditions of the obligation unfulfilled, and the time to which the same is extended."—Cope v. Foundry Co., 21 Mont. 18; 52 Pac. 617.

III. CONSTRUCTION AND OPERATION, 31-36.

31. A mortgage of certain crops, "now growing and standing," in a certain field, includes such crops which at the time were nourished and supported by the soil of the earth, and not yet cut or threshed.—Ford v. Sutherlin, 2 Mont. 440.

32. Under Twelfth Session Laws, § 4, providing that chattel mortgages duly recorded shall be good, as against creditors, for not exceeding one year, such a mortgage, as between the parties, may be good for any length of time. —Laubenheimer v. McDermott, 5 Mont. 512; 6 Pac. 344.

33. A creditor does not waive his lien under a chattel mortgage by attaching his debtor's property while the mortgage is still in force; such attachment being unauthorized before foreclosure.—Chicago T. & T. Co. v. O'Marr, 18 Mont. 568; 46 Pac. 809.

34. A took possession of a stock of goods under a chattel mortgage, placing one H in charge, and thereafter mortgages were given to defendants and to intervenors in the order named; H, with A's consent, continued in possession as agent of all the mortgagees. Another mortgage was subsequently executed to plaintiff, who had knowledge of the possession and claims of defendants and intervenors, and plaintiff, after purchasing A's mortgage, presented an order to H, signed by A, whereupon H surrendered possession to plaintiff, who placed B in charge as his agent. *Held*, that B should be treated as holding for all parties, and that plaintiff had a first lien only as to the mortgage purchased from A.—Id.

35. A bona fide sub-purchaser of chattels takes free from the lien of an unrecorded mort-

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27. A chattel mortgage of property left in the possession of the mortgagor is void as against attaching creditors where it is not accompanied by the affidavit of the mortgagee required by Civ. Code, § 3861.—First Nat'l Bank v. Beley, 32 Mont. 291; 80 Pac. 256.

28. Under Civ. Code, § 3866, an affidavit of renewal, stating the requisite facts, including the averment of good faith, does not validate a mortgage originally void as to attaching creditors because of the want of the accompanying affidavit of good faith required by § 3861.—Id.

D. VALIDITY, 29.

29. A defect in the affidavit to a chattel mortgage will not invalidate the mortgage as against third persons if the mortgagee takes actual possession thereunder before their rights accrue.—Chicago T. & T. Co. v. O'Marr, 18 Mont. 568; 46 Pac. 809.

II. RENEWAL, 30.

30. The affidavit by filing which a chattel mortgage may be renewed (Comp. Stat., p. 1069, § 1542) is required to state the time to which the debt, not the mortgage, is extended, the provision being that it state "the amount of the debt justly owing at the time of filing such affidavit or the conditions of the obligation unfulfilled, and the time to which the same is extended."—Cope v. Foundry Co., 21 Mont. 18; 52 Pac. 617.

III. CONSTRUCTION AND OPERATION, 31-36.

31. A mortgage of certain crops, "now growing and standing," in a certain field, includes such crops which at the time were nourished and supported by the soil of the earth, and not yet cut or threshed.—Ford v. Sutherlin, 2 Mont. 440.

32. Under Twelfth Session Laws, § 4, providing that chattel mortgages duly recorded shall be good, as against creditors, for not exceeding one year, such a mortgage, as between the parties, may be good for any length of time. —Laubenheimer v. McDermott, 5 Mont. 512; 6 Pac. 344.

33. A creditor does not waive his lien under a chattel mortgage by attaching his debtor's property while the mortgage is still in force; such attachment being unauthorized before foreclosure.—Chicago T. & T. Co. v. O'Marr, 18 Mont. 568; 46 Pac. 809.

34. A took possession of a stock of goods under a chattel mortgage, placing one H in charge, and thereafter mortgages were given to defendants and to intervenors in the order named; H, with A's consent, continued in possession as agent of all the mortgagees. Another mortgage was subsequently executed to plaintiff, who had knowledge of the possession and claims of defendants and intervenors, and plaintiff, after purchasing A's mortgage, presented an order to H, signed by A, whereupon H surrendered possession to plaintiff, who placed B in charge as his agent. *Held*, that B should be treated as holding for all parties, and that plaintiff had a first lien only as to the mortgage purchased from A.—Id.

35. A bona fide sub-purchaser of chattels takes free from the lien of an unrecorded mort-

gage, though the first purchaser had notice.—Caplice v. Beauchamp, 22 Mont. 258; 56 Pac. 278.

36. The taking of a mortgage on a chattel by defendant's grantor in June is no acknowledgment by defendant, who purchased the chattel from his grantor in the following March, of the mortgagor's title.—Potter v. Lohse, 31 Mont. 91; 77 Pac. 419.

IV. RIGHTS AND LIABILITIES OF PARTIES, 37-50.

A. Possession or Control of Property, 37-38.

B. Conversion of Property or Proceeds, 39-40.

C. Actions for Possession or Value of Property, 41-47.

D. Actions for Damages, 48-50.

A. POSSESSION OR CONTROL OF PROPERTY, 37-38.

37. A chattel mortgage provided that the property should remain in the possession of the mortgagor until default upon the condition that the mortgagor should not dispose of the property or remove or suffer it to be removed from the county, or allow it to be taken from his possession by legal process or otherwise, and that any violation of such conditions would authorize the mortgagee to take immediate possession of the property. *Held*, that such conditions were valid, and on attachment the mortgagee may take possession of the property.—Eddy v. Kenney, 5 Mont. 502; 6 Pac. 342.

38. Where defendants, intervenors and plaintiff were in joint possession of a stock of goods under chattel mortgages, defendants, whose mortgage was a first lien, brought suit against the mortgagor on their debt, attached the property and sold the same under execution. *Held*, that defendants were liable to the other mortgagees for the value of the property so converted.—Chicago T. & T. Co. v. O'Marr, 18 Mont. 568; 46 Pac. 809.

B. CONVERSION OF PROPERTY OR PROCEEDS, 39-40.

39. In an action for conversion it appeared that plaintiff sold certain personal property, and took a mortgage to secure payment, and, after the mortgagors had paid a part of the price, they, with the consent of the mortgagee, sold their interest to another, who orally agreed to pay the mortgagee the balance due, and accept the property subject to the terms of the mortgage. The mortgage was void as to the creditors of the mortgagors, because not accompanied by an affidavit of good faith. The property was delivered by the mortgagors to the second purchasers, and it was thereafter levied upon by defendants in a suit by creditors of the former. The mortgage, by its terms, provided that the mortgagee should be entitled to the immediate possession of the property if attached by creditors of the mortgagors. *Held*, that it was error to grant defendant a nonsuit on the ground that plaintiff had no title or right to possession which would support conversion.—Reynolds v. Fitzpatrick, 23 Mont. 52; 57 Pac. 452.

40. A mortgagee can maintain an action of conversion against one who takes the mortgaged property from his mortgagor after default in the conditions of the mortgage, where the mortgage provides that the mortgagee shall be entitled to possession on default in the conditions of the mortgage.—Id.

C. ACTIONS FOR POSSESSION OR VALUE OF PROPERTY, 41-47.

41. A mortgagee of personal property can not maintain an action of claim and delivery to recover possession of same from a third person, when the mortgage provides that the mortgagor shall retain possession. Right of possession is necessary as a basis for the action.—Laubenheimer v. McDermott, 5 Mont. 512; 6 Pac. 344.

42. In an action by the first mortgagee against a subsequent mortgagee to recover possession of mortgaged chattels, in which the second mortgagee claims that the first mortgage was given in fraud of creditors, evidence that the mortgagor was allowed to buy and sell goods after the execution of the first mortgage is inadmissible to show its invalidity on the ground of fraud.—Schwab v. Owens, 10 Mont. 381; 25 Pac. 1049.

43. Where a second mortgage recites that it is in consideration of $950 money paid and rent due, but that the mortgagee may retain out of the proceeds only $450 for cash paid and rent due, "besides expenses of sale and fees," and the evidence is conflicting as to the amount due, but shows that in no case was it more than $450, a verdict, in an action for possession of the property, for $1850 to the second mortgagee, in case the first mortgagee retains the property, is unsupported by the evidence.—Id.

44. A complaint in claim and delivery by a chattel mortgagee against a prior mortgagee, whose mortgage is invalid against third persons, is insufficient, where it does not state that plaintiff's mortgage was filed, as required by Comp. Stat., p. 1069, § 1541.—Cope v. Foundry Co., 20 Mont. 67; 49 Pac. 387.

45. A complaint in claim and delivery by a chattel mortgagee against a prior mortgagee, whose mortgage is invalid as to third persons, is insufficient, where it shows that plaintiff's debt has matured, whereon his mortgage expired, under Comp. Stat., p. 1069, § 1542, unless renewed as therein provided, and avers only the conclusion that the mortgage was extended.—Id.

46. In an action by a mortgagee to recover possession of chattels taken from him under execution against the mortgagor, in which plaintiff claims that the mortgagor had no interest at the time of the levy, the mortgage and notice of sale thereunder are admissible on behalf of defendant, as tending to show the interest that the mortgagor had at the time of levy.—Sweetman v. Ramsey, 22 Mont. 323; 56 Pac. 361.

47. In an action of claim and delivery, brought by a mortgagee for the wrongful seizure of property under a writ of execution, the measure of damages if return of the goods can not be had is the value of the goods up to the amount of the indebtedness, with accrued interest, and not the value of the property and the amount of the indebtedness with interest.—Gallick v. Bordeaux, 31 Mont. 328; 78 Pac. 583.

D. ACTIONS FOR DAMAGES, 48-50.

48. A complaint by a mortgagee for wrongful seizure of the mortgaged goods, which shows that the mortgage debt was not due when the complaint was filed, need not allege its nonpayment.—Marcum v. Coleman, 8 Mont. 196; 19 Pac. 394.

49. In conversion by a mortgagor of a chattel against a purchaser from the mortgagee who was rightfully in possession, a charge to find for plaintiff if he was the owner of the property and defendant had knowledge of his rights, was erroneous, as ignoring the question of plaintiff's right to possession.—Potter v. Lohse, 31 Mont. 91; 77 Pac. 419.

50. Where a mortgagee of a chattel right-

fully in possession thereof sells it to another, the mortgagor, who has neither paid nor tendered the mortgage indebtedness, has no right of possession such as to entitle him to maintain conversion against the purchaser.—Id.

V. RIGHTS AND REMEDIES OF CREDITORS, 51-60.

A. In General, 51.
B. Retention of Property, 52-60.

A. IN GENERAL, 51.

51. An unauthorized sale of mortgaged property by the mortgagee before maturity of the mortgage debt, the mortgage being valid, and the mortgagor acquiescing in the sale, is not invalid as to creditors who had no lien on the property.—Noyes v. Ross, 23 Mont. 425; 59 Pac. 367.

B. RETENTION OF PROPERTY, 52-60.

52. Under Comp. Stat., p. 1068, § 1538, providing that a chattel mortgage shall be void as to third persons, unless the property be delivered to the mortgagee, or if the mortgage provide that it remain with the mortgagor, unless an affidavit accompany it, stating it was given in good faith, without intent to hinder or delay creditors, a mortgage of a stock of goods providing that the mortgagor may sell in the usual course of trade is void.—Leopold v. Silverman, 7 Mont. 266; 16 Pac. 580.

53. A mortgage of a stock of goods, providing that the mortgagor might sell in the usual course of trade, accounting to the mortgagee, it appearing that the mortgagor, by consent, received a portion of the sales, is void. —Id.

54. A chattel mortgage on a lot of specifically described articles, fixtures, etc., and "also all the wines, liquors and cigars now in and upon said premises, of whatever kind, character or description, whether for consumption or otherwise," and providing that the mortgagor shall "have the right to remain in possession, and carefully use" the property, until default, and that if the mortgagor shall "make way with, sell or in any manner dispose of it," the mortgagee shall have the right to immediate possession, it is not void as to the mortgagor's creditors, on the ground that by its terms it was given solely to hinder and delay them.—Schwab v. Owens, 10 Mont. 381; 25 Pac. 1049.

55. Though a mortgage of personal property may be void as to part of the property for uncertainty of description, or where such part is covered by a provision which violates the statute, it is not thereby void in toto, but where the good faith of the parties is admitted, such mortgage may be enforced as to other property, sufficiently described and not affected or embraced within the unlawful provision.—Rocheleau v. Boyle, 11 Mont. 451; 28 Pac. 872.

56. A mortgage which leaves possession with the mortgagor, with power to sell the goods in the course of trade without accounting for the proceeds, is void as to creditors, though accompanied with the proper affidavit, as under such circumstances the possession of the mortgaged property can not be said to remain in the mortgagor as security for the debt, as permitted by Comp. Stat., p. 1068, § 1538.—Id.

57. Where a mortgage given on a baker's stock in trade permitted the mortgagor to retain possession of the goods, which he continued to sell in the regular course of trade, and the mortgagee from time to time purchased such goods from the mortgagor, such sales were clearly made with the mortgagee's knowledge and consent.—Id.

58. The provision of Comp. Stat., p. 1068, c. 92, that no mortgage of goods shall be valid as against the rights of any other person than the parties thereto unless accompanied by delivery, or the mortgage provides that the mortgagor may remain in possession, and be accompanied by affidavits of the parties thereto, and be acknowledged and recorded, applies to a bill of sale made by a debtor to his creditor, and a contemporaneous agreement that if the debt is paid within a fixed time the bill of sale shall be cancelled; and, such formalities not being observed, the transaction is void as to the debtor's assignee for the benefit of creditors—Story v. Cordell, 13 Mont. 204; 33 Pac. 6.

59. Where the property embraced in a bill of sale consists of barrels of whiskey, and they are merely marked by the creditor's agent with a cross and the creditor's name, and moved from their position in the debtor's warehouse out into the middle of the room, there is no delivery within the provision of Comp Stat., p. 1068, c. 92, that no mortgage of goods shall be valid as against the rights of any other persons than the parties thereto, unless accompanied by delivery.—Id.

60. Where a chattel mortgagee permitted the mortgagor to retain possession of the goods, and to sell and dispose of them without accounting for the proceeds to the mortgagee, the mortgage was fraudulent as to creditors and subsequent purchasers from the mortgagor in good faith. —Stevens v. Curran, 28 Mont. 366; 72 Pac. 753.

VI. REMOVAL OR TRANSFER OF PROPERTY BY MORTGAGOR, 61-63.

61. The owner of personal property that has been mortgaged can sell or exchange the same without affecting the validity of the mortgage. —Davis v. Blume, 1 Mont. 463.

62. In an action for conversion, plaintiff did not claim to be the owner of the property converted, but claimed the right to the immediate possession thereof by reason of an alleged default in the terms of a verbal mortgage claimed by him to cover the property. *Held*, error, under Civ. Code, § 3861, to exclude testimony that, prior to any assertion by plaintiff of his rights under the mortgage, the mortgagor, who then had possession of the property, had sold the same to a third person, who had no notice of plaintiff's rights, as this evidence tended to show title in the third person, and therefore to defeat the action.—Reynolds v. Fitzpatrick, 28 Mont. 170; 72 Pac. 510.

63. In conversion by a chattel mortgagee, plaintiff must allege (1) that at the date of the conversion he was the owner and holder of the notes in question; (2) that the notes had not been paid, or, if paid in part, the amount then due; (3) that he had some property interest in the chattels converted, either general or special, and was either in actual possession or entitled to the possession thereof; and (4) the value of the property converted.—Harrington v. Stromberg, 29 Mont. 157; 74 Pac. 413.

VII. FORECLOSURE, 64-66.

64. The mortgagees of personal property should take immediate possession of the property after the maturity of their debt, or endeavor to do so with sufficient diligence; otherwise, they lose their lien, as against the purchaser from the mortgagor during the default.— Travis v. McCormick, 1 Mont. 148.

65. Where a chattel mortgage provides for the payment of the debt secured in monthly in-

stallments, with a clause providing that the mortgagee may take possession of the property at any time he may deem it necessary in order to protect his interests, upon the failure to pay one of the installments the whole will become due and the mortgagee may take the property and sell it without becoming liable for damages, where it is not denied in the answer that he deemed it necessary to take the property into his own possession.—Clark v. Baker, 6 Mont. 153; 9 Pac. 911.

66. Under Comp. Stat., p. 158, § 358, declaring that there shall be but one action for the recovery of any debt secured by mortgage, "which action shall be in accordance with the provisions of this chapter," relating to the foreclosure of mortgages, a creditor can not waive his chattel mortgage security, sue on the debt, and attach his debtor's property, but must bring suit to foreclose.—Largey v. Chapman, 18 Mont. 563; 46 Pac. 808.

VIII. REDEMPTION, 67.

67. In an action to redeem from a chattel mortgage, a complaint which alleges that after the maturity of the debt the assignee of the mortgagee took possession of the property and has ever since held possession, treating the same as his own and selling portions thereof, but which does not allege any facts showing that in taking possession defendant in any way violated the terms of the mortgage or otherwise wrongfully converted the property, fails to show grounds for equitable relief.—Crowe v. La Mott, 14 Mont. 355; 36 Pac. 452.

CITIZENS.

1. Citizens of the United States, who have left their former residence without intending to return, and with the intention of residing in Montana, are citizens of that state.—Donovan v. Smith, 21 Mont. 344; 53 Pac. 1133.

CLERKS OF COURTS.

1. Laws 1891, p. 219, provides that the clerk of the district court may, in vacation, grant letters of guardianship, "where no protests or objections are made or filed thereto"; and that any such act of the clerk "shall be binding on all the parties interested therein until the next term of the court after they are entered of record, when they shall be read in open court, and approved, set aside, or modified; but until so set aside or modified it shall have the same force and effect as if done by the court." *Held*, that the statute does not give the clerk any judicial power, and therefore does not authorize a clerk in vacation to adjudge a person insane, and to appoint a guardian.—In re Kane's Estate, 12 Mont. 197; 29 Pac. 424.

2. Laws 1891, p. 208, requiring the clerk of the supreme court to collect "in advance" from the appellant a docket fee of $10 on filing the transcript, applies to criminal cases appealed by the state.—State v. Northrup, 13 Mont. 424; 34 Pac. 608.

3. Laws 1891, p. 235, reducing the salary of the clerk of the district court from that allowed by the law in existence at the time of his election, which was the same as allowed under the territorial legislature, does not violate Const., art. 20, § 5, providing that clerks of the district courts, "until otherwise provided by law," shall be entitled to the same fees as are now provided by law for the clerks of the district courts of the territory.—Clark v. Silver Bow, 17 Mont. 80; 42 Pac. 104.

4. The fee bill of the clerk of the supreme court, as provided by Pol. Code, § 872, makes no provision for the collection of an appearance fee in special proceedings. Hence none can be charged by such clerk in such proceedings.—State v. District Court, 24 Mont. 425; 62 Pac. 688.

5. Code Civ. Proc. § 1943, declares that the clerk of a court to which a writ is directed in special proceedings shall return the writ with the transcript required; and the fee bill of the clerk, as provided by Pol. Code, § 4636, makes no provision for the collection of a fee for making a transcript in such case. *Held*, that a fee for making a transcript was not a necessary disbursement, and that the clerk was not authorized to collect a transcript fee.—Id.

COLLEGES AND UNIVERSITIES.

1. Under the express provisions of Pol. Code, § 1636, the state treasurer is bound to turn over to the treasurer of the state agricultural college the proceeds from the sale of bonds issued, under § 1630, for the benefit of said college, immediately on receipt of the money; and the proper disbursement of such fund is a matter with which the state treasurer has no concern.—State v. Wright, 17 Mont. 77; 42 Pac. 103.

2. Act Cong. Feb. 22, 1889, granted to the state, subject to Act Cong. Jul. 2, 1862, certain lands for the use of agricultural colleges. Act Cong. Jul. 2, 1862, provided that lands so granted should be sold, and the proceeds invested as a perpetual fund, the interest to be appropriated to the support of at least one college in such manner as the legislature might prescribe. Const., art. 17, § 2, provided for the temporary leasing of such lands until they should be sold, and art. 11, § 4, authorized such sale. Art. 11, § 12, devoted the interest on invested funds from sales and rents from leased lands to the maintenance of the institution to which the grant belonged. Pol. Code, §§ 3470-3519, 3590-3595, authorize the leasing of unsold lands by the land commissioner, and the payment of revenues derived therefrom into the state treasury. Id., § 1516, declares that the board of education shall receive all funds and incomes to which any of the state educational institutions may be entitled to be used for the specific purpose of the grant. Sec. 1513 provides that the state treasurer shall be the treasurer of this board. Sec. 1625 gives the immediate control of the state agricultural college to an executive board, the treasurer of which should give bond to the state board of education. *Held*, that the legislature had not failed to prescribe how the income from the grant should be appropriated to the support of the agricultural college, and it was the duty of the state treasurer to pay the warrants drawn by the executive board on the income in his possession.—State v. Barrett, 26 Mont. 62; 66 Pac. 504.

3. The income from the lease of lands granted was available for the use and support of the agricultural college, it not being a condition precedent to its right thereto that the lands should be sold, and the proceeds invested so as to provide an income from the interest thereon.—Id.

4. The funds and income derived from the grant were trust funds, to be disposed of through the agency of the state, and were not subject to Const., art. 7, § 20, providing that claims against the state other than for the salary or compensation of a public officer should be audited and allowed by the state board of examiners, and paid only on the warrant of the state auditor.—Id.

COMMERCE.

1. A law requiring a license for selling goods does not, by its effect in raising the price

thereof, become a restriction upon commerce and repugnant to the constitution of the United States. (See 129 U. S. 104.)—Territory v. Farnsworth, 5 Mont. 304; 5 Pac. 869.

2. U. S. Const., art. 1, § 8, relating to the regulation of interstate commerce, applies as well where the commerce is carried on by corporations as when carried on by natural persons. —McNaughton v. McGirl, 20 Mont. 124; 49 Pac. 651.

3. Where a foreign corporation sent its agent into Montana to buy or solicit the assignment of wool to its warehouses in other states, the business thus conducted was interstate commerce, within U. S. Const., art. 1, § 8, giving congress the exclusive power to regulate interstate commerce.—Id.

4. Act Mar. 8, 1893, requiring every foreign corporation, before commencing business in the state, to designate an agent and its principal place of business, and declaring its contracts void on failure to comply, in so far as it applies to foreign corporations engaged in interstate commerce, is void.—Id.

5. Where a foreign corporation sells goods within the state, there is no presumption that the sales are interstate commercial transactions, so as to render inapplicable Act Mar. 8, 1893, requiring such corporations to do certain acts as a condition precedent to the right to do business in the state.—Kent v. Tuttle, 20 Mont. 208; 50 Pac. 559.

6. Pol. Code, § 4071, as amended by Act Mar. 6, 1897, providing that every corporation "doing business in this state" as a telephone company must pay a license, in each county where such business is transacted, of 75 cents per year for each instrument in use, is not invalid as regards a telephone company doing business within the state, also engaged in interstate traffic, the statute being intended only to apply to instruments used solely in business within the state.—State v. Telephone Co., 27 Mont. 394; 71 Pac. 311.

7. An express company transacting interstate and intra state business is not liable for an occupation tax, under Pol. Code, § 4074, since the statute, not making any discrimination between local and interstate business, contravenes the federal constitution, giving congress sole power to regulate interstate commerce.— State v. Express Co., 27 Mont. 419; 71 Pac. 404.

8. Civ. Code, § 681, applying as it does only to business of insurance companies transacted within the state, is not objectionable as interfering with interstate commerce.—Northwestern M. L. Ins. Co. v. Lewis and Clark, 28 Mont. 484; 72 Pac. 982.

CONFUSION OF GOODS.

1. In an action for damages sustained by plaintiffs, owing to defendants having removed ore from within the boundaries of plaintiff's location, an instruction that if defendants had carried away ores belonging to plaintiffs, and in so doing they were mixed with other ores to which defendants were entitled, so that the amount of each could not be ascertained, plaintiffs were entitled to recover the value of all ores taken with which the ores belonging to plaintiffs were mixed, was erroneous.—Maloney v. King, 30 Mont. 158; 76 Pac. 4.

CONSPIRACY.

1. Where a person is an agent and trustee of the United States, goods come rightfully into his possession and he can not be guilty of stealing such goods, yet all this does not in the least take away his power to enter into a conspiracy to defraud the United States by combining and confederating with others to fraudulently dispose of such goods.—United States v. Upham, 2 Mont. 170.

2. In an indictment for an offense, which in the statute is set out disjunctively, the particular offense must be distinctly charged.— Territory v. Carland, 6 Mont. 14; 9 Pac. 578.

3. U. S. R. S., § 5508, provides that if two or more persons go in disguise upon the premises of another, with the intent to prevent or hinder his free enjoyment of any right secured by the constitution and laws of the United States, they shall be fined, etc. An indictment founded on such section averred that the defendants had interfered with the rights of the complaining witnesses as the owners of a certain mining claim, but it also averred that the notice of the location of the claim, and the declaratory statement thereof, had been filed in the names of certain other persons, who were associated with the complainants in the ownership of the claim. *Held*, that such indictment was insufficient, as whatever rights the complainants had under such lease they had surrendered when they allowed their associates to make the declaratory statement in their own names exclusively, under U. S. R. S., §§ 2322, 2324, providing that all records of mining claims shall contain the names of the locators, and that the locators of all mining locations shall have the exclusive enjoyment of all the surface within the lines of their locations.—United States v. Ringeling, 8 Mont. 353; 20 Pac. 643.

4. Under Comp. Stat., p. 460, § 302, providing that two or more defendants jointly indicted for a misdemeanor shall be tried jointly or separately, in the discretion of the court, error can not be predicated on the refusal of a separate trial to one of three defendants jointly charged with conspiracy (a misdemeanor), in the absence of a showing of an abuse of discretion.—State v. Davis, 13 Mont. 384; 34 Pac. 182.

CONSTITUTIONAL LAW.

I. Amendment of Constitution, 1-2.
II. Construction, Operation, and Enforcement of Constitutional Provisions, 3-11.
III. Distribution of Governmental Powers and Functions, 12-21.
A. Legislative powers, and delegation thereof, 12-19.
B. Judicial powers and functions, 20.
C. Executive powers and functions, 21.
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IX. Privileges or Immunities, and Class Legislation, 49-55.
X. Equal Protection of Laws, 56-57.
XI. Due Process of Law, 58-67.
XII. Right to Justice, and Remedies for Injuries, 68-71.

I. AMENDMENT OF CONSTITUTION, 1-2.

1. Compliance with Const., art. 19, § 9, requiring the secretary of state to publish proposed amendments in full for three months before the election to be held for their ratification, is essential to the validity of any amendment; art. 3, § 29, making all the provisions of the constitution mandatory, unless expressly declared to be otherwise.—State v. Tooker, 15 Mont. 8; 37 Pac. 840.

2. Const., art. 8, § 5, as amended by Laws 1897, p. 57, by providing for calling in a district judge when a supreme court judge is disqualified, is void for failure to enter on the journals of both houses of the legislature a full copy of the proposed amendment, before its submission to the people, as provided by art. 19, § 9.—Durfee v. Harper, 22 Mont. 354; 56 Pac. 582.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS, 3-11.

3. The constitution of a state should be liberally construed to determine the primary purpose of any constitutional enactment.—State v. Kenney, 10 Mont. 410; 25 Pac. 1022.

4. The provisions of a constitution will be construed to operate prospectively only, unless a retrospective intention is clearly expressed.—State v. Kenney, 11 Mont. 553; 29 Pac. 89.

5. Const., art. 3, § 15, does not abrogate Comp. Stat., p. 1058, § 1495, et seq., granting to the owners of mining claims a right of way across the claims of others, and providing for the assessment of damages by commissioners, but merely modifies the statute as to the method of determining the damages, leaving the jurisdiction and procedure in other respects unchanged.—State v. District Court, 14 Mont. 476; 37 Pac. 7.

6. Comp. Stat., 817, § 697, declaring the liability of the corporation to a servant in case of injury from negligence of his superior to be the same as if the servant were a passenger, having application only to a domestic railroad corporation created under the act, is annulled by Const., art. 15, § 11,—Criswell v. Montana Central, 18 Mont. 167; 44 Pac. 525.

7. Where, in construing a provision of the state constitution, it appears it was adopted from the constitution of another state, and that previous to such adoption the court of last resort of the parent state had placed on the provision an interpretation not clearly erroneous, the presumption is that the convention adopting the provision was conversant with and designed to adopt the interpretation given.—State v. Fortune, 24 Mont. 154; 60 Pac. 1086.

8. House Bill No. 162 of the legislative assembly of 1897 is entitled "An Act to add to art. 2, c. 12, tit. 10, pt. 3, of the Political Code, a section to be numbered 4084." Sec. 8 of the act purports to add a section, to be numbered 4084 to art. 2, c. 13, tit. 10, pt. 3, of the Political Code. The proposed § 4084 adds a penalty of 10% to the amount of certain liquor licenses in case action is brought to collect the same. Pol. Code, § 4044, directs $15 damages to be included in the judgment in case of a suit on liquor licenses and a recovery. In a suit to recover a liquor license after the passage of the proposed amendment, judgment was rendered for $15 damages, which was less than 10% of the amount of the license. *Held*, that on appeal it was unnecessary to decide whether the failure to mention § 4084 properly in the title would render the section invalid, as the amount of damages awarded did not exceed that authorized by § 4044.—State v. Courtney, 27 Mont. 378; 71 Pac. 308.

9. A court will not pass on the constitutionality of a statute unless it is absolutely necessary to a decision of the case.—State v. King, 28 Mont. 268; 72 Pac. 657.

10. Any invalidity of the local option law (Pol. Code, §§ 3180-3188), on account of its failure to except from its provisions liquor for medicinal or sacramental purposes, or imported in original packages, can not avail one who sold liquor otherwise than for those purposes or in that manner.—In re O'Brien, 29 Mont. 530; 75 Pac. 196.

11. In the matter of legislation, the people, through the legislature, have plenary power, except in so far as prohibited by the constitution, and one denying the authority in any given instance must point out distinctly the particular constitutional provision limiting or prohibiting the power exercised.—Missouri River Power Co. v. Steele, 32 Mont. 433; 80 Pac. 1093.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS, 12-21.

A. LEGISLATIVE POWERS, AND DELEGATION THEREOF, 12-19.
B. JUDICIAL POWERS AND FUNCTIONS, 20.
C. EXECUTIVE POWERS AND FUNCTIONS, 21.

A. LEGISLATIVE POWERS, AND DELEGATION THEREOF, 12-19.

12. Act Nov. 22, 1867, authorizing county commissioners to call in all outstanding orders against the treasuries of their respective counties, and issue bonds in lieu thereof, is within the scope of legislative power.—Thomas v. Smith, 1 Mont. 21.

13. A statute providing a rule of procedure, in certain cases, for the observance of courts in the exercise of their jurisdiction, even though mandatory upon the courts, is not invalid as encroaching upon the judiciary.—Godbe v. McCormick, 1 Mont. 105.

14. The legislature may make the adoption of a city charter dependent on the consent of the resident taxpaying householders.—People v. Butte, 4 Mont. 176; 1 Pac. 414.

15. U. S. Stat., vol. 20, p. 89, enacting that timber growing on the public mineral lands in Montana may be cut for building, agricultural, mining and other domestic purposes, "subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the undergrowth growing on such lands, and for other purposes," is constitutional, and the rules and regulations of the secretary of the interior made thereunder are not unconstitutional, as trenching upon the domain of the legislative department of the government.—United States v. Williams, 6 Mont. 379; 12 Pac. 851.

16. The district courts, in punishment of contempts for the disobedience of orders made by them on their equity side, are not limited to the punishment provided by the statutes of the territory.—Zimmerman v. Zimmerman, 7 Mont. 114; 14 Pac. 665.

17. Under Const., art. 8, §§ 2, 3, 15, the legislature had no power to regulate the physical form of the pleadings and instruments to be filed with this court; and Act Mar. 9, 1901, known as "Senate Bill No. 101," providing that transcripts on appeal may be printed or typewritten, at the election of appellant, is invalid.—Jordan v. Andrus, 26 Mont. 37; 66 Pac. 502.

18. The local option liquor law (Pol. Code, §§ 3180-3188) is not unconstitutional as being

a delegation of legislative power.—In re O'Brien, 29 Mont. 530; 75 Pac. 196.

19. The power to punish for contempt is inherent in the district courts, and exists independently of statutes, and can not be taken away or so far abridged by the legislature as to leave such courts without proper and vigorous means of protecting themselves from insult or of actually enforcing their lawful orders. —State v. Clancy, 30 Mont. 193; 76 Pac. 10.

B. JUDICIAL POWERS AND FUNCTIONS, 20.

20. The courts may compel an executive officer to perform a mere ministerial act.—Chumasero v. Potts, 2 Mont. 242.

C. EXECUTIVE POWERS AND FUNCTIONS, 21.

21. The powers conferred by Act Jan. 12, 1865, § 4, "to protect and regulate the irrigation of land in Montana Territory," on commissioners to apportion water, was judicial, and can not be granted by the legislative assembly, under the organic act of the territory. —Thorp v. Woolman, 1 Mont. 168.

IV. POLICE POWER IN GENERAL, 22.

22. In the exercise of the "police power," citizens may, for the public good, be constrained in their conduct with reference to matters in themselves lawful and right.—Butte v. Paltrovich, 30 Mont. 18; 75 Pac. 521.

V. PERSONAL, CIVIL, AND POLITICAL RIGHTS, 23.

23. Pen. Code, § 293, subd. 7, in making the publication of a false and grossly inaccurate report of the proceedings of any court a contempt, and also a criminal offense, does not violate Const., art. 3, § 10, providing that no law shall be passed impairing the freedom of speech, and allowing every one to speak, write or publish whatever he will, "being responsible for all abuse of that liberty."—State v. Faulds, 17 Mont. 140; 42 Pac. 285.

VI. VESTED RIGHTS, 24-29.

24. The holder of a territorial warrant, which, under the statute, may be received for taxes, has no such vested rights as to prevent the repeal of the statute.—Langford v. King, 1 Mont. 33.

25. When rights have become vested under a valid contract, legislative authority can not invalidate such contract or disturb such rights.—Northern Pacific v. Carland, 5 Mont. 146; 3 Pac. 134.

26. Statutes of limitation, being founded on public policy, and conferring no vested rights, may shorten the period for commencing actions on existing debts, if a reasonable time for commencing the suit is given before the bar takes effect.—Guiterman v. Wishon, 21 Mont. 458; 54 Pac. 566.

27. Act Feb. 8, 1865, § 1 (Bann. Stat., p. 454), providing that the property of deceased joint tenants shall be treated as if there had been a tenancy in common, affected subsequent accruing rights only, since the legislature had no power to interfere with existing rights by converting joint tenancies into tenancies in common.—Butte & B. C. M. Co. v. M. O. P. Co., 25 Mont. 41; 63 Pac. 825.

28. Laws 1899, p. 115, amending Civ. Code, § 3996, so as to allow a negotiable instrument to contain a provision for reasonable attorney's fees, is constitutional, the change affecting the remedy only.—Bullard v. Smith, 28 Mont. 387; 72 Pac. 761.

29. The preferential right given to a successful contestant under 21 Stat. 140, was not a property or vested right which could be enforced against the government, but a mere privilege of becoming the first entryman.—Graham v. Townsite Co., 30 Mont. 393; 76 Pac. 808.

VII. OBLIGATIONS OF CONTRACTS, 30-41.

30. A statute giving a sub-contractor a direct lien is not rendered unconstitutional by the fact that under existing laws contractors are not expressly made the agents of the owners, as an implied agency is created by contracting with reference to the law giving the lien.—Merrigan v. English, 9 Mont. 113; 22 Pac. 454.

31. Where an act of incorporation reserves no right to repeal or amend the charter, an exemption from taxation therein granted is a contract between the state and the incorporators, which the state can not impair by subsequent legislation.—Northern Pacific v. Carland, 5 Mont. 146; 3 Pac. 134.

32. In the absence of constitutional restrictions, a legislature, having power to create a particular office, and to regulate the manner in which it shall be filled, and the term and duties of the incumbent, has the power to lengthen or abridge such term, or to declare the office vacant, and appoint another to fill the vacancy.—People v. Van Gaskin, 5 Mont. 352; 6 Pac. 30.

33. The executory contracts of a state, as its promises to pay for services rendered under agreements authorized by law, have no legal obligation. They depend upon good faith for their performance, and can not be enforced at law.—State v. Kenney, 9 Mont. 389; 24 Pac. 96.

34. An administrator's claim to fees allowed by statute is not a contract, within the inhibition of the United States constitution prohibiting a state from passing a law impairing the obligation of contracts.—In re Dewar's Estate, 10 Mont. 426; 25 Pac. 1026.

35. It is within the legislative power of a state, unless restrained by some provision of the constitution itself, to create, modify or abolish an office, or to increase or diminish the compensation of the officer.—Lloyd v. Silver Bow, 11 Mont. 408; 28 Pac. 453.

36. Act Jul. 1, 1895, extending the time for redemption of premises sold under mortgage, as applied to mortgages executed before its passage, impairs the obligation of the contract, and is unconstitutional. (See Barnitz v. Beverly, 163 U. S. 118.)—State v. Gilliam, 18 Mont. 94; 44 Pac. 394; 45 Pac. 661.

37. Civ. Code, § 1034, making enforceable contracts of any foreign corporation made before it had filed statement and certificate, if it thereafter make such filing, does not impair the obligations of contracts, but merely affords a remedy.—Mutual Benefit L. I. Co. v. Winne, 20 Mont. 20; 49 Pac. 446.

38. Where a contract was made with reference to Pol. Code, § 1601, which provided that, if certain state warrants to be issued in payment of work on the state school of mines buildings should not be paid on presentation for lack of money in the state school of mines fund, out of which they were to be paid, they should bear interest at the rate of 7% per annum from the date of presentation, Laws 1897, p. 124, repealing Pol. Code, § 1601, was void as to such contract, being in conflict with U. S. Const., art. 1, § 10, forbidding the impairment of the obligations of contracts by state legislation,

and Mont. Const., art. 3, § 2, to the same effect; and hence the holder was entitled to interest on such warrants.—State v. Barrett, 25 Mont. 112; 63 Pac. 1030.

39. A statute changing the rate of interest which a judgment shall bear after entry is not unconstitutional as affecting a contract right, within U. S. Const., art. 3, § 11.—Stanford v. Coram, 28 Mont. 288; 72 Pac. 655.

40. Code Civ. Proc., § 3842, providing that a mortgage can be created, renewed or extended only by writing, with the formalities required in the case of a grant of real property, if retroactive, would be unconstitutional, as impairing the validity of the contract of renewal.—Wilson v. Pickering, 28 Mont. 435; 72 Pac. 821.

41. In a suit by a minority stockholder of a mining corporation to restrain the sale of the corporate property, *held*, as to a mining corporation organized between 1889 and 1898, the authority conferred on such corporation to sell its property by Laws 1899, p. 113, was not violative of U. S. Const., art. 1, § 10, and the Constitution of Montana, art. 3, § 11, as impairing the obligation of contracts.—Allen v. Mining Co., 30 Mont. 490; 77 Pac. 47.

VIII. RETROSPECTIVE AND EX POST FACTO LAWS, 42-48.

42. Const., art. 3, § 8, reducing the number of grand jurors required to investigate criminal charges, is not ex post facto in respect to an offense committed before the constitution was adopted.—State v. Ah Jim, 9 Mont. 167; 23 Pac. 76.

43. Act Feb. 18, 1895, providing that money loaned on school bonds afterwards declared by the supreme court to be void may be repaid out of the proceeds of sale of subsequent bonds, does not conflict with Const., art. 15, § 13.—State v. Dickerman, 16 Mont. 278; 40 Pac. 698.

44. Under Comp. Stat., p. 505, § 19, providing that express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof, a conclusive presumption of malice arises on proof of the deliberate, intentional, and unlawful killing of another; so that Pen. Code, § 351, which provides that express malice exists when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature, did not change the rules of evidence as to murder committed prior to its adoption so as to render it an ex post facto law.—State v. Gay, 18 Mont. 51; 44 Pac. 411.

45. Const., art. 15, § 13, forbidding the enactment of any law for any corporation or individual, retrospective in its action, does not inhibit a general retrospective act enabling foreign corporations on thereafter filing statement and certificate to enforce contracts made while the law provided that contracts made by such corporations before such filing should be void and invalid as to them.—Mutual Benefit L. I. Co. v. Winne, 20 Mont. 20; 49 Pac. 446.

46. Act Feb. 8, 1865, § 1 (Bann. Stat., p. 454), providing that the property of deceased joint tenants shall be treated as if there had been a tenancy in common, was not retrospective in its operation, since the legislature had no power to interfere with existing rights by converting joint tenancies into tenancies in common.—Butte & B. C. M. Co. v. M. O. P. Co., 25 Mont. 41; 63 Pac. 825.

47. Act Feb. 7, 1865, § 2 (Bann. Stat., p. 454), provides that, if any person shall exercise exclusive ownership over or injure property held in joint tenancy, tenancy in common or coparceny, the party aggrieved shall have his action of trespass or trover for the injury in the same manner as if such tenancy did not exist. *Held*, that this section was not merely remedial, but was intended to substantially alter the rights of co-tenants, and make violation of these rights constitute legal injuries, and hence could not be retroactive in its operation, so as to violate the constitutional safeguard protecting vested rights.—Id.

48. Laws 1899, p. 115, amending Civ. Code, § 3996, so as to allow negotiable instruments to contain provision for reasonable attorney's fees, even if construed as affecting notes given prior to its passage, is not objectionable as being retrospective: the only constitutional limitation as to retrospective legislation being Constitution, art. 3, § 11, prohibiting ex post facto laws and laws impairing the obligation of contracts.—Bullard v. Smith, 28 Mont. 387; 72 Pac. 761.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION, 49-55.

49. Laws 1889, p. 175, which requires graduates of all medical schools thereafter beginning the practice of medicine within the territory to submit to an examination by the territorial board of examiners, but which exempts from such examination persons having practiced for 10 years within the territory, is not in conflict with U. S. Const., art. 4, § 2, providing that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"; nor does it abridge the privileges or immunities of citizens of the United States, within the XIVth amendment, § 1.—Craig v. Medical Examiners, 12 Mont. 203; 29 Pac. 532.

50. The proceeding authorized by Const., art. 3, § 8, allowing prosecutions by information with leave of court, without preliminary examination having been had, is not a deprivation of the liberty of the citizen without due process of law, and does not abridge the privileges and immunities of any citizen as guaranteed by the XIVth amendment.—State v. Brett, 16 Mont. 360; 40 Pac. 873.

51. The objection that Pol. Code, §§ 4079, 4080, requiring a license fee of $25 from a male laundryman with an assistant, while allowing steam laundries to be conducted with a license of only $15 per quarter, was meant to affect Chinamen only, is without merit, since the act itself expressly relates to every male laundryman.—State v. French, 17 Mont. 54; 41 Pac. 1078.

52. Pol. Code, § 4079, does not violate the XIVth amendment, providing that no state shall deny to any person the equal protection of the laws.—Id.

53. Const., art. 3, § 8, providing that prosecutions shall be either by information or indictment, and authorizing the court to decide which method shall be pursued in each particular case, is not an abridgement of the privileges and immunities of citizens.—State v. Little Whirlwind, 22 Mont. 425; 56 Pac. 820.

54. Code Civ. Proc., §§ 1900, 1901, authorizing any corporation incorporated in the state for guarantying or becoming a surety on bonds to become a sole surety without an affidavit showing qualifications, is not a special law granting to a corporation a special or exclusive privilege, within the prohibition of Const., art. 5, § 26, though such right is not enjoyed by other corporations, and individual sureties must be at least two in number, and must accompany the bond with an affidavit of qualifications.—King v. Elling, 24 Mont. 470; 62 Pac. 783.

55. Conceding that Laws 1901, p. 166, § 2, punishes proprietors of games of chance, while patrons of the game enjoy immunity, it

is not unconstitutional as class legislation, no exception being made of the persons who fall within its operation.—State v. Woodman, 26 Mont. 348; 67 Pac. 1118.

X. EQUAL PROTECTION OF LAWS, 56-57.

56. A city ordinance requiring certain classes of professional men to pay a license tax is not unconstitutional, in that such tax is not required of all classes of professional men, where the tax bears equally upon all persons of the class named.—Bozeman v. Cadwell, 14 Mont. 480; 36 Pac. 1042.

57. An ordinance does not deny the equal application of the law because regulating the hours of operating pawn shops, loan offices, and second hand stores, only.—Butte v. Paltrovich, 30 Mont. 18; 75 Pac. 521.

XI. DUE PROCESS OF LAW, 58-67.

58. Comp. Stat., p. 486, § 463, providing that when a person is arrested for any criminal offense his real estate and mining claims shall be liable for any judgment imposing a fine or costs, and that such judgment shall be a lien from the time of arrest, is not unconstitutional as encumbering the property without any hearing, adjudication or legal process.—Silver Bow v. Strumbaugh, 9 Mont. 81; 22 Pac. 453.

59. Comp. Stat., p. 826, § 713, providing that every railroad corporation within the territory, which shall damage or kill any horse by running against it with an engine, shall be liable to the owner for its value, is unconstitutional for attempting to impose a liability on such corporation without any negligence or breach of duty on its part.—Bielenberg v. Montana Union, 8 Mont. 271; 20 Pac. 314.

60. Rev. Stat., p. 579, § 816, making license fees a first lien on all property held and used in any of the trades, occupations or professions, for which a license is required, and making it the duty of the county treasurer, on failure or refusal of any person to procure a license when required, "to seize any of the property upon which a lien is hereby created, or any other property belonging to such person * * * and sell the same in the manner provided for sheriffs on execution to satisfy said license and costs," but making no provision for giving notice to the owner of such property of the seizure and sale thereof, is unconstitutional, as depriving persons of property without due process of law.—Chauvin v. Valiton, 8 Mont. 451; 20 Pac. 658.

61. Laws 1891, p. 267, requiring railroad companies to build fences sufficient to prevent live stock from going upon their tracks, or else respond in damages for animals killed or injured, and allowing double damages when not paid within 30 days after notice, is constitutional.—Beckstead v. Montana Union, 19 Mont 147; 47 Pac. 795.

62. Code Civ. Proc., §§ 3377, 3380, in effect authorizing the state to contradict its own witness, and to ask him whether he has made other statements, are not repugnant to Const., art. 3, § 27 (U. S. Const., 14 amend., § 1), prohibiting the deprivation of liberty without due process of law.—State v. Bloor, 20 Mont. 574; 52 Pac. 611.

63. Code Civ. Proc., § 592, as amended by Laws 1899, p. 134, provides that, if any person shall exercise acts of exclusive ownership over property held in joint tenancy or tenancy in common, the party aggrieved shall have his action for the injury as if such tenancy did not exist, and, further, that a co-tenant or joint tenant shall not thereby be prevented from entering the common property at a point not actually occupied by his co-tenants and extracting ore, subject to an accounting for the profits to the other tenants *Held*, that such act being an attempt to impair vested rights of co-tenants to enter and extract ores without accounting therefor, under Code Civ. Proc., § 592, existing at the time it became operative, it was repugnant to Const., art. 3, § 3, declaring the right of persons to acquire and possess property and be protected from deprivation thereof.—Butte & B. C. M. Co. v. M. O. P. Co., 25 Mont. 41; 63 Pac. 825.

64. The action of the court, on the hearing of an order to show cause why an injunction should not issue, in rejecting evidence for defendant and issuing an injunction because defendant was guilty of contempt in violating a restraining order, is a denial of the process of law.—Harley v. M. O. P. Co., 27 Mont. 388; 71 Pac. 407.

65. Code Civ. Proc., § 1314, authorizing an inspection of mining claims in an action to determine adverse claims thereto, is not unconstitutional as depriving the owner of the claims inspected of his property without due process of law.—State v. District Court, 28 Mont. 528; 73 Pac. 230.

66. Laws 1897, p. 219, § 30, providing that when a street improvement is made the city council shall enact by ordinance that the expense shall be paid by the entire district created as previously provided, according to area, is not unconstitutional as depriving the property owner of his property without due process of law, in that such provision is a legislative declaration that all property in the proposed district is benefitted by the improvement, and to the same extent.—McMillan v. Butte, 30 Mont. 220; 76 Pac. 203.

67. Act Dec. 10, 1903, amending Code Civ. Proc., § 189, so as to provide for the disqualification of district judges on the filing of an affidavit of prejudice, is not in violation of U. S. Const., amend., 14, § 1, nor Const. Mont., art. 3, § 27, as depriving a client of his property without due process of law, in that no notice is required to be given of the filing of the disqualifying affidavit, since, as the mere filing of the affidavit works the disqualification, the giving of notice would serve no purpose.—State v. Clancy, 30 Mont. 529; 77 Pac. 312.

XII. RIGHT TO JUSTICE, AND REMEDIES FOR INJURIES, 68-71.

68. The provision in Org. Act that bills of exception and appeals shall be allowed in all cases is not infringed by requiring appellants to comply with the provision of the statute regulating the method of taking appeals. (See 117 U. S. 282.)—Kleinschmidt v. McAndrews, 4 Mont. 8, 223; 2 Pac. 286.

69. Laws 1889, p. 172, amending Comp. Stat., p. 1035, § 1394, so as to provide that, in an action to enforce mechanics' or other liens, plaintiff shall, if successful, recover "a reasonable attorney fee" as costs, is not repugnant to Const., art. 3, § 6, providing "that courts of justice shall be open to every person and a speedy remedy afforded for every injury of person, property or character, and that right and justice shall be administered without sale, denial or delay."—Wortman v. Kleinschmidt, 12 Mont. 316; 30 Pac. 280.

70. Code Civ. Proc., § 180, as amended by Act Dec. 10, 1903, provides for the disqualification of district judges by the filing of an affidavit of prejudice, upon the filing of which the judge is authorized to transfer the cause or call in another judge to try the same. Sec. 215 authorizes a change of venue where a judge is disqualified, and as amended by the same act declares that, if the judge is dis-

qualified for prejudice no change shall be granted if another judge is called in to try the cause within 30 days. *Held*, that such amendatory act was not in contravention of Const., art. 3, § 6 guarantying administration of justice without delay, in that it permits a party filing a disqualifying affidavit to prevent further action in case the disqualified judge will not call in another judge, since in that event the opposite party would at once be entitled to a change of venue under § 615.—State v. Clancy, 30 Mont. 529; 77 Pac. 312.

71. Act Dec. 10, 1903, amending Code Civ. Proc., § 180, authorizing each party to a suit to disqualify five district judges by filing an affidavit of prejudice, could not be held in contravention of Const., art. 6, § 3, guarantying the administration of justice without delay, though it authorizes the successive disqualification of two-thirds of the district judges in the state, in the absence of a showing that the "necessary consequence" of the enforcement of the act will be to deny litigants a speedy trial. —Id.

CONTEMPT.

I. Acts or Conduct Constituting Contempt of Court, 1-12.

II. Power to Punish, and Proceedings Therefor, 13-28.

III. Punishment, 29.

I ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT, 1-12.

1. In proceedings to punish defendants for contempt in wagering upon a decision of the court, it appeared that, while one of them supposed he was making an actual wager for one J, the money obtained by him from J with which to make the wager, was furnished by the other defendant and party to the wager, who had agreed that J should not loose the money. *Held*, that there was no wager, and therefore no contempt.—Territory v. Murray, 7 Mont. 251; 15 Pac. 145.

2. Defendant was a party to certain actions in the supreme court, known as the "Smoke House cases," all of which were of a similar character, and part of which had been decided in his favor. While a part of them were pending before the court, defendant caused to be published, in a newspaper published in the city where the court was sitting, a dispatch falsely stating that persons named had made a wager that, owing to the influence of adverse claimants, the supreme court would reverse its former decision in the "Smoke House cases." *Held*, a contempt at common law.—Id.

3. The provision of Rev. Stat., p. 145, § 566, declaring "disorderly, contemptuous, and insolent behavior towards the judge while holding court, tending to interrupt the due course of a trial, or other judicial proceeding," to be a contempt, embraces the case of one sending a contemptuous telegram for publication in a newspaper published in the city where the court is sitting.—Id.

4. The act of incorporation of the city of Butte (Comp. Stat., p. 700, § 371) confers on the police magistrate exclusive jurisdiction of actions arising under the city ordinances, and, in addition, the same jurisdiction as is conferred by law on justices of the peace. Comp. Stat., p. 271, §§ 816, 817, provide that a justice may punish any person guilty of a contempt in his court, as defined by this act, by fine or imprisonment, or both, but the fine shall not exceed $100, nor imprisonment one day. Sec. 584 provides that such punishment may be inflicted for "disorderly, contemptuous, or insolent behavior towards the judge while holding court, tending to interrupt the due course of a trial or other judicial proceeding," and for "any other unlawful interference with the process or procedure of a court" *Held*, that the police magistrate has no power to inflict a fine, with imprisonment in default of payment thereof, on the writer of a newspaper article attacking the system of city ordinances under which the police court is organized, and declaring that abuses have existed therein, but without mentioning any specific case in such court.—In re Shannon, 11 Mont. 67; 27 Pac. 352.

5. Defendant published in a newspaper, in reference to proceedings then pending for the probate of a will, the following article: "An old timer, who is familiar with the * * * Davis will case, * * * said: 'Prejudice? Why, of course, there is prejudice. I tell you there is money enough in this business to corrupt every corruptible man in the state. * * * Unless a change of venue is granted, the jig is up for the contestants of the will.'" *Held*, not a contempt of the court in which the proceeding was pending.—In re McKnight, 11 Mont. 126; 27 Pac. 336.

6. A witness who refuses to answer a question which is neither relevant nor pertinent to the matter in issue is not punishable for contempt in persisting in such refusal.—Id.

7. Comp. Stat., p. 211, § 584, subd. 9, provides that "any other unlawful interference with the process or proceedings of a court" shall constitute contempt. *Held*, that the unauthorized employment of counsel to appear for another may constitute contempt.—Blaine v. Briscoe, 16 Mont. 582; 41 Pac. 1092.

8. Under Pen. Code, § 293, subd. 7, making the publication of a false and grossly inaccurate report of the proceedings of any court a contempt, and also a criminal offense, a publication of an article charging a court with dealing out injustice in certain cases pending before it, and entering into a "dirty deal" to do so, is contempt.—State v. Faulds, 17 Mont. 140; 42 Pac. 285.

9. A void order of court may be attacked collaterally, and it is not contempt to dispute it. —State v. District Court, 21 Mont. 155; 53 Pac. 272.

10. Where, under an order of this court, staying proceedings under an order appointing a receiver, the receiver, in good faith, and under advice of counsel, did not return the property to the person from whom it was taken, the question of whether or not the order staying proceedings operated to require such a return, being previously unlitigated, the receiver was guilty of merely a technical contempt, and should be required to pay only a nominal fine. —Rumney v. Donovan, 28 Mont. 69; 72 Pac. 305.

11. A chief of police and his subordinates, who, with actual knowledge that a writ of habeas corpus had been issued for a certain prisoner under their control, endeavored to avoid the service and execution of the writ, and aided in delivering the prisoner into the custody of a messenger from the governor of another state, under extradition process, were guilty of contempt of court.—State v. District Court, 29 Mont. 230; 74 Pac. 412.

12. Under Code Civ. Proc., §§ 1944, 1945, a judge of a district court is not guilty of contempt in altering an order after he has been served with a writ of review from the supreme court directing that "all proceedings under said order be stayed," the stay being by its terms limited to the enforcement of the order.—In re Harney, 29 Mont. 370; 74 Pac. 1080.

II. POWER TO PUNISH, AND PROCEEDINGS THEREFOR, 13-28.

13. Whether or not a publication is contemptuous is to be determined from a consideration of the language used, and the defendant's denial under oath of any improper or disrespectful intent is not conclusive.—Territory v. Murray, 7 Mont. 251; 15 Pac. 145.

14. A court may punish as contempt the misconduct of witnesses and counsel before a referee appointed by the court.—In re Haldorn, 10 Mont. 222; 25 Pac. 101.

15. Under Const., art. 8, § 3, the supreme court has authority to issue a writ of certiorari to the district court to review a proceeding in contempt.—In re McKnight, 11 Mont. 126; 27 Pac. 336.

16. Contempt proceedings are reviewable by the supreme court on certiorari.—State v. District Court, 13 Mont. 347; 34 Pac. 39.

17. An order for payment of temporary alimony being appealable, and such appeal, with stay bond, furnishing a complete remedy against the enforcement of the order, certiorari will not lie to review the action of the court in committing defendant for contempt in disobeying the order, the provision of Const., art. 8, § 3, that the justices of the supreme court may issue writs of certiorari in proceedings for contempt in the district court, not being intended to apply where there is a remedy by appeal—In re Finklestein, 13 Mont. 425; 34 Pac. 847.

18. An order of the court in committing a person for contempt for refusal to pay alimony pending divorce can not be reviewed by certiorari or habeas corpus, but the remedy is by proceedings to nullify the judgment.—State v. District Court, 14 Mont. 396; 40 Pac. 66.

19. Although the publication of a contemptuous report of the proceedings of a court is punishable as a misdemeanor, this does not deprive the court of the power to punish such act as a contempt.—State v. Faulds, 17 Mont. 140; 42 Pac. 285.

20. Code Civ. Proc., § 2170 declares it a contempt of court to disobey any lawful judgment, order or process thereof; and § 2179 provides that one guilty of such contempt shall be liable to a fine not exceeding $500, etc. Pen. Code, § 2910, provides that all fines collected in courts other than police courts must be applied to the payment of the costs of the case in which the fine is imposed. *Held*, that the judgment against relator, giving costs to complaining witnesses in civil contempt proceedings for violation of an injunction order obtained by them restraining such relator from interfering with their riparian rights, was invalid, since such costs must be paid from the fine imposed.—State v. District Court, 24 Mont. 33; 60 Pac. 493.

21. Under Code Civ. Proc., § 171, and § 2170, subd. 5, where there had been disobedience of an order made at a term of court, the judge at chambers in vacation had power to punish the same as contempt.—State v. Loud, 24 Mont. 428; 62 Pac. 497.

22. Under Code Civ. Proc., §§ 1860, 3472, 1866, on the dismissal, at cost of relator, of a writ of review to review an order in a contempt proceeding, such proceeding being special, defendant was entitled to the fee paid by him for the judgment and minute entries included in his return, and also for the expense of making the transcript, excepting certain pages consisting merely of recitals by defendant.—State v. District Court, 26 Mont. 224; 68 Pac. 470.

23. Where, on habeas corpus, and certiorari in aid thereof to review an order of commitment in a contempt proceeding, relator asked that the evidence be certified up, defendant, on dismissal at the costs of relator, was entitled to costs for the expense of transcribing the evidence into longhand, under Code Civ. Proc., § 1860.—In re Boyle, 26 Mont. 365; 68 Pac. 409; 68 Pac. 471.

24. In a proceeding for contempt of court the costs can not be charged to the contemners. —State v. District Court, 29 Mont. 230; 74 Pac. 412.

25. Const., art. 7, § 11, provides that the legislature in extra session shall have no power to legislate on any subjects other than those specified in the proclamation or which may be recommended by the governor. The governor, in calling the second extra session of the 8th legislature, announced in a proclamation the necessity for general legislation whereby bias and prejudice of district judges shall constitute a disqualification, and legislation making suitable provision for the trial of such cases in such event. No additional recommendations relative to the matter were made, and the legislature enacted only the amendment to Code Civ. Proc., §§ 180, 615. The former added to the then existing grounds of disqualification for district judge a fourth, viz., where a party makes affidavit that he can not have a fair trial before a district judge by reason of his bias or prejudice. The latter provided that no change of venue in a civil action shall be granted where the parties agree on a judge pro tempore, etc. *Held*, that the two amendments must be construed as correlative and co-extensive, and, as the latter applies only to civil actions, and not to contempt proceedings, the former can not be construed so as to enable a party to disqualify a judge to punish him for contempt.—State v. Clancy, 30 Mont. 193; 76 Pac. 10.

26. Code Civ. Proc., §§ 2170-2183, relative to contempts, define them and provide for their summary punishment, with process of arrest, bail, hearing, fine, or imprisonment. Pen. Code, §§ 1970-1981, provide for a change of venue in criminal cases. Code Civ. Proc., § 615, relative to the place and trial of civil actions, as amended by 2d Ex. Sess. 8th Leg., adds to the original section providing for change of venue a provision that, in case the parties shall agree on another district judge or on a member of the bar as judge pro tempore, or if any qualified district judge shall be called in, and within 30 days shall appear and assume jurisdiction, no change of venue shall be granted. *Held*, that contempt proceedings being of a criminal nature, the above amendment is inapplicable thereto.—Id.

27. Code Civ. Proc., § 180, as amended by Act Dec. 10, 1903, making the alleged prejudice of a district judge a ground of disqualification in civil cases, and providing for a change of venue under certain circumstances therefor, has no application to a motion to strike the answer of a defendant from the files, which was treated by both parties as a proceeding in contempt.—State v. District Court, 30 Mont. 547; 77 Pac. 318.

28. Where a petition for an order to show cause why S should not be held for contempt of court in violating a decree was demurred to, whether the decree was sustained by the pleadings and the evidence could not be considered on the demurrer, the court having had jurisdiction of the parties and the subject matter.—State v. District Court, 32 Mont. 1; 79 Pac. 319.

III. PUNISHMENT, 29.

29. The district court has power to punish for contempt by striking the defendant's answer from the record, where, defendant being absent from the territory, punishment for the contempt can not be otherwise inflicted.—Zimmerman v. Zimmerman, 7 Mont. 114; 14 Pac. 665.

CONTINUANCE.

I. Grounds, 1-6.
II. Admissions to Prevent, 7.
III. Application and Procedure, 8-9.

I. GROUNDS, 1-6.

1. The refusing or granting of a continuance rests in the sound discretion of the court to whom the application is made, and this court can not review this discretion, unless it was grossly abused.—Black v. Appolonio, 1 Mont. 342.

2. In passing upon a motion for a continuance a court is not confined to the statements in the affidavit as to the degree of diligence used in procuring the attendance of a witness, but can take into consideration those facts which are within his judicial knowledge concerning the condition of the country and the means of communication.—Id.

3. The power to grant or the refusal to grant a continuance rests in the legal discretion of the trial court.—Wormall v. Reins, 1 Mont. 627.

4. An immaterial amendment in a declaration, introducing no new matter, and which can not prejudice the defendant in his defense, does not entitle the defendant to a continuance.—Id.

5. The trial court has discretionary power to permit a complaint to be amended at the close of the evidence to conform to the proof, and to deny a motion for a postponement of the trial therefor, where the amendments presented no other issues than those tried in the evidence, and it did not appear from the affidavits filed at the time the ruling was made, or in support of the motion for new trial, that the defendant had other evidence which it could have presented, had the postponement been granted.—M. O. P. Co. v. Mining Co., 27 Mont. 288; 70 Pac. 1114.

6. Where it appeared from the record that defendant had three counsel, two of whom were partners, an affidavit for a continuance until after a certain date, which stated that counsel who was to try the case was to be engaged in the supreme court on the day set for trial and the two following days, but which failed to show any reason why his partner could not attend to the business in the supreme court, or why the other counsel could not try the case, was insufficient to show error in the refusal of the continuance.—York v. Steward, 30 Mont. 363; 76 Pac. 755.

II. ADMISSIONS TO PREVENT, 7.

7. Under Code Civ. Proc., § 1039, the fact that plaintiff admitted that defendant's absent witnesses would testify as alleged, if present, did not deprive plaintiff of the right to object to the competency, relevancy and materiality of such facts.—Tague v. John Caplice Co., 28 Mont. 51; 72 Pac. 297.

III. APPLICATION AND PROCEDURE, 8-9.

8. The court, in passing upon a motion for continuance, is not confined to the statements in the affidavit, but can take into consideration those facts which are within his judicial knowledge concerning the condition of the country and the means of communication, in determining whether due diligence has been used to procure the absent evidence.—Black v. Appolonio, 1 Mont. 342.

9. Comp. Stat., p. 121, § 253, authorizes a continuance on account of absence of material testimony when the adverse party refuses to admit that such testimony would be given, and that "upon terms" the court may, in its discretion, postpone a trial upon other grounds than the absence of evidence. Sec. 503 authorizes the courts to impose costs as a condition of granting a continuance. *Held*, that costs may be imposed as a condition of continuance for absence of evidence.—State v. District Court, 10 Mont. 456; 26 Pac. 182.

CONTRACTS.

I. Requisites and Validity, 1-33.
A. Nature and essentials in general, 1-3.
B. Acceptance of terms, 4.
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I. REQUISITES AND VALIDITY, 1-33.

A. Nature and Essentials in General, 1-3.
B. Acceptance of Terms, 4.
C. Formal Requisites, 5-6.
D. Consideration, 7-17.
E. Legality of Object and of Consideration, 18-33.

A. NATURE AND ESSENTIALS IN GENERAL, 1-3.

1. An agreement to extend the time of payment of a debt till a bank which had suspended should resume payment is void for uncertainty.—Ahlstrom v. Fitzpatrick, 17 Mont. 295; 42 Pac. 757.

2. An instrument arising from and based on transactions had between the parties at its date, acknowledging an indebtedness, and promising to pay it, is a contract.—Noyes v. Young, 32 Mont. 226; 79 Pac. 1063.

3. In an action on an instrument acknowledging an indebtedness, and promising to pay it on the happening of a certain contingency, the actual occurrence of the contingency renders untenable a contention that the contract is void for uncertainty.—Id.

B. ACCEPTANCE OF TERMS, 4.

4. In order to constitute a binding contract, the terms of payment, as well as the other terms of the contract, must be agreed upon.—Brophy v. Provision Co., 31 Mont. 279; 78 Pac. 493.

C. FORMAL REQUISITES, 5-6.

5. Under the internal revenue law imposing a duty on written instruments evidencing an agreement to pay money, a written instrument stating that there was due a certain person a certain amount of gold dust, the money value of which is not expressed and can not be ascertained from the terms of the instrument, is not subject to the duty.—Griffith v. Hershfield, 1 Mont. 66.

6. The lowest bidder for the construction of a building, who fails to execute a bond, or to sign a contract therefor, as he understood he was to do, can not maintain an action for damages for breach of the contract, based upon his bid.—Hogan v. Shields, 20 Mont. 438; 52 Pac. 55.

D. CONSIDERATION, 7-17.

7. Where one voluntarily expends moneys in behalf of another, without the latter's knowledge or request, the subsequent promise of the latter to repay the sum so expended is void, being without consideration.—Savage v. Burns, 3 Mont. 527.

8. An agreement by one of three parties to the other two, all three of whom were equally obligated to a fourth party, to procure the payment of their common indebtedness from other resources of an insolvent company, for which they were personal security, is without any consideration and void. (See 116 U. S. 599).—Kinna v. Woolfolk, 4 Mont. 318; 1 Pac. 401.

9. The maker and payee of two notes agreed in writing that certain stock had been deposited as collateral to secure the payment of the notes, and that on payment the stock should be delivered to said maker, but if the notes were not paid the stock should be delivered to the payee, to be by him held and disposed of as collateral security. *Held*, that an agreement, independent and separate from said written agreement, that the collateral should first be exhausted before bringing suit, would have to be supported by an independent consideration.—Fisher v. Briscoe, 10 Mont. 124; 25 Pac. 30.

10. An allegation that plaintiff made a contract with a water company to furnish it with water for a certain period, and that the company sold its rights in the contract to defendant, who "assumed" the contract, that defendant collected the price and water rates mentioned in the contract, discloses a valuable consideration for the assumption of the contract.—Horsky v. Water Co., 13 Mont. 229; 33 Pac. 689.

11. Where a written instrument is sued on as an original and complete contract, not as an admission of a balance due on any other contract, and the complaint alleges that no part of the sum due under it has been paid, a payment which plaintiff admits defendant has made is no part of the amount expressed in the contract sued on, and hence it can not be relied on to support a previous oral agreement as the basis and consideration of the written contract—Easterly v. Jackson, 29 Mont. 496; 75 Pac. 357.

12. Where joint owners of land entered into a contract for its sale, agreeing to execute deeds in escrow on the first payment being made, the refusal of one of them to sign the deeds on such payment was not a valid consideration for the purchaser's promise to pay him an additional sum.—Id.

13. Under Civ. Code, § 2185, subd. 5, and § 2186, 2204, 2281, where one who purchased land from joint owners thereof agreed to pay one of them a sum in addition to that named in the written contract of sale, to induce him to execute the contract, such agreement, being nullified by the written agreement, does not constitute any consideration for a subsequent written agreement whereby the purchaser agreed to pay such sum.—Id.

14. An agreement not to enforce a judgment until a claim of a third party against the judgment creditor should be settled was based on no consideration.—Burton v. Kipp, 30 Mont. 275; 76 Pac. 563.

15. Where a sister of a decedent makes a claim in behalf of the decedent's estate, and her right to recover was disputed by the alleged debtor, the settlement of the claim and the agreement to forbear suing thereon was a sufficient consideration for the execution of a contract between the sister and the alleged debtor, and in an action thereon it was not necessary to determine whether the sister could have successfully maintained the claim against the alleged debtor.—Noyes v. Young, 32 Mont. 226; 79 Pac. 1063.

16. A promissor may bind himself by merging an oral agreement into a written contract, and can not escape liability merely because the consideration had passed to the promissees prior to the execution of the written contract.—Id.

17. In an action on an instrument acknowledging an indebtedness and promising to pay it, no consideration need be averred or proved independently of the proof of the contract itself, under Civ. Code, §§ 2169, 2170.—Id.

E. LEGALITY OF OBJECT AND OF CONSIDERATION, 18-33.

18. By the terms of a contract entered into between several owners of different water rights connected with the working of certain placer mining land, it was covenanted that each of said owners, under penalty of $10,000 as agreed and liquidated damages, should not sell his water right, or interest therein, without the written consent of all the parties thereto, and also, that, without such written consent, neither should make any sale to or settlement or compromise with certain parties who were then endeavoring to obtain possession of said water rights, or any other person or persons who might thereafter endeavor to obtain possession of the same. It was also covenanted that each should join with the others in the event of any litigation arising with reference to said water rights. *Held*, that such a contract is void as being contrary to public policy, as being analagous to contracts in restraint of trade, and on the ground that it imposes a restraint and condition upon compromises and settlements of litigation and disputes.—Ford v. Gregson, 7 Mont. 89; 14 Pac. 659.

19.—In an action upon a contract, declared to be void as being against public policy, to recover the penalty therein, where the part of the contract which is contrary to public policy is a substantial part thereof, such part can not be disregarded, and the law will not recognize the contract.—Id.

20. A contract to sell a brand of cigars to no one in the state but defendant, and to give

him the exclusive agency for such sale, is not in restraint of trade.—Newell v. Meyendorff, 9 Mont. 254; 23 Pac. 333.

21. A contract by which plaintiff, in effect, agreed to procure testimony that would win a lawsuit for defendant, for which services he was to receive a commission upon the amount recovered, is void as against public policy and as tending to impede the administration of justice.—Quirk v. Muller, 14 Mont. 467; 36 Pac. 1077.

22. Where the purposes of a partnership agreement were dishonest and immoral, the law will not aid the parties thereto in adjusting their rights among themselves, on the ground that the purposes of such agreement have been accomplished and exectued.—Morrison v. Bennett, 20 Mont. 500; 52 Pac. 553.

23. Where three persons entered into an agreement to buy and raise a horse and race it for a stake against a horse owned by another, they to share equally in the winnings, it being agreed that the three would import a better horse than the other party had, and deceive him as to its being an imported or better horse, and one of the three secured possession of the winnings, and refused to share them with the others, no action for accounting will lie, as the agreement was dishonest and immoral.—Id.

24. Where three persons agreed to fraudulently induce another to bet with them on a horse race, and to divide the winnings among themselves, the agreement to divide the profits is not a subsequent collateral agreement founded on a new consideration, so as to bring it within the rule that such agreements are not contaminated by the original illegal agreement.—Id.

25. Under Code Civ. Proc., § 2245, a provision of a contract by which the construction to be placed on it by the agent of one of the parties should be final, without the right of appeal to the courts, is void.—Wortman v. Montana Central, 22 Mont. 268; 56 Pac. 316.

26. A provision in a contract to replace the abutting walls and arches of a railway tunnel with others, that the engineer of the railway company shall be the judge as to whether the work has been done according to the specifications of the contract therefor, is valid.—Id.

27. That an alderman made an illegal contract with a city to construct a sewer is no defense to his contract to indemnify a third person for his payment of debts incurred in its construction, and expenses in excess of the stipulated price in completing the sewer according to contract.—Gallagher v. Cornelius, 23 Mont. 27; 57 Pac. 447.

28. Forfeitures of contracts not immoral or against public policy are not to be declared unless the law under which the forfeitures are claimed is so clear and direct in language that it admits of but one construction by which the contract sued upon must be adjudged void and unenforceable.—Manhattan Trust Co. v. Davis, 23 Mont. 273; 58 Pac. 718.

29. In a suit on a note, defendant set up as a counterclaim the amount taxed by the court for his legal services on a mortgage foreclosure. Plaintiff's replication alleged that it had been agreed between them that whenever, on a foreclosure sale, plaintiff purchased the property, defendant should receive one-half of the attorney's fee taxed by the court, and that the other half should go to plaintiff; that plaintiff had purchased under the foreclosure in question; and that one-half of the fee allowed had been credited on the note. *Held*, that it was error to strike that part of plaintiff's replication relative to the agreement, on the ground that it was against public policy, since if the contract was immoral, and had been executed, the plaintiff had the right to show the facts in defense of the counterclaim.—Murray v. Haldorn, 25 Mont. 218; 64 Pac. 511; 69 Pac. 835.

30. Where bidders for a school building, after the rejection of their separate bids and consultation with the members of the board, agreed to reduce their bids, and that in consideration of a bonus part of the bidders would let another have the contract for furnishing stone, pursuant to which they secured the contract without re-advertisement, such agreement is void, as against public policy, and affords no basis for an action by one of such bidders against the other.—Whalen v. Harrison, 26 Mont. 316; 67 Pac. 934.

31. The parties to an appeal from a justice stipulated for an extension of time within which the sureties might justify, beyond that fixed by statute, and within the time so stipulated for defendant signed as surety, and six months later the appeal was dismissed. *Held*, that defendant's action in becoming a surety was not contrary to public policy.—Morin v. Wells, 30 Mont. 76; 75 Pac. 688.

32. Plaintiffs allege that, being owners of certain capital stock in defendant company, they deposited it with the company, to be sold by defendant and the proceeds used in paying its debts, in consideration of an agreement that plaintiff should hold certain offices of defendant until its business should be in successful operation; that defendant violated its agreement and ejected plaintiffs from the offices, and had sold and issued the stock to others, and refused and failed to deliver it to plaintiffs, or to pay plaintiffs the value thereof, though requested to do so. *Held*, that plaintiffs could not recover as on a contract, as the alleged contract was illegal, under Civ. Code, § 341.—Glass v. Mining Co., 31 Mont. 21; 77 Pac. 302.

33. Under such a state of facts plaintiffs could not recover as on a disaffirmance of an illegal contract, as the complaint showed performance on their part, and reliance on a contract.—Id.

II. CONSTRUCTION AND OPERATION, 34-55.

A. General Rules of Construction, 34-41.
B. Parties, 42-43.
C. Subject Matter, 44-45.
D. Place and Time, 46-48.
E. Conditions, 49-50.
F. Compensation, 51-55.

A. GENERAL RULES OF CONSTRUCTION, 34-41.

34. The situation of the parties to an agreement can be considered by the court to ascertain the meaning of the instrument.—Creighton v. Vanderlip, 1 Mont. 400.

35. The plaintiff entered into a contract which provided that he should be engaged as general manager of a mining business of defendants "during the continuance of the agreement," which was for five years, at so much per year. The contract did not provide when the plaintiff should receive pay for services. *Held*, that the contract was an entire one.—Isaacs v. McAndrew, 1 Mont. 437.

36. A signed and delivered to B and C an agreement by which he agreed to pay two promissory notes made by A, B and C to D, as soon as he had collected for the Park Ditch Co. a certain promissory note and any "other demands due it," or received "from any resources whatever" of said ditch company "any other sums." *Held*, that the subsequent sale of water was included in the expression "any resources whatever," and that the recitals of the

instrument might be referred to for the purpose of ascertaining the situation of the parties thereto.—Ming v. Woolfolk, 3 Mont. 380.

37. A entered into a contract with the government to furnish beef cattle, 20% to be deducted for all cows furnished, and B contracted with A to furnish beef to the government on A's contract at a certain price per pound, gross weight. *Held*, that the provisos in A's contract entered into B's, and that he was bound by the stipulation as to the cows.—Dawes v. Powers, 5 Mont. 59; 1 Pac. 421.

38. Plaintiff alleged a verbal contract by which he was to obtain for defendant the titles of the latter's co-owners of a mine for not more than a certain sum, his commission to be the difference between that sum and the price paid. Defendant alleged that, unless a certain sale of the property which he was negotiating was effected, plaintiff was to have nothing for his services, and that the sale was not effected. *Held*, that it was proper to charge, in reference to a statement signed by plaintiff only, in which he stated that he had leased the interest of the other owners of the mine, and had the option of buying, and an obligation to sell to defendant for the sum which he alleged he actually paid, and the further sum, which equalled his alleged commission, to be paid plaintiff at the same time, that, while not a contract, it was such a writing as might be considered, in connection with the other evidence, in determining what were the terms of the contract.—Huntoon v. Lloyd, 8 Mont. 283; 20 Pac. 693.

39. A contract recited that plaintiff owned a specific number of shares of railroad stock; that defendant owned others, and that it had been agreed that defendant should purchase one-half of plaintiff's stock. The contract further recited that in consideration of the promises the parties agreed to certain things, which were set forth in a series of 11 paragraphs. The first was that plaintiff should sell and deliver to defendant one-half of his stock for a certain sum, for which defendant was to make a note payable six months after date. The other paragraphs related to pooling and voting the stock. *Held*, that the first paragraph was separate and complete in itself.—Edgerton v. Power, 18 Mont. 350; 45 Pac. 204.

40. Where the intent of the parties to a contract is explicitly declared on the face of the writing, resort can not be had to the surroundings of the parties, the subject matter, and prior negotiations, to determine its construction. —Ming v. Pratt, 22 Mont. 262; 56 Pac. 279.

41. A note sued on was given in consideration of the written contracts of the payee, made a few days before the date of the note, that he would, on or before a certain day, purchase or procure a purchaser for the maker's interest in certain mines at a stated price, and that, if he failed to do so, the maker would be absolved from all liability to convey such interests. *Held*, that these contracts were admissible, under Civ. Code, § 2207, as relating to the same matters as the note in suit between the same parties, and as parts of substantially one transaction.—Talbott v. Heinze, 25 Mont. 4; 63 Pac. 624.

B. PARTIES, 42-43.

42. An independent contractor is one who renders service in the course of an occupation, and represents the will of his employer only as to the result of his work, and not as to the means whereby it is accomplished, and is usually paid by the job.—Jensen v. Barbour, 15 Mont. 582; 39 Pac. 906.

43. Plaintiffs agreed to sell a mine, and the deeds were placed in escrow in a bank until the payment of the balance of the purchase price. The purchaser sold the mine under a contract providing that a certain amount should be deposited in such bank to pay plaintiffs the balance of the purchase price in full, and such amount and a copy of the contract were forwarded to the bank. *Held*, that under Civ. Code, § 2103, plaintiffs were not entitled to enforce such contract for the payment of the balance of the purchase price as a contract made for their benefit, since such section does not apply to executory contracts without consideration.—McDonald v. Bank, 25 Mont. 456; 65 Pac. 896.

C. SUBJECT MATTER, 44-45.

44. An agreement to drill a well does not imply that other than surface water shall be obtained.—Littrell v. Wilcox, 11 Mont. 77; 27 Pac. 394.

45. A contract for replacing the wooden walls and arches of a railway tunnel with others authorized the railway company to stop any of the work, or to diminish the force employed by the contractor, should it be necessary to do so, and require the contractor to stop the work or diminish his force as the railway company's engineer directed. The work was to be prosecuted at such times and at such points as the engineer should direct. Cars for handling the material were to be furnished by the company. Failure of the contractor to comply with the contract was to authorize a cancellation thereof by the company, and if, in the opinion of the company's engineer, the contractor neglected to prosecute the work as fast as required to complete it within a specified time, the company had the right to terminate it, or to employ other parties to complete it, charging the cost thereof to the contractor, and deduct it from the moneys due him. *Held*, that the railway company had no right to temporarily stop the whole work, to be resumed later on.—Wortman v. Montana Central, 22 Mont. 268; 56 Pac. 316.

D. PLACE AND TIME, 46-48.

46. Where the contract for the erection of a mill stipulates that "the whole mill with all the machinery, shall be built and delivered in perfect running order within four months from date, provided the timber required to be used in constructing the building, and placing the machinery therein, is delivered on the ground * * * within 40 days after the receipt of the bill for said lumber by the party of the second part," if the party of the second part fails to deliver the lumber as stipulated, the condition as to the four months time becomes inoperative, and the party of the first part remains bound to use only reasonable diligence. (See 141 U. S. 222.)—Starr v. Mining Co., 6 Mont. 485; 13 Pac. 195.

47. Where one has, in pursuance of a parol contract, obtained a lease and deed in escrow of certain premises, for which services he was to receive $1,000, but it is doubtful whether the money was payable when the services were performed, or on completion of a sale which the payer was negotiating, and for which the lease and deed were required, a document signed by the payee only, agreeing that he will, on payment of the price of the lease and deed, so that he can obtain them, and the further payment of $1,000, make, deliver, etc., is not a contract that the $1,000 shall not be due until the principal payment is made.—Huntoon v. Lloyd, 7 Mont. 365; 16 Pac. 573.

48. Where a note was given in consideration of the payee's written promise to pay a stated amount for the maker's interest in certain mines before a stated time, such time being expressly declared to be of the essence of the contract,

or that otherwise the maker would be released from all liability to convey such interests, failure to show that the interests were sold within the prescribed time and for the stated price, or the waiver of such conditions, was fatal to a suit on the note.—Talbott v. Heinze, 25 Mont. 4; 63 Pac. 624.

E. CONDITIONS, 49-50.

49. One who has agreed to obtain title to certain land "at the earliest possible date," and authorizes the other to obtain the title on his failure to do so, and in that event agreed to forfeit certain property in escrow for reimbursement, is not entitled to notice from such other person to put in default, nor is one to whom he has assigned the property in escrow entitled to such notice.—Pabst Brew. Co. v. Brewing Co., 19 Mont. 294; 48 Pac. 234.

50. Under a building contract providing that final payment should be made only upon the production of satisfactory proof that there were no claims or liens against the building, the performance of the condition is precedent to the right of payment.—Franklin v. Schultz, 23 Mont. 165; 57 Pac. 1037.

F. COMPENSATION, 51-55.

51. An agreeemnt that the traveling and living expenses of a superintendent of mines shall be a charge to and borne by the joint property and business, makes them liens upon such property and business, but does not create any personal liability until the remedy against the property has been exhausted.—Isaacs v. McAndrew, 1 Mont. 427.

52. Under Laws 1876, p. 118, making the rates paid for printing by the United States treasury department the measure for rates to be paid for printing for the territory, the rate applies to the time when the contract is made, but such rates may be changed or modified at any time, and the changed or modified rate becomes the law.—Woolfolk v. Woolman, 6 Mont. 1; 9 Pac. 445.

53. A written building contract provided that the contractor should, to the satisfaction of the architects, perform and finish "all work included in the entire completion" of the building for a named sum, and that he should make no claim for additional work unless the same should be done pursuant to a written order from the architects, and that written notice of all claims should be given the architects within three days of the beginning of such work. *Held*, that in the absence of an agreement modifying the original contract, the builder was not liable for extra work unless it was done on a written order, and the court erred in an instruction that the contractor could recover for extra work if it was done "at the request, or with the knowledge and consent, express or implied," of the builder, "or his agent," without charging the jury concerning the effect of a waiver by the builder of a written order, or of his independent promise to pay for the work. —Wortman v. Kleinschmidt, 12 Mont. 316; 30 Pac. 280.

54. A contract between an owner of an opera house and a manager of an opera company, providing that the opera company should receive a fixed sum and 85% of all moneys received in the sale of seats, does not mean that the percentage should be computed only on the amount of the receipts in excess of the fixed sum, but entitles the company to such sum and a percentage of the gross receipts.—Ming v. Pratt, 22 Mont. 262; 56 Pac. 279.

55. When joint owners of land made a contract to sell and deed it to the purchaser, or persons whom he might designate, an oral agreement by the purchaser to pay an additional sum to one of the vendors can not be made the basis of a recovery against the purchaser as an agreement for sharing the profits of a resale of the land, unless it is resold for a higher price than that which was to be paid under the original contract.—Easterly v. Jackson, 29 Mont. 496; 75 Pac. 357.

III. MODIFICATION AND MERGER, 56-57.

56. A contract for the payment of gold dust, in the nature of a promissory note, is not merged in an agreement by which the time for payment is extended, the rate of interest reduced, and the means of paying it placed in the hands of parties liable thereon.—Creighton v. Vanderlip, 1 Mont. 400.

57. An agreement, to operate as a merger of a note, must be such a one as by its terms or by its legal intent and meaning would defeat a right of action on the note.—Id.

IV. RESCISSION AND ABANDONMENT, 58-62.

58. Neither the vendor nor the vendee can rescind a written agreement for the purchase of land if the buildings thereon, which were not the chief inducement to such purchase, are destroyed by fire without any fault of the vendor. The vendee can not recover the portion of the purchase money which he paid the vendor on this agreement before the fire occurred.—Bautz v. Kuhworth, 1 Mont. 133.

59. An agreement can not be rescinded by the failure of one party to perform the condition of the contract which has been waived by the party seeking to rescind.—Davis v. Germaine, 1 Mont. 210.

60. Distinct and clear proof of fraud is necessary to void a written contract attended with every presumption of validity.—Wilson v. Harris, 21 Mont. 374; 54 Pac. 46.

61. A contractor wrote a railway company that he had shut down work because the company refused to make payments stipulated. The company replied, instructing him to continue work as per instructions, and then stop all work until further notice. The contractor answered that he would obey the instructions, reserving his rights, and in another letter stated that he should proceed with the work as ordered, unless otherwise ordered, but that, if the company would terminate the contract, and pay him the balance due, and allow a fair valuation for the working plant, he would make no further claim. The company answered to stop work as soon as completed according to previous letters, and in another letter the contractor stated that the company's order to quit work bankrupted him, and he desired to continue work some other way, if not under the contract. The company answered that, when the work was resumed, it might be arranged with him to do the work, but that it would make no promise as to when the work should be resumed, or, if resumed, who would do it. *Held*, that this correspondence did not amount to an independent agreement to stop work temporarily merely.—Wortman v. Montana Central, 22 Mont. 268; 56 Pac. 316.

62. Defendant contracted with plaintiff for a tombstone, plaintiff reserving title thereto until it was paid for, and the right to retake it for non-payment. Plaintiff furnished the tools and engaged a workman, with defendant's knowledge, to cut it, under his supervision, from granite on the public domain. Defendant paid the workman, at plaintiff's request, a part of what he was to have for the work, consulted plaintiff from time to time as the work pro-

gressed and was shown the work by plaintiff when finished. *Held*, that she could not disregard her contract, and buy it of the workman, though plaintiff may have been wrongfully in possession thereof as a trespasser on the public domain.—Sullivan v. Schultz, 22 Mont. 541; 57 Pac. 279.

V. PERFORMANCE OR BREACH, 63-74.

A. Performance as Condition Precedent to Seeking Relief for Breach by Other Party, 63-65.
B. Demand of Performance, 66.
C. Readiness to Perform, 67.
D. Sufficiency of Performance, 68.
E. Acts Constituting Breach, 69.
F. Approval of Architect, 70.
G. Substantial Performance, 71.
H. Acceptance of Performance, 72-73.
I. Waiver of Breach, 74.

A. PERFORMANCE AS CONDITION PRECEDENT TO SEEKING RELIEF FOR BREACH BY OTHER PARTY, 63-65.

63. If a contract is entire in its nature, full performance thereof by the plaintiff is a condition precedent to his right to sue thereon. —Isaacs v. McAndrew, 1 Mont. 437.

64. A contract recited that plaintiff owned a specific number of shares of railroad stock; that defendant owned others, and that it had been agreed that defendant should purchase one-half of plaintiff's stock. The contract further recited that in consideration of the promises the parties agreed to certain things, which were set forth in a series of 11 paragraphs. The first paragraph was that plaintiff should sell and deliver to defendant one-half of his stock for a certain sum, for which defendant was to make a note payable six months after date. The other paragraphs related to pooling and voting the stock. *Held*, that an action would lie on the note made by defendant, without an averment of performance of the stipulations other than those contained in the first paragraph; the stipulation being independent.—Edgerton v. Power, 18 Mont. 350; 45 Pac. 204.

65. Where plaintiffs agreed to furnish all services and materials for placing a heating plant in a building, the materials and labor to be paid for by a certain schedule, but no time was fixed for payment, substantial performance of the whole contract was a condition precedent to liability for the whole or any part of the consideration, the fixing of the prices on the different articles not amounting to a severance. —Riddell v. Ventilating Co., 27 Mont. 44; 69 Pac. 241.

B. DEMAND OF PERFORMANCE, 66.

66. When a contract is made payable in a certain number of dollars' worth of specific articles of personal property, after demand and refusal to deliver the property, the contract becomes one to pay the amount specified.—Taylor v. Holter, 1 Mont. 688.

C. READINESS TO PERFORM, 67.

67. Where a contract is entire in its nature, if performance by plaintiff is prevented or made impossible by the action of defendant, plaintiff must, at all times during the continuance of the contract, be ready and willing to perform on his part.—Isaacs v. McAndrew, 1 Mont. 427.

D. SUFFICIENCY OF PERFORMANCE, 68.

68. A party who agrees to sell real and personal property upon the payment of a note, which stipulates that the interest shall be compounded monthly if not paid, is required to convey the property on the payment of the principal of the note, and simple interest upon the same.—Wilson v. Davis, 1 Mont. 183.

E. ACTS CONSTITUTING BREACH, 69.

69. A contract for walling and arching a tunnel was to be completed within a specified time, and payments for the work were to be made in installments. If slides occurred in the tunnel during the progress of the work, the contractor was to remove them for a specified compensation. Such slides having occurred, the contractor refused to remove them, claiming that they were not within the terms of the contract; and the railway company assented, and made an independent contract with him for their removal, agreeing to pay him a specified compensation. *Held*, that the railway company's failure to pay him the amount due under the independent contract for their removal was not a breach by the company of the contract to wall and arch the tunnel.—Wortman v. Montana Central, 22 Mont. 268; 56 Pac. 316.

F. APPROVAL OF ARCHITECT, 70.

70. A building contract provided that all payments should be made on the certificate of the architect that payments had become due, and that final payment should be made when the work was completed and accepted. *Held*, that presentation of a certificate was a condition precedent to final payment.—McGlauflin v. Wormser, 28 Mont. 177; 72 Pac. 428.

G. SUBSTANTIAL PERFORMANCE, 71.

71. There is not a substantial performance of a building contract entitling the builder to recovery of the final payment, where there was a failure to plaster a portion of the house and build a flue provided for in the contract.—Franklin v. Schultz, 23 Mont. 165; 57 Pac. 1037.

H. ACCEPTANCE OF PERFORMANCE, 72-73.

72. An intention to waive defects in the construction of a building, and accept same as a compliance with the contract by payment of a portion of the final installment on the contract, will not be inferred, where it is not shown that payment was made with knowledge of the defects.—Franklin v. Schultz, 23 Mont. 165; 57 Pac. 1037.

73. That the owner of a newly constructed building, refusing to accept the same because not completed according to contract, moves into the building, will not operate as a waiver of defects and acceptance.—Id.

I. WAIVER OF BREACH, 74.

74. A telephone company leased a telephone to plaintiff under a contract requiring plaintiff to pay $16 per quarter in advance on demand, and authorized the company to terminate the contract and remove the telephone on default in payment by serving written notice on plaintiff, and providing that the contract could not be varied or waived except by a writing signed by the general manager of the company. Plaintiff did not pay an installment of rent on Saturday when it became due, on a demand by the collector of the company therefor, by reason

of not having a check book, and the collector suggested that payment be deferred till the succeeding Monday. On that day plaintiff tendered the sum to the general manager, who informed him that notice of termination had been served at plaintiff's place of business, and the phone removed. *Held*, in an action against the company therefor, that it was error to refuse to instruct that the failure to pay the collector on demand authorized the company to forfeit the contract, unless the extension of time, if any, by the collector, was in writing, and signed by the general manager.—Ashley v. Telephone Co., 25 Mont. 286; 64 Pac. 765.

VI. ACTIONS FOR BREACH, 75-92.

A. CONDITIONS PRECEDENT, 75.
B. PLEADING, 76-80.
C. PLEADING AND PROOF, 81-86.
D. PRESUMPTIONS AND BURDEN OF PROOF, 87-88.
E. QUESTIONS FOR JURY, 89.
F. INSTRUCTIONS, 90-92.

A. CONDITIONS PRECEDENT, 75.

75. A bond, conditioned that the principal shall furnish all material and labor needed for a building "as specified and shown on plans as furnished by" the architect, may be read in the light of the plans and specifications (Comp. Stat., p. 225, § 632), all being contemporaneous, and requires no reformation in order to recover thereon for breach of the contract.—Watson v. O'Neill, 14 Mont. 197; 35 Pac. 1064.

B. PLEADING, 76-80.

76. Under the code system of pleading, it is sufficient to allege the facts from which a promise is implied, without alleging the promise. —Higgins v. Germaine, 1 Mont. 230.

77. In an action on a verbal contract, a demand is sufficiently alleged in the complaint in the following language: "That at various times before the commencement of this suit, plaintiff demanded of said defendant the said sum of $500"; and the time and place of the demand need not be alleged.—Frank v. Murray 7 Mont. 4; 14 Pac. 654.

78. A complaint which alleges that plaintiff made a contract with a water company to furnish it with water for a certain period, and that the company sold its rights in the contract to defendant, who "assumed" the contract, and "substituted itself for the old company," furnished water and collected rates, sufficiently alleges an assumption of the contract on the part of defendant.—Horsky v. Water Co., 13 Mont. 229; 33 Pac. 689.

79. A complaint merely alleging a contract and breach thereof by defendant entitles plaintiff to nominal damages, and is therefore good on general demurrer.—Jacobs v. Mercantile Co., 17 Mont. 61; 42 Pac. 109.

80. Where a building contract provided that the owner might protect itself against any lien which might be filed on the building by withholding from the contractor a sufficient sum to liquidate the same, and in an action by the contractor to recover an alleged balance due on the contract the defendant alleged in its answer that a lien was filed for a certain sum and was paid by defendant, the failure of the plaintiff to deny the allegations by his replication entitled the defendant to a reduction from the contract price in the amount of the lien discharged.—Wagner v. Hospital, 32 Mont. 206; 79 Pac. 1054.

C. PLEADING AND PROOF, 81-86.

81. If a party sets forth a special contract in his complaint, he can not recover unless he establishes by the proof this contract; and if it appears from the testimony that he has failed of performance in a material part; he can not recover.—Simonton v. Kelly, 1 Mont. 363.

82. In an action on a written agreement to deliver a certain amount of gold dust at a certain time, where the answer alleged a contract between the parties which released defendant from all liability under the agreement sued on, it was error to admit a contract which extended the time for delivery of the gold dust, and provided security for its delivery and a means by which the gold dust could be procured, and which reduced the rate of interest to be paid pending its delivery.—Creighton v. Vanderlip, 1 Mont. 400.

83. Where an express verbal contract is complete, an action can not be sustained as on an implied contract for money laid out and expended at the instance and request of the adverse party. (See 116 U. S. 491.)—Ryan v. Dunphy, 4 Mont. 342; 1 Pac. 710.

84. Where plaintiffs alleged an express contract, and the evidence proves an implied contract, there may be a recovery on the latter, defendants not having been misled.—Nyhart v. Pennington, 20 Mont. 159; 50 Pac. 413.

85. A building contract was alleged to have been breached by temporarily stopping the contractor from proceeding with the work, and wrongfully refusing to permit him to resume. The evidence was that after the time for its completion the contractor had notified the company that he should quit unless he was paid installments due. A letter to the company stated that he had shut down work because the company refused to make the payments stipulated. The company wrote the contractor to continue work as per certain instructions, and then stop all work until further notice, and the answer was that the contractor would obey instructions, reserving his rights. In another letter the contractor stated that he should proceed with the work as ordered, and then stop, unless ordered otherwise; that the company's action was a hardship, the cause of the company's action being the stopping of work for one day only, but that, should the company terminate the contract, and pay him the balance due, and allow him a fair valuation for the working plant, he would have nothing further to claim. The company answered to stop work as soon as completed, according to previous letters. Another letter of the contractor stated that the company's order to quit bankrupted him; that he desired to continue work in some other way, if not under the contract. The company answered that when work was resumed on the tunnel the company might be able to arrange with him for doing the work, but that he should distinctly understand that no promises were made him as to when work would be resumed, or, if resumed, who would do it. *Held*, that the evidence showed a cancellation of the contract by the company for failure of the contractor to complete it within the specified time, and hence there was a fatal variance, even if the cancellation was wrongful.—Wortman v. Montana Central, 22 Mont. 268; 56 Pac. 316.

86. Allegations in a complaint seeking recovery for merchandise sold to defendants' employees under an agreement on defendants' part to pay therefor are not supported by proof of money paid out in cashing time checks for defendants, nor is evidence of such service admissible under such allegations.—Hefferlin v. Karlman, 29 Mont. 139; 74 Pac. 201.

D. PRESUMPTIONS AND BURDEN OF PROOF, 87-88.

87. To recover in an action brought upon a special contract, the plaintiff must establish the contract as alleged in the complaint, and prove that he has complied with its terms.—Simonton v. Kelly, 1 Mont. 363.

88. The presumption is that a provision of a contract requiring it to be completed within a specified time is waved by the owner permitting the contractor to proceed with the work after the expiration of the time for its completion.—Wortman v. Montana Central, 22 Mont. 268; 56 Pac. 316.

E. QUESTIONS FOR JURY, 89.

89. Where defendant telephone company, in an action for removing a telephone from a customer for a default in the payment of rent, contends that it had terminated the contract by service of notice before plaintiff tendered the rent due, it is not error to submit the question whether the contract was terminated by notice, as authorized by contract, before the amount due was tendered, though the evidence is uncontradicted that it was so terminated, since the jury is the sole judge of the credibility of the witnesses testifying to the service of the notice.—Ashley v. Telephone Co., 25 Mont. 286; 64 Pac. 765.

F. INSTRUCTIONS, 90-92.

90. In an action for the breach of a contract to wall and arch a railway tunnel, which authorized a cancellation by the company if, in the opinion of its engineer, the work was not properly done, or not done fast enough to complete it within the required time, the complaint alleged that the breach was by the company's engineer temporarily stopping the contractor from working, and then wrongfully refusing to permit him to resume. The defense was that the engineer had permanently stopped the work, as under the contract he was authorized to do. The court charged that the burden was on the company to show that, in the opinion of its engineer, the contractor was either refusing, or was not prosecuting the work with reasonable diligence, and that the jury must find for the contractor, unless they found that the engineer had formed such opinion, and communicated it to the company, and that, though he formed it, the company could not take advantage thereof, unless it was communicated to the company. *Held*, that in the absence of proof on the subject matter of the instruction, it was not erroneous, as authorizing the jury to infer that the company, having failed to establish that it had cancelled the contract only after its engineer had formed such opinion and communicated it, had violated the contract.—Wortman v. Montana Central, 22 Mont. 268; 56 Pac. 316.

91. Such charge was erroneous as ignoring the fact that, by claiming that the termination of the contract by the engineer was authorized, the defendant had ratified his acts.—Id.

92. In an action for merchandise sold to defendants' employees under an agreement on the part of defendants to pay therefor, an instruction that plaintiffs have sued defendants for goods sold by them to various employees of defendants, for which it is alleged that defendants agreed to pay plaintiffs, did not sufficiently state the nature of defendants' alleged agreement.—Hefferlin v. Karlman, 29 Mont. 139; 74 Pac. 201.

CORPORATIONS.

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I. INCORPORATION AND ORGANIZATION, 1-8.

A. Creation and Organization, 1-5.
B. Defective or Incomplete Incorporation or Organization, and De Facto Corporations, 6-8.

A. CREATION AND ORGANIZATION, 1-5.

1. There is a consideration for the contract contained in the charter incorporating the Northern Pacific Railroad Company, which consideration is founded in the public benefits to be derived to the whole public of the United States, by reason of the construction of such road.—Northern Pacific v. Carland, 5 Mont. 146; 3 Pac. 134.

2. The Montana law of 1872, providing for the formation of corporations for carrying on any branch of business "designed to aid in the industrial or productive interests of the country, and the development thereof," is not in conflict with U. S. R. S., § 1889, which provides that the territorial legislatures shall not grant private charters, but may permit persons "to associate themselves together as bodies corporate for mining, manufacturing or other industrial pursuits"; and a mercantile corporation may be incorporated under such law.—Carver Merc. Co. v. Hulme, 7 Mont. 566; 19 Pac. 213.

3. Where three persons file the usual certificate organizing a corporation, and appointing themselves as trustees, and take all the stock issued, and thereafter, at a meeting of stockholders and trustees, elect themselves as president, secretary and treasurer, after which no regular meeting of the stockholders or trustees was ever held, and all said stockholders jointly managed the business of the company until one of them severed his connection therewith, leaving the other two of the trustees in charge as sole owners and managers, and no attempt was made to supply a third trustee, as required by Comp. Stat., p. 726, § 450, and no statement ever published or filed, as required by Comp. Stat., p. 728, § 460, such surviving trustees become liable as co-partners, and their company, so far as third persons are concerned, was a mere joint proprietorship, with all the joint owners in actual charge, and with absolute power of disposition.—Teitig v. Boesman, 12 Mont. 404; 31 Pac. 371.

4. Under Pol. Code., § 410, requiring the secretary of state to charge and collect as a fee (subd. 12) "for filing certificate of increase or decrease of capital stock, five dollars," the duty is ministerial, and he must file such a certificate, regular on its face, though the increase was made, immediately after incorporation, from $5,000 to $1,000,000, and was done to avoid the fee of 50 cents per $1,000 imposed by statute on original capital stock.—State v. Rotwitt, 17 Mont. 537; 43 Pac. 922.

5. Civ. Code, pt. 4, c. 1, art. 1, relating to the organization of corporations under the state laws, provides that the instrument by which a private corporation is formed is called "articles of incorporation," and that, on filing a copy, certified by the county clerk, with the secretary of state, the secretary must issue to the corporation a certificate, and thereupon the persons signing the articles, and their associates and successors, shall be a body corporate. Pol. Code, § 410, subd. 3, provides that the secretary of state must charge and collect, for receiving and filing each certificate of incorporation, the sum of 50 cents on each $1,000 of the capital stock of the company. *Held*, that a foreign insurance company is not required, on filing its charter as provided by statute, to pay to the secretary of state the fees provided by § 410.—State v. Rotwitt, 18 Mont. 87; 44 Pac. 409.

B. DEFECTIVE OR INCOMPLETE INCORPORATION OR ORGANIZATION, AND DE FACTO CORPORATIONS, 6-8.

6. Civ. Pr. Act, § 61, provides that in pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof. In an action for the usurpation of a franchise the complaint alleged that defendant claimed a right to use such franchise under "the act of the legislative assembly of the territory entitled 'An Act to incorporate the Virginia City & Summit City Wagon Road Company,' approved Jan. 27, 1865." *Held*, that said act of incorporation was made a part of the complaint by the reference, and the court must find that defendant was a corporation.—Territory v. Road Co., 2 Mont. 96.

7. Where the act incorporating a road company gives the persons the right to make complaints of the bad condition of the road before a justice of the peace, and prescribes fines and other penalties against the company for its failure to keep the road in good condition, this remedy does not modify the common law and statute remedy for the usurpation of a franchise by the company.—Id.

8. In an action for usurpation of a franchise, the complaint is sufficient, where it alleges that defendant had for more than three years used and usurped certain specified franchises, that defendant claims the right to use said franchises under an act of the legislative assembly of the territory (reciting the title), approved on a certain day, that said right of defendant was without warrant, and that defendant had forfeited said right by its failure to comply with said act in maintaining and keeping in repair its toll road.—Id.

II. CORPORATE EXISTENCE AND FRANCHISE, 9-10.

9. Grants by the legislative assembly which confer franchises are contracts between the sovereign power of the territory and private citizens, upon certain conditions precedent, which must be complied with.—Id.

10. In an action against a member of a firm who claims that the firm has become incorporated in another state, a certificate of articles of incorporation is inadmissible, where there is no certificate that the attestation of the certificate of articles of incorporation is in due form by the proper officers, as required by U. S. R. S., § 906.—Parchen v. Peck, 2 Mont. 567.

III. DOMICILE, 11.

11. Comp. Stat., p. 725, § 449, provides that, if a company is organized under that chapter for the purpose of carrying on any part of its business outside the state, the certificate shall so state, and shall also name the locality in the state where its principal place of business is located. *Held*, that the removal of the entire official business of a domestic corporation beyond the state, and acts of the directors in attempting to hold regular monthly meetings and to sit as the board of directors in another state, are ultra vires.—McConnell v. Milling Co., 30 Mont. 239; 76 Pac. 194.

IV. CAPITAL, STOCK, AND DIVIDENDS, 12-27.

A. NATURE AND AMOUNT OF CAPITAL AND SHARES, 12-13.
B. SUBSCRIPTION TO STOCK, 14.
C. ISSUE OF CERTIFICATES, 15.
D. TRANSFER OF SHARES, 16-27.

A. NATURE AND AMOUNT OF CAPITAL AND SHARES, 12-13.

12. The mere repurchase of capital stock by a corporation does not tend to decrease the same unless the directors should absolutely merge or extinguish the stock after its purchase, within the meaning of Civ. Code, § 438.—Porter v. Mining Co., 29 Mont. 347; 74 Pac. 938.

13. It is presumed that directors did not violate the law and decrease the capital stock of the corporation on repurchasing the same, and some positive showing must be made to the contrary to overturn that presumption.—Id.

B. SUBSCRIPTION TO STOCK, 14.

14. A subscriber for certain shares in a corporation, by accepting the same and paying an assessment thereon, estops himself from denying the existence and validity of the contract of subscription.—Inter-Mountain v. Jack, 5 Mont. 568; 6 Pac. 20.

C. ISSUE OF CERTIFICATES, 15.

15. A court of equity can not, at the instance of a minority stockholder, decree a forfeiture of the stock of any other stockholder in the same corporation to the corporation, on the ground that the title of such stockholder has been acquired and is held in violation of the corporation's charter.—MacGinniss v. Mining Co., 29 Mont. 428; 75 Pac. 89.

D. TRANSFER OF SHARES, 16-27.

16. In an action to rescind a contract for the purchase of shares of corporate stock, where plaintiff makes a formal tender of the shares at the trial, and defendant refuses it on the sole ground that the stock was attached, as he was informed, he thereby waives other objections, and can not urge them on appeal.—Schultz v. O'Rourke, 18 Mont. 418; 45 Pac. 634.

17. An agreement that, if S did not make certain payments, defendant might make them, and deduct from capital stock in escrow enough to equal in cash value the payments, gives defendant title to stock deducted pursuant thereto. —Pabst Brew. Co. v. Brewing Co., 19 Mont. 294; 48 Pac. 234.

18. Where defendant objected to a tender of corporate shares on the ground that they had been attached in the hands of a former owner only, he can not subsequently object to such tender on the ground of irregularities in the issuance of the certificates.—O'Rourke v. Schultz, 23 Mont. 285; 58 Pac. 712.

19. Where a transfer of corporate shares is valid, no irregularity in the issuance of the stock certificates to the transferee can affect her interest or lessen her rights to the stock transferred.—Id.

20. Where a corporation contracted to sell stock, agreeing that if, at the expiration of six months from the date of sale, the purchaser should become dissatisfied with the stock or with its earning powers as an investment, he should be entitled to return the same, it could not be heard to say that the sale was valid, and the contract to repurchase was void, without rescinding the sale and returning the purchase money, thus placing the purchaser in statu quo.—Porter v. Mining Co., 29 Mont. 347; 74 Pac. 938.

21. A contract for the sale of stock by a corporation, whereby the corporation agreed to take back the stock if the purchaser should become dissatisfied therewith, is not objectionable as a secret contract between the corporation and a subscriber, by which the subscriber is at liberty to withdraw his subscription, but is valid and enforceable.—Id.

22. Where the option of resale of corporate stock was to be exercised "at the expiration of six months from this date," the seller was not bound to repurchase until the expiration of the six months, and an offer to deliver the stock before the expiration of that time was premature, and of no avail.—Id.

23. Civ. Code, § 1950, defines a conditional obligation as one in which the rights of the parties depend upon the occurrence of an uncertain event. Sec. 1953 defines concurrent conditions as mutually dependent, and to be performed at the same time. Sec. 1955, provides that, before a party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent imposed upon himself, and must be able to offer to fulfill all conditions concurrent imposed upon him on like fulfilment by the other party. *Held*, that a purchaser of corporate stock, who, under his contract of purchase, was entitled to reconvey the same to the corporation, and receive the price paid, could not compel the corporation to repurchase the stock, without him-

self performing the concurrent condition of redelivery to the corporation.—Id.

24. An allegation that plaintiffs were "ready and willing" to return certain stock in accordance with a contract providing for its return and a repayment of the consideration given, can not be construed as an allegation of an "offer" to return the stock.—Id.

25. Where a company recognized plaintiff as a stockholder, and he was permitted to vote the stock at stockholders' meetings, he was estopped to deny the delivery of the stock to him and acceptance of it.—Cotter v. Smelting Co., 31 Mont. 129; 77 Pac. 509.

26. Under Civ. Code, §§ 2271, 2273, a complainant undertaking to rescind a contract of purchase of stock, under which he paid certain money, and demanding a return of the money, is not entitled to rescission, where he existence of none of the grounds of rescission is shown, and complainant has not complied with the prescribed rules governing rescission. —Id.

27. Where plaintiff rescinded a contract of purchase of stock and demanded repayment of the money after he had been recognized as a stockholder and voted the stock, a finding for defendant was justified under an instruction that if plaintiff paid the money with the understanding that he was to receive stock, and defendant failed to deliver the stock to him within a reasonable time, the jury should find for plaintiff.—Id.

V. MEMBERS AND STOCKHOLDERS, 28-52.

A. Rights and Liabilities as to Corporation, 28-32.
B. Meetings, 33.
C. Suing or Defending on Behalf of Corporation, 34-44.
D. Liability for Corporate Debts and Acts, 45-52.

A. RIGHTS AND LIABILITIES AS TO CORPORATION, 28-32.

28. Evidence that plaintiff, to enable the trustees of defendant corporation to organize the corporation, received from the president a certificate of stock, the par value of which was $149,997, without paying any consideration therefor, and immediately transferred it back to the corporation; that plaintiff, shortly after defendant's incorporation, sold defendant property worth about $72,000, receiving cash and notes of the corporation aggregating some $68,000, and took, as security for the notes, stock of the defendant worth $125,000,—warrants a finding that the notes were given in payment for the property, and that plaintiff did not purchase the stock handed him by the president.—Parberry v. Woodson, 18 Mont. 317; 45 Pac. 278.

29. The ratification by a majority of the stockholders of an illegal and incomplete transfer of the corporate property may be enjoined by stockholders who acquired their stock after such transfer was made.—Forrester v. Mining Co., 21 Mont. 544; 55 Pac. 229, 353.

30. The holders of after acquired stock may enjoin the ratification of an illegal transfer of corporate property, the former owners of the stock not having participated in the transaction. —Id.

31. The fact that minority stockholders of a corporation waited until the day preceding the time set for the ratification by a majority of the stockholders of an illegal and incomplete transfer of the corporate property before suing for injunction was not laches, nor a waiver of their rights.—Id.

32. A contract provided that, if the purchaser of a one-fourth interest in brick works should become dissatisfied with the purchase, she should be entitled to a return of the purchase price on surrender of the property sold. Subsequently, by agreement of both parties, her interest was transferred to a corporation, and 2,500 shares of its stock received, as representing the property. After the purchaser had sued to rescind the contract she assigned it, and her assignee tendered the vendor 2,500 shares, to which she was legally entitled, as against the corporation. *Held*, that such tender was valid, notwithstanding alleged irregularities in the issuance of the certificate representing the stock.—O'Rourke v. Schultz, 23 Mont. 285; 58 Pac. 712.

B. MEETINGS, 33.

33. Pursuant to Code Civ. Proc., § 1728, the president of a corporation, on appealing from a judgment which directed him to execute and deliver to a certain person a certificate of stock, executed the certificate, and deposited it in court to abide the appeal, and then gave the supersedeas bond required to stay the execution. *Held*, that the person named in the certificate as the owner of the shares therein mentioned was not, during the pendency of the appeal, entitled to vote such shares at corporate meetings.—Durfee v. Harper, 22 Mont. 373; 56 Pac. 589.

C. SUING OR DEFENDING ON BEHALF OF CORPORATION, 34-44.

34. Where two of the four managing directors of a corporation are conspiring to defraud it, and the other two unite in resisting the assertion of its rights, the minority stockholders need not request the directors to institute suit for relief, before doing so themselves.—Gerry v. Bank, 19 Mont. 191; 47 Pac. 810.

35. The directors of a corporation organized another corporation in another state, and transferred the entire property of the former to it, in consideration of the second corporation delivering its entire stock to the former, and assuming its liabilities Having obtained the consent of the holders of more than three-fourths of the stock of the first corporation to such transfer, they executed another conveyance, in confirmation of the first, and delivered possession to the new company. They then obtained an irrevocable power of attorney from the holders of three-fourths of the stock, authorizing such stock to be voted in favor of a ratification of the transfer, called a stockholders' meeting and ratified such transfer, and a protest against it by minority stockholders was disregarded. *Held*, that the minority stockholders were entitled to enjoin ratification of the transfer without proof that they had without avail exhausted their remedies within the corporation.—Forrester v. Mining Co., 21 Mont. 544; 55 Pac. 229, 353.

36. Minority stockholders, who successfully brought a suit in equity against directors to restrain and cancel an attempted transfer of the entire property of the corporation to a foreign corporation organized by defendant directors for the purpose, were entitled to an allowance for attorney's fees.—Forrester v. Mining Co., 29 Mont. 397; 74 Pac. 1088; 76 Pac. 211.

37. Such fees were properly allowed by the court as a part of plaintiffs' costs and expenses, taxable according to the course and practice of courts of equity, and were not recoverable only in an action at law as money paid out for the benefit of the derelict corporation.

or to be allowed only as part of the expenses of administering through the receiver the trust fund in the hands of the court of equity.—Id.

38. That the decree declaring the transfer null and void and allowing the attorneys' fee contained a provision for an accounting by the foreign corporation did not render the allowance of the attorneys' fee premature, as the reservation for an accounting did not make the judgment less a final judgment, under Code Civ Proc., §§ 1000, 1820.—Id.

39. On the successful termination of a suit by minority stockholders to restrain and cancel a transfer of all the property of the corporation, the value of all such property, and not merely the value of the stock held by plaintiffs, is to be considered in determining the amount of attorneys' fees allowable to plaintiffs.—Id.

40. It was proper to take into consideration the services of the attorneys in special proceedings in which the trial court was a nominal party to writs of review and prohibition to prevent the execution of orders in the main proceeding.—Id.

41. Services in unsuccessful intermediate orders and appeals might be considered.—Id.

42. It is not every unlawful act of a corporation that may be questioned by a minority stockholder in an action against it, but to enable him to complain he must be injuriously affected, either directly or indirectly.—MacGinniss v. Mining Co., 29 Mont. 428; 75 Pac. 89.

43. Though a corporation is necessarily made a party to an action against its officers for fraudulently diverting and misappropriating its funds, and though the action is brought in the name of the plaintiffs, who are minority stockholders, it is in reality on behalf of the corporation.—McConnell v. Milling Co., 30 Mont. 239; 76 Pac. 194.

44. Demand on the officials of a corporation to bring suit for fraud of officers and directors in misappropriating its funds is not a condition precedent to action by the minority stockholders.—Id.

D. LIABILITY FOR CORPORATE DEBTS AND ACTS, 45-52.

45. Judgment may be entered against defendants individually who are named and described in the complaint as a certain company, although they are not members of it, if the jury find that they are liable individually.—Comanche Min. Co. v. Rumley, 1 Mont. 201.

46. Under Const., art. 5, § 10, and Comp. Stat., p. 727, § 457, providing that stockholders shall be individually liable to creditors to the amount of their unpaid stock for all acts of the company until the whole amount of stock subscribed for shall have been paid in; and § 458, providing that the trustees of a company may purchase mines and issue stock to the amount of the value thereof in payment therefor, which shall be full stock, and not liable to any further call,—the purchase of a mine which the stockholders knew was not worth over $125,000, and payment therefor in stock of the par value of $7,500,000, which is purchased by the stockholders, with full knowledge of the transaction, at 2½% of its par value, is fraudulent as to a creditor, and the stock will be treated as unpaid to the extent of the difference between the actual value of the mine and the nominal value of the stock.—Kelly v. Clark, 21 Mont. 291; 53 Pac. 959.

47. Under Comp. Stat., p. 727, § 457, providing that stockholders shall be individually liable to the amount of their unpaid stock for all acts and contracts of the company until the whole amount of stock subscribed shall have been paid in, a holder of such unpaid stock is liable for the debts of the corporation.—Id.

48. One accepting mining stock issued to him with knowledge that it represented a mine worth about 1⅜% of the total stock subscribed, can not escape liability to creditors for the unpaid balance on the ground that he did not sign the stock subscription list.—Id.

49. Since Comp. Stat., p. 727, § 457, providing that stockholders shall be individually liable to creditors to the amount of their unpaid stock for all acts of the company until the whole amount of stock subscribed shall have been paid in, prescribes no remedy, a judgment creditor, whose execution against the corporation has been returned nulla bona, may go into equity to obtain relief against the stockholders.—Id.

50. The statute of limitations (Comp. Stat., p. 69, § 42) does not begin to run against a stockholder of a corporation liable on unpaid stock for a tort of the corporation, until the creditor has liquidated his claim, or reduced it to judgment, and failed to make it against the corporation, unless it appears to be useless to proceed against the corporation.—Id.

51. Where a complaint by a creditor of a corporation to enforce a stockholder's liability unnecessarily alleges actual fraud on the part of defendant, the allegation will be treated as surplusage, and plaintiff may recover on proper allegations of fraud in law, no motion to correct the pleading being made.—Id.

52. Under Comp. Stat., p. 727, § 457, providing that the stockholders of every company incorporated under an act shall be liable to the creditors of the company to the amount of unpaid stock held by them, etc., the liability of the stockholders arises only after execution on a judgment against the corporation has been returned unsatisfied, and limitations do not begin to run against an action against the stockholders until such time.—King v. Mining Co., 28 Mont. 74; 72 Pac. 309.

VI. OFFICERS AND AGENTS, 53-94.

A. Authority and Functions, 53.
B. Rights, Duties, and Liabilities as to Corporation and its Members, 54-86.
C. Liability for Corporate Debts and Acts, 87-94.

A. AUTHORITY AND FUNCTIONS, 53.

53. The president of a corporation organized to acquire townsites and erect buildings, has no implied authority to act as its managing agent and bind the company by a contract with an architect for building plans.—Mathias v. White Sulphur Springs Ass'n, 19 Mont. 359; 48 Pac. 624.

B. RIGHTS, DUTIES, AND LIABILITIES AS TO CORPORATION AND ITS MEMBERS, 54-86.

1. Compensation, 54-58.
2. Fiduciary Nature of Relation, and Management of Corporate Affairs, 59-65.
3. Corporate Books and Records, and Corporate Property, Funds, and Securities, 66-70.
4. Individual Benefit From Corporate Business, and Engaging in Competing Business, 70a-71.

5. Dealings With Corporations or Shareholders, and Fraud as Against the Same, 72-75.
6. Actions Between Corporation and Its Officers or Agents, 76-78.
7. Actions Between Shareholders and Officers or Agents, 78-86.

1. Compensation, 54-58.

54. Where a by-law authorizes the trustees of a mining corporation to employ and fix the salary of its superintendent, a trustee, who is also secretary of the corporation, may recover on an implied contract for services rendered as such superintendent, which were clearly outside his ordinary duties as secretary or trustee, and which were performed under circumstances showing that it was well understood by the corporate officers, as well as himself, that they were to be paid for.—Felton v. Mining Co., 16 Mont. 81; 40 Pac. 70.

55. The fact that one is a stockholder, director and officer of a corporation will not debar him from recovering on a quantum meruit for services rendered the corporation which were clearly outside his duties in either of such capacities, and which were rendered with the knowledge and acquiescence of the other directors.—Severson v. Milling Co., 18 Mont. 13; 44 Pac. 79.

56. Where the secretary of a corporation, who is unlawfully paid a salary by the directors, is not a director, and is connected in no way with the fraudulent transactions of the directors in misappropriating and diverting the corporate funds, he can not be held liable in an action by minority stockholders against the officers and directors for relief against the fraudulent acts, but the officials who caused the money to be paid to him must account therefor.—McConnell v. Milling Co., 30 Mont. 239; 76 Pac. 194.

57. A resolution of four directors of a corporation voting three of their number salaries, and giving them back pay, predicated on by-laws previously passed by five directors, including the first mentioned four, is void, under Civ. Code, 2970-2976.—Id.

58. In the absence of power emanating from the stockholders, from statute, or from by-laws legally adopted, directors of a corporation have no authority to vote a salary to any of their number.—Id.

2. Fiduciary nature of relation, and management of corporate affairs, 59-65.

59. Where a mining claim is forfeited owing to failure to do the required representation work, a purchase of the claim by a director and trustee of the corporation from a relocator, in good faith, does not inure to the benefit of the corporation.—McDermott Mining Co. v. McDermott, 27 Mont. 143; 69 Pac. 715.

60. Directors of a corporation are prima facie empowered to maintain an office at the place designated in the charter for the principal office of the corporation, and a rent charge occasioned for that purpose, so far as reasonable, may be charged against the corporation.—McConnell v. Milling Co., 31 Mont. 563; 79 Pac. 248.

61. Loss occasioned by the mismanagement of an employee of a corporation or by an actual shrinkage in the value of supplies is not chargeable to the directors unless they knowingly and wilfully allowed the employee to pursue a course of action with reference to the business from which resulting loss would be equivalent to misappropriation of the assets of the company.—Id.

62. Directors of a corporation can not charge to the corporation expenses incurred by them in defending a suit brought by minority stockholders against them for a fraudulent misappropriation of the company's funds, although the company is made a nominal defendant.—Id.

63. It is within the power of directors of a corporation to employ a secretary and pay him a salary, and to incur necessary expenses for offices and office help; but expenses charged by the directors as having been incurred for such purposes during a time when the corporation was not engaged in active operations should be explained.—Id.

64. Expenses of lobbying a bill through the legislature, incurred by directors of a corporation, can not be charged against the corporation over the objection of non-assenting stockholders.—Id.

65. The expenses of the president and vice president of a corporation in attending stockholders' meetings and in visiting directors are not prima facie proper charges against the company.—Id.

3. Corporate books and records, and corporate property, funds, and securities, 66-70.

66. One who was present at the time the redemption of property was agreed upon between directors of the corporation which owned the property, and who took part in the redemption, was charged with knowledge that the transaction was constructively fraudulent as against the corporation and its stockholders, and stood in no better position than the directors involved.—Coombs v. Barker, 31 Mont. 526; 79 Pac. 1.

67. One who joined with the directors of a corporation, knowing that they were directors, in the redemption of corporate property, was charged with knowledge of the principle of law that such directors could not redeem the property in their own names.—Id.

68. A redemption, by the directors of corporate property sold under execution, could not be deemed fair and bona fide where the judgment under which the redemption was made was rendered in favor of one of their number only two days before the redemption, and a default based upon the acceptance of service of summons by another of their number.—Id.

69. A director of a corporation may purchase its property at a judicial sale when he has no control over the proceeds, or may purchase from a purchaser at judicial sale, but in either case his acts must be fair and honest.—Id.

70. Where directors redeemed corporate property sold under execution, and held it as their own, making considerable profit out of the same, they were entitled, on being sued by the stockholders, to a credit for money paid out on redemption of the property, and in satisfaction of claims against the same, with interest from the date of payment, and also for expenses incurred in working the property.—Id.

4. Individual benefit from corporate business, and engaging in competing business, 70a-71.

70a. Directors of a corporation stand in a fiduciary capacity to the corporation and stockholders, and must exercise the utmost good faith in all transactions touching their duties to the corporation and its property, and they hold any profits they may make from the company's property or business as trustees for the corporation and its stockholders.—Coombs v. Barker, 31 Mont. 526; 79 Pac. 1.

71. Transactions had by a director of a company with reference to its property, whereby he obtains a profit, are voidable by the company or stockholders if action is taken within a reasonable time.—Id.

5. Dealings with corporations and shareholders, and fraud as against the same, 72-75.

72. The president and treasurer of a mining company, who controlled nearly two-thirds of the stock, induced non-resident stockholders, one of whom was a director, not to oppose a purchase by the company from the president of a mining claim for more than double what it cost him and was worth, by false representation of its value and cost, on which the non-resident had a right to rely, and by stating that the purchase was necessary to protect the lateral rights of the company's mine, and that, if they did not consent, the purchase would be made nevertheless. The purchase was afterwards authorized at a directors' meeting attended by such officers, the secretary and another resident director, the president not voting. *Held*, that the purchase was void, though the two directors other than the president and treasurer were innocent of actual fraud.—Gerry v. Bank, 19 Mont. 191; 47 Pac. 810.

73. Where the president of a corporation by fraud effects a purchase of property from him by the company at an excessive price, he can not demand that he be put in statu quo before relief is granted to the company.—Id.

74. Directors of a corporation may become its creditors and enforce their claims by the same methods as other creditors, but the contracts by which they become creditors are subjected to the strictest scrutiny, and will be enforced only when fair and equitable.—Coombs v. Barker, 31 Mont. 526; 79 Pac. 1.

75. A breach of official duty on the part of directors of a corporation is fraud in law, as against the stockholders, and is sufficient to entitle the latter to relief, though no fraud in fact is shown.—Id.

6. Actions between corporation and its officers or agents, 76-78.

76. The burden is on directors of a corporation to show that transactions had by them with the corporation, from which they make a profit, are fair and bona fide.—Coombs v. Barker, 31 Mont. 526; 79 Pac. 1.

77. A judgment obtained by the president of a corporation against the corporation for money expended by him for it is a charge against it, to be satisfied out of the assets, notwithstanding the misappropriation of funds of the corporation by him.—McConnell v. Milling Co., 31 Mont. 563; 79 Pac. 248.

78. In an action against the officers and directors of a corporation for fraudulent misappropriation of corporate funds, the fact that sums of money were paid to the president and vice president and charged up to the corporation as attorney's fees, neither the president nor vice president being an attorney, and no employment by the company as such having been shown, is not conclusive, and the items should be charged against defendants or not, upon proof of the real purpose for which they were expended.—Id.

7. Actions between shareholders and officers or agents, 79-86.

79. In an action by non-resident minority stockholders to set aside a purchase of property by the company from the president for more than double its cost to him and its value, a complaint alleging that plaintiffs were induced not to oppose the purchase by a fraudulent conspiracy to defraud the company by the president and treasurer, who falsely represented to them the value and cost of the property, and the necessity for its purchase, did not present the conspiracy as one theory, and the violation of the fiduciary relationship as another.—Gerry v. Bank, 19 Mont. 191; 47 Pac. 810.

80. A director of a corporation may procure the appointment of a receiver pending an investigation of charges of fraud and mismanagement against the trustees.—State v. District Court, 22 Mont. 220; 56 Pac. 219.

81. Though the allegations of a complaint in an action against the officers and directors of a corporation for fraudulently diverting and misappropriating its funds are not sufficient to entitle the action to be considered as brought on behalf of others than plaintiffs, who are minority stockholders, its sufficiency as an action in plaintiffs' behalf is not impaired by averments that they bring it for others as well as themselves.—McConnell v. Milling Co., 30 Mont. 239; 76 Pac. 194.

82. Where a series of illegal acts by a corporation's officers and directors, continuing over a period of several years, is pursued till the commencement of an action against the officers and directors therefor by minority stockholders, laches can not be predicated of the plaintiffs' delay in bringing suit.—Id.

83. In an action by minority stockholders against the officers and directors of a corporation for fraudulently diverting and misappropriating its funds, evidence examined, and *held* sufficient to charge the president and secretary with knowledge of all expenditures made, to whom they were made, and for what purpose.—Id.

84. Evidence *held* sufficient to show that one who joined with directors in redeeming property of a corporation was a bona fide purchaser for value, without notice of the unlawful acts of the directors.—Coombs v. Barker, 31 Mont. 526; 79 Pac. 1.

85. The unauthorized levy of an assessment by directors without observance of the formalities required by law, and the threatened sale of stock as delinquent, is sufficient to sustain an action by the stockholders against the directors.—McConnell v. Milling Co., 31 Mont. 563; 79 Pac. 248.

86. Corporate notes executed by the directors of a bank can not be set aside for fraud or any other reason in an action by stockholders against the directors to which the bank is not a party.—Id.

C. Liability for corporate debts and acts, 87-94.

87. Under Comp. Stat., p. 728, § 460, which provides that the trustees of a corporation shall be liable for its debts unless, within 20 days after the 1st of September, they shall file in the county clerk's office a statement of the capital stock, the amount paid up, the existing debts of the corporation, the trustees, in the absence of a formal dissolution of the corporation, are liable for its debts, on failure to file and publish the statement, though the corporation has been totally insolvent for some months prior to September 1st, and has transferred all its property to one of its creditors.—Gans v. Switzer, 9 Mont. 408; 24 Pac. 18.

88. The cause of action accruing in favor of a creditor against the trustees of a corporation who fail to file an annual report as required by statute is not renewed or extended by subsequent defaults in filing reports.—State Savings Bank v. Johnson, 18 Mont. 440; 45 Pac. 662.

89. An action to recover an indebtedness of a corporation from its trustees individually, on the ground that the corporation failed to make the annual report required by statute, is, as regards the question of limitation, one for a penalty, and, under Comp. Stat., p. 69, § 45, must be commenced within one year from its accrual.—Id.

90. Where a corporation fails to make its annual report, its trustees become at once liable for its debts, and the statute of limitations begins to run, as to a cause of action then accruing, in favor of a creditor.—Id.

91. Under Comp. Stat., p. 729, § 463, making the officers of corporations engaged in buying and selling town lots, who sign a false annual report as to its capital and debts, liable for all its debts contracted while they were in office, applies only to debts contracted after the false report was made.—Giddings v. Holter, 19 Mont. 263; 48 Pac. 8.

92. The contingent liability of a land company claiming under a Sioux half-breed scrip entry, cancelled after it had conveyed the land, on its covenant of warranty in the deed, was not, prior to such cancellation, an "existing debt," within Comp. Stat., p. 728, § 460, making trustees of a corporation engaged in buying and selling town lots liable for its debts, if it failed to publish an annual report showing its existing debts.—Id.

93. The directors of a corporation are personally liable for the death of one killed by the explosion of powder unlawfully kept in the corporation's warehouse, though they had no knowledge thereof, if, by exercising ordinary diligence as directors, they could have known that the warehouse contained an unlawful amount.—Cameron v. Kenyon, 22 Mont. 312; 56 Pac. 358.

94. In an action to recover of directors for the death of one killed by the explosion of an unlawful amount of powder kept in the corporation's warehouse, the burden is on the directors to shaw that by the exercise of ordinary diligence in the management of the business they could not have discovered that powder was stored in unlawful quantities.—Id.

VII. CORPORATE POWERS AND LIABILITIES, 95-146.

A. Extent and Exercise of Powers in General, 95-105.

B. Representation of Corporation by Officers and Agents, 106-130.

C. Property and Conveyances, 131-132.

D. Contracts and Indebtedness, 133-134.

E. Civil Actions, 135-146.

A. Extent and exercise of powers in general, 95-105.

95. Even though a corporation claiming title to land may not have had the right to acquire and hold the same, the question can not be raised by a stranger asserting an unwarranted claim of ownership.—Butte Hardware Co. v. Cobban, 13 Mont. 351; 34 Pac. 24.

96. It is not ultra vires for a corporation in the hardware business to purchase a claim against a third party secured by lien, where the purchase is made in good faith and for the protection of its own interests.—Mahoney v. Hardware Co., 27 Mont. 463; 71 Pac. 674.

97. A private corporation may purchase its stock if the transaction is fair and in good faith, if it is free from fraud, actual or constructive, if the corporation is not insolvent or in process of dissolution, and if the rights of its creditors are in no way affected thereby. —Porter v. Mining Co., 24 Mont. 347; 74 Pac. 938.

98. The holding of stock in a corporation by one person or another does not affect the rights of any other stockholder so long as the purposes of the corporation are carried out under its charter for the benefit and profit of all the stockholders alike, according to the best judgment of those who have the active management of its business, and so long as the transaction by which the stock was obtained does not violate any constitutional or statutory provision. —MacGinniss v. Mining Co., 29 Mont. 428; 75 Pac. 89.

99. Since Const., art. 15, does not prohibit the consolidation of corporations, except of certain kinds and for certain purposes, and Civ. Code, § 527, expressly authorizes the consolidation of domestic mining corporations, and Laws 1899, p. 113, authorizes such corporations to sell or exchange their property and assets to other corporations, domestic or foreign, for the whole or any part of their stock, whether mining corporations or not, it is not against the public policy of this state to permit, and mining corporations are permitted, to hold and vote stock in other corporations of like character.—Id.

100. One corporation can not hold or vote stock in another unless expressly authorized to do so by the terms of its charter or by statute. —Id.

101. Where a statute authorizes the organization of corporations thereunder for general mining purposes, but does not specify as one of the objects donations for political purposes, such donations are ultra vires.—McConnell v. Mining Co., 30 Mont. 239; 76 Pac. 194.

102. In an action against the officers and directors of a corporation for fraudulently diverting and misappropriating its funds, it appeared that, during a period of time in which the official business of the company had been removed from the state without authority of law, stockholders' meetings were held annually in the state for the purpose only of electing directors, at which a majority of the stock was represented. At each of those meetings a resolution was passed approving all acts of the directors and officers for the past year. None of the acts of which plaintiffs complain were presented at those meetings. The board of directors, after suit was brought, at a regular meeting held in the state, passed a resolution ratifying the acts done without the state; some of the defendants voting for and causing its adoption. *Held*, insufficient to show a ratification of the ultra vires acts.—Id.

103. Though the majority stockholders of a corporation sanction the acts of its directors and officials in illegally making expenditures of the corporate funds, so as to bind themselves by estoppel, yet such acts are not binding on stockholders who neither took part in the proceedings, nor sanctioned, by act or acquiesence, the making of the expenditures.—Id.

104. Stockholders who take no part in a meeting, and did not vote either in person or by proxy, are not estopped to complain of an unauthorized act on the part of the directors ratified at such meeting.—McConnell v. Mining Co., 31 Mont. 563; 79 Pac. 248.

105. The fact that the stockholders agreed to the unauthorized act of the directors in removing the office of the corporation to a different city and state did not estop them to complain of the wrongful use by the directors of the funds of the corporation after the removal.—Id.

B. Representation of Corporation by Officers and Agents, 106-130.

1. Application of Principles of Agency, 106-107.
2. Particular Acts or Transactions, and Authority Respecting Them, 108-117.
3. Establishment of, and Right to Question, Authority, 118-129.

4. INDIVIDUAL INTEREST OF OFFICER AS AFFECTING PERSON DEALING WITH CORPORATION, 130.

1. Application of principles of agency, 106-107.

106. A corporation is not liable on an agreement made by one or two of its trustees, in the absence of authority to bind the corporation having been delegated to such trustees, or ratification of the agreement by the corporation.—Wagner v. Hospital, 32 Mont. 206; 79 Pac. 1054.

107. The secretary of a mining company, who is not a member of the board of directors, has no implied authority to bind the company beyond the authority given him as secretary.—Farrell v. Mining Co., 32 Mont. 416; 80 Pac. 1027.

2. Particular acts or transactions, and authority respecting them, 108-117.

108. Where the only stockholders of a corporation are the officers, and by a failure to comply with the corporation law they become liable as co-partners, a bona fide assignment by them in the name of the corporation to secure preferred creditors thereof, is good, though the assignment was not authorized by any meeting of stockholders or trustees.—Teitig v. Boesman, 12 Mont. 404; 31 Pac. 371.

109. Plaintiff endorsed on his certificates of stock an assignment to one D, and left them in the hands of defendant's secretary, explaining that he was about to borrow money from D, and that he endorsed them in advance to facilitate the transaction. The loan was not consummated, and the secretary afterwards unsuccessfully sought to purchase the stock for himself. Plaintiff then made a demand for the certificates, but the secretary said, "You have no stock in this company." The defense was that, plaintiff having endorsed them, in contemplation of transferring them to D, the secretary was justified in withholding them until D reassigned them, or ordered their delivery to plaintiff. *Held*, that a finding that the defense was not well founded was warranted.—Galvin v. Mac M. & M. Co., 14 Mont. 508; 37 Pac. 366.

110. The managing agent or general manager of a non-trading corporation has no implied authority to bind the corporation by making a negotiable instrument.—Helena Nat'l Bank v. Telegraph Co., 20 Mont. 379; 51 Pac. 829.

111. A corporation was charged with notice that its receipts were less than its expenses each month, and that its general manager would, in the ordinary and prudent conduct of its business, borrow at times the required money to meet these expenses, since it did not advance funds to meet them. It knew, or was negligent in not knowing, that the bank account in its name was necessary to be kept where its managing agent attended to its business, and that such manager would pay, by a temporary loan from the bank, portions of its current expenses which could not be delayed. The manager made an overdraft in a proportionate sum to these business necessities. No fraud or collusion existed between the bank and the manager. *Held*, sufficient to show authority of the manager to pledge the corporation's credit in making the overdraft.—Id.

112. At common law the directors or a majority of the stockholders of a prosperous corporation, able to achieve the objects of its creation, can not sell or otherwise dispose of all the property, without the consent of all the stockholders.—Forrester v. Mining Co., 21 Mont. 544; 55 Pac. 229; 353.

113. A creditor of a mining company importuned its president to give him a bill of sale of ore mills of the company as security for a debt. The president refused to do so, but referred the creditor to the company's superintendent, who, he said, had full authority in the matter. The creditor then went to the superintendent, who signed a bill of sale as "manager" of the company. The president was authorized by the company's by-laws to buy and sell property for the company, but was given no power to delegate that authority. *Held*, that the act of the president in referring such creditor to the superintendent did not authorize the latter to execute a bill of sale, nor did his act amount to a ratification of the superintendent's act, though he had an imperfect knowledge of what had been done: and such bill of sale was void as against a subsequent attaching creditor.—Trent v. Sherlock, 24 Mont. 255; 61 Pac. 650.

114. A bill of sale of a portion of a mining company's property, by the superintendent, which he had no authority to make, was not prima facie binding on the corporation, and did not tend to show that he had an implied power to make it.—Id

115. The secretary and general manager of a mining corporation has no implied power, by virtue of his office, to bind the corporation by a contract for medical attendance on injured employees.—Spelman v. Mining Co., 26 Mont. 76; 66 Pac. 597.

116. A transfer by the directors of a corporation of all its property to a foreign corporation, organized by the directors of the former for the purpose of receiving its property, the scheme being to have its stockholders sell to, or exchange their stock with, the new company, is not voidable only, but void.—Forrester v. Mining Co., 29 Mont. 397; 74 Pac. 1088; 76 Pac. 211.

117. It is the duty of directors of a corporation to obtain money to pay current charges either by borrowing or by levying assessments upon the stockholders, and the obligation of the corporation to pay money borrowed by the directors is not affected by the fraudulent diversion of part of the money by the directors, even though some of the requirements of the by-laws as to the execution of evidences of indebtedness were not strictly complied with.—McConnell v. Milling Co., 31 Mont. 563; 79 Pac. 248.

3. Establishment of, and right to question, authority, 118-129.

118. One B was local manager of plaintiff and was trustee and bookkeeper of defendant. When defendant ceased operations, its trustees sent to B to ascertain the amount of its indebtedness to plaintiff for the purpose of preparing the annual report required by Comp. Stat., p. 728, § 460, making the trustees personally liable for the corporate debts in case of failure to annually publish a report of indebtedness, etc. B assured the trustees that defendant owed plaintiff nothing, and that the general indebtedness to others was trifling, and advised the trustees not to make the statutory report, which statements were relied on by the trustees. It appeared that B made the statements in order to hold a trustee, who was financially responsible, for the payment of plaintiff's claim. *Held*, that plaintiff was estopped to assert the liability of the trustees for a debt due to it from the defendant.—Elkhorn T. Co. v. Mining Co., 16 Mont. 322; 40 Pac. 606.

119. A corporation is not chargeable with notice that an officer having no authority to do so has executed a note in its name.—Helena Nat'l Bank v. Telegraph Co., 20 Mont. 379; 51 Pac. 829.

120. A general manager of a telegraph com-

pany gave a negotiable note to a bank in the name of the corporation. The bank knew that he had full power to manage the business and make all necessary arrangements in operating the same, and he kept an account in the bank in the company's name. The corporation knew or ought to have known that its outlay surpassed its receipts. The manager made a contract in the company's name, and on the same day executed a note in its name, of which the note in evidence was a renewal; but it did not appear that the company knew of the execution of either until he ceased to be its manager. He discounted at another bank a note made in the company's name, of which the company was notified by mail, and the note was paid by his successor. It appeared by the company's books that the bank credited his successor, as general manager, with the amount so paid, and also with the amount of a note made by him in the company's name to a certain other bank, which his successor also paid; and, after he left its employ, the company charged these amounts to him personally. He gave in the company's name two other notes, one of which was paid, and the other unpaid, except by the endorsement of several small credits for telegraph services by agreement. While he was manager he was in the habit of reporting deficits to the representatives of the company, which were afterwards paid. The company did not know of the execution of any of these notes until after the manager was discharged. *Held*, insufficient to show a ratification of the execution of the note.—Id.

121. A general manager of a corporation will not be presumed to have power to grant an easement or give a license in the corporation's name.—Butte & B. C. M. Co. v. M. O. P. Co., 21 Mont. 539; 55 Pac. 112.

122. A defendant claiming an easement under an agreement with the general manager of a plaintiff corporation has the burden of showing such manager's authority.—Id.

123. The superintendent of a mining company had been permitted in one instance to contract for the purchase of machinery, and to sign the contract as "manager," and on another occasion he had deposited the corporate money in his own name, and issued his personal checks thereon, but this had been stopped by the president. *Held*, that such acts did not constitute such a consent and acquiescence on the part of the corporation in the exercise of powers by the superintendent as to authorize him to pledge the company's property for a corporate debt, due for the price of property bought by the company, even though his previous acts might have conferred on him the implied power to purchase the property.—Trent v. Sherlock, 24 Mont. 255; 61 Pac. 650.

124. Where plaintiff sought to recover for medical services rendered to employees of a mining corporation by virtue of a contract with the manager and secretary, testimony by a physician, whom plaintiff had called to his assistance, that he was paid by a check on some part of which appeared the name of the corporation, and that it was his impression that it was signed by the corporation "per some one else's order," was not sufficient evidence of a ratification by the corporation of the secretary's contract.—Spelman v. Mining Co., 26 Mont. 76; 66 Pac. 597.

125. Independent of any ratification, a bill of sale of corporate property, made by the general manager thereof without authority, was void, and not voidable, and one who attached the property as belonging to the corporation was entitled to raise the question of its validity in replevin by the grantee in the bill of sale.—Trent v. Sherlock, 26 Mont. 85; 66 Pac. 700.

126. A creditor of a mining company sought to have its president execute a bill of sale for certain machinery purchased from defendants. The president refused, but referred the creditor to the mine's superintendent, who executed such bill, signing it as manager of the company. The directors of the company, with the exception of the president, resided in another state, and the president had the general management of its affairs within the state. The creditors testified that he informed the president that the bill had been executed, and that the president knew the character of the transaction, but did not want it known that he was cognizant of the transaction, and that he was in the immediate vicinity when the creditor took possession of the property. Defendants sued, and attached the machinery as the property of the company. *Held*, that the evidence of the ratification of the bill of sale by the corporation was sufficient to justify the court in submitting that question to the jury, together with the bill of sale.—Id.

127. On the admission of the bill of sale, together with the evidence of ratification, defendant was not entitled to have the jury instructed that they should consider the contract as prima facie the act of the corporation, though it purported on its face to be executed by the manager on behalf of the corporation.—Id.

128. Evidence that three directors of a mining corporation acknowledged the justness of a claim against it, and agreed that it should be paid, in the absence of proof that they constituted a majority of the board, or that they acted otherwise than in their individual capacity, does not establish an obligation against the corporation.—Farrell v. Mining Co., 32 Mont. 416; 80 Pac. 1027.

129. In an action to recover an alleged balance due on a contract for the construction of a building for a corporation, in which plaintiff sought to establish a liability of the defendant corporation for money paid in excess of a specific sum for work done by a particular person, at the request of the architects by showing consent of one or two of the trustees to the agreement, the burden was on plaintiff to show the authority of the trustees, or ratification of the agreement by the corporation.—Wagner v. Hospital, 32 Mont. 206; 79 Pac. 1054.

4. Individual interest of officer as affecting person dealing with corporation, 130.

130. Where the general manager of a corporation has implied authority to borrow money in its behalf, the lender is not bound to show an actual appropriation of the loan to the company's use, in order to charge the company therewith.—Helena Nat'l Bank v. Telegraph Co., 20 Mont. 379; 51 Pac. 829.

C. Property and conveyances, 131-132.

131. The grantee of grantees of a corporation, in a suit by the latter to quiet title, can not claim that it had no power to acquire and hold land, as no title he may have is derived from it.—Butte Hardware Co. v. Cobban, 13 Mont. 351; 34 Pac. 24.

132. A purchase by a corporation, organized to deal in hardware, of an account secured by lien, against a mining company, for services and goods sold, is not ultra vires, where made in good faith, to protect its own interest as a creditor of the mining company.—Mahoney v. Hardware Co., 19 Mont. 377; 48 Pac. 545.

D. Contracts and indebtedness, 133-134.

133. Where the only stockholders of a corporation are the officers, and, by a failure to comply with the corporation law, they become liable as co-partners, a bona fide assignment by them in the name of the corporation, to secure preferred creditors thereof, is good, not-

withstanding no corporate seal was used or adopted by the corporation.—Teitig v. Boesman, 12 Mont. 404; 31 Pac. 371.

134. Comp. Stat., p. 1069, §§ 1538, 1555, providing that a deed of trust by a corporation must be accompanied by an affidavit that the same is made in good faith, and without design to hinder or delay creditors, do not apply to assignments or transfers of both real and personal property, where actual delivery of possession accompanies the conveyance, even though the conveyance is in trust to convert the property into money to pay debts.—Id.

B. CIVIL ACTIONS, 135-146.

1. PROCESS AND NOTICE, 135-138.
2. APPEARANCE AND REPRESENTATION BY ATTORNEY, 139.
3. PLEADING, 140-146.

1. Process and notice, 135-138.

135. In an action against a corporation organized under the laws of the state of Pennsylvania to carry on business in Montana, the sheriff's return recited: "I served the within summons by reading the same to Rodman Carter, and delivering to him a copy thereof. Also delivered to him a copy of the complaint," etc. Plaintiff sought to remedy the defective service by filing affidavits of three persons to show that Carter was a managing agent. One affidavit set forth what Carter told affiant was the position he held in the company. One deposed concerning the contents of a written power of attorney which he said Carter told him was sent by telegram. The third affidavit set forth certain transactions in which Carter was engaged as the agent of the company. *Held*, that the affidavits were insufficient, as being hearsay, and not showing that the alleged agency appertained to all the affairs of the company. —Brown v. Gaston, etc., Min. Co., 1 Mont. 57.

136. The provision of Comp. Stat., p. 78, § 75 (originally enacted in 1883), that service on any corporation doing business in the state may be made on the president or other officer, and, if they can not be found, then by serving the same on certain subordinate employees, does not repeal § 72 [re-enacted from Rev. Stat., 1879), allowing service on the managing agent of a domestic corporation in the first instance. —Congdon v. Railway Co., 17 Mont. 481; 43 Pac. 629.

137. Since the provision of Comp. Stat., p. 78, § 75, does not repeal § 72, allowing service on the managing agent of a domestic corporation in the first instance, a return of service on such agent need not show that the president or other officer could not be found.—Id.

138. A return on a summons in an action against a corporation, reciting a service on C, "a trustee, being the defendant named in said summons," by delivering to C, trustee, a copy of the summons, for defendant, is fatally defective, for failure to show a service upon the corporation.—Mathias v. White Sulphur Springs Ass'n, 17 Mont. 542; 43 Pac. 921.

2. Appearance and representation by attorney, 139.

139. The attorney in fact of a corporation, who is not its general managing agent, can not appear in an action against it without special authority.—Lamb v. Mining Co., 1 Mont. 64.

3. Pleading, 140-146.

140. An allegation, as a ground for nonsuit, that defendant was sued as a corporation, when it was in fact a co-partnership, will be disregarded when the only evidence in support of the allegation is a denial in the answer "that defendant is or ever was a corporation organized and existing under the laws of England."—Wright v. Insurance Co., 12 Mont. 474; 31 Pac. 87.

141. Want of capacity of a corporation to sue must appear from allegations of the complaint, to support a demurrer on that ground.—Herbst Imp. Co. v. Hogan, 16 Mont. 384; 41 Pac. 135.

142. In an action against the trustees of a corporation, under Comp. Stat., p. 728, § 460, making the trustees liable for corporate debts unless they file, "in the office of the clerk of the county where the business of the company is carried on," a report stating the amount of capital stock, etc., the complaint is bad if it fails to state in what county the business of the corporation was carried on.—Wethey v. Kemper, 17 Mont. 491; 43 Pac. 716.

143. An architect can not recover for services rendered a townsite corporation in drawing plans for a new building at the instance of the president, without other evidence of the latter's authority than the fact that he had previously employed plaintiff to remodel a building belonging to the corporation.—Mathias v. White Sulphur Springs Ass'n, 19 Mont. 359; 48 Pac. 624.

144. On an issue of the authority of a manager of a corporation to buy up for it a claim against a third person, the articles of incorporation are admissible to show what business the corporation was authorized to transact. Mahoney v. Hardware Co., 19 Mont. 377; 48 Pac. 545.

145. A complaint against a corporation, by an assignee of its stock to plaintiff, alleged that on December 24 the stock was assigned to S, who on the same day assigned it to plaintiff. The answer alleged that on December 24 the stock of S was attached, and that he was the assignee of the stock in question at the time of the attachment. *Held*, that a failure to reply admitted that S owned the stock at the time of the attachment.—Matusevitz v. Telegraph Co., 19 Mont. 388; 48 Pac. 552.

146. Where, in an action on a note against a corporation, there was evidence that the person signing the note was defendant's secretary, treasurer and manager, and that at a certain meeting of the directors they considered the debt of the corporation and the amount claimed by plaintiff, and at such meeting interest was paid on the note, and the president "thought the money paid Mrs. A should have been paid off before this time," etc., the note was properly admitted in evidence in connection with the other proof, though it was not of itself prima facie evidence of the indebtedness of the corporation.—Agle v. Drug Co., 29 Mont. 111; 74 Pac. 135.

VIII. INSOLVENCY AND RECEIVERS, 147-151.

147. Where four shareholders get control of a majority of the stock of the corporation, elect their officers, pocket the dividends, keep false books to deceive the other shareholders, and buy a worthless franchise, for which they mortgage all the corporate property, for the purpose of having the mortgage foreclosed, and the property of the corporation wiped out, a court of equity has power to appoint a receiver for the corporation pending an action by the minority stockholders against the corporation, its managing officers, and the mortgagee, to cancel the mortgage.—State v. District Court, 15 Mont. 324; 39 Pac. 316.

148. In the absence of statutory prohibition, an insolvent corporation may make a general assignment for the benefit of creditors, with

preferences.—Ames v. Heslet, 19 Mont. 188; 47 Pac. 805.

149. The appointment of a receiver of a corporation pendente lite does not necessarily mean its dissolution.—State v. District Court, 22 Mont. 220; 56 Pac. 219.

150. Under Rev. Stat., p. 450, §§ 244, 245, providing that on filing a required certificate the persons signing it shall be a body corporate, and may acquire realty necessary to carry on the operations named in the certificate, the failure of a mining company, which has filed such certificate, to hold any meetings of its stockholders, and omission to commence business, will not invalidate a conveyance of mining claims to the corporation; for neither such failure nor omission dissolved the corporation; or invalidated the proceedings already taken, under which it became a corporation.—Morrison v. Clark, 24 Mont. 516; 63 Pac. 98.

151. Const., art. 15, § 1, providing that all existing charters or grants of special or exclusive privileges under which the grantees shall not have organized or commenced business in good faith at its adoption shall thereafter have no validity, does not affect a mining company incorporated under general laws, though it had omitted to commence business prior to the adoption of the constitution, since such section only annulled private charters or special grants then existing, under which the corporations thereby authorized had not organized.—Id.

IX. DISSOLUTION AND FORFEITURE OF FRANCHISE, 152-153.

152. The corporate existence of a corporation continues until disincorporated by order of the court, or dissolved by limitation, or until its franchise be forfeited for cause through judicial proceedings; and a corporation is not dissolved by abandonment or non-user of its franchise.—Gans v. Switzer, 9 Mont. 408; 24 Pac. 18.

153. Under Civ. Code, § 561, constituting the directors of a corporation dissolved for any reason trustees to wind up its affairs, when the directors of a building and loan association, whose charter has expired, are acting as such trustees, a receiver should not be appointed unless it appears that the party complaining has been, or is about to be, injured by unwarranted procedure on the part of such trustees.—Ferrell v. Evans, 25 Mont. 444; 65 Pac. 714.

X. FOREIGN CORPORATIONS, 154-169.

A. Recognition and Regulation, 154-155.
B. Powers and Liabilities, 156-163.
C. Actions, 164-169.

A. RECOGNITION AND REGULATION, 154-155.

154. Comp. Stat., p. 720, c. 24, provided that all foreign corporations should file with the secretary of the territory a copy of the charter or certificate of incorporation, and a statement of the finances of the company, and a designation of attorney for service of process. Laws 1893, p. 91, expressly repealed Comp. Stat., p. 720, c. 24, and provided that a foreign corporation could do business after filing with the secretary of state a certified designation of an agent for service of process in the state. Civ. Code, §§ 1030-1033, re-enacted provisions similar to Comp. Stat., p. 720, c. 24, but in different phraseology, with different provisions as to penalties and reports of finances. Pol. Code, § 5186, passed after the enactment of Civ. Code, §§ 1030-1033, expressly declares that Laws 1893, p. 91, shall be in full force. *Held*, that Civ. Code § 1030, requiring a foreign corporation to file with the secretary of state a copy of its charter, and § 1033 a semi-annual report, were new and original enactments, and therefore not affected by the re-enactment in Pol. Code, § 5186 of the repealing clause of Laws 1893, p. 91.—State v. Rotwitt, 17 Mont. 41; 41 Pac. 1004.

155. The requirements of Comp. Stat., p. 720, §§ 442-444, that a foreign corporation shall file certain papers with the recorder of the county where it intends to do, or is doing, business, and invalidating its contracts and imposing on it a forfeiture of a certain sum per day during the period of its neglect, and § 445, requiring it to file an annual report in the county where its business is carried on, are complied with by filing the same with the recorder of the county where its principal office for doing business within the state is located, and filings need not be made in every county where it may transact any item of business.—Manhattan Trust Co. v. Davis, 23 Mont. 273; 58 Pac. 718.

B. Powers and Liabilities, 156-163.

156. Under a statute requiring foreign corporations doing business in the territory to first file a charter or act of incorporation and providing a penalty for a failure so to do, such corporations are not prohibited from doing business in the territory.—King v. National M. & E. Co., 4 Mont. 1; 1 Pac. 727.

157. Cod. Stat., § 46, requiring foreign corporations to record their charter before doing business, though mandatory in form, is limited by the provisions for a penalty in the following section, which penalty provides not that such corporations shall be prohibited from doing business, but simply relieves the party suing such corporations from the necessity of proving the incorporation, except by reputation.—Id.

158. A foreign corporation is not prohibited from doing business in the territory by reason of not having filed its certificate of incorporation, as required by Cod. Stat., p. 419. (See 130 U. S. 290.)—Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. 153.

159. Failure of a corporation to comply with Comp. Stat., p. 720, § 442, providing that all foreign corporations, before doing any business within the territory, shall file with the secretary thereof, and the recorder of the county wherein they intend to transact business, a copy of their charter, and a statement, does not preclude it from suing to recover taxes paid under protest, and alleged to have been illegal, as such action is not based upon any act or contract of plaintiff in the conduct of its business.—Powder R. C. Co. v. Custer, 9 Mont. 145; 22 Pac. 383.

160. Comp. Stat., p. 720, provides that a foreign corporation shall, upon failure to file a copy of its charter with the county clerk, pay a penalty of $10 for every day it shall so neglect to file such copy, and all its acts and contracts made during such neglect shall be void. *Held*, in an action against such corporation for an injunction, where plaintiff failed to allege facts sufficient to constitute a cause of action, that he could not enforce or avail himself of the statutory penalties against defendant.—Hershfield v. Telephone Co., 12 Mont. 102; 29 Pac. 883.

161. Comp. Stat., p. 721, § 444, providing that, if any foreign corporation commence to do business in Montana without first filing certain statements and certificates, it shall forfeit to the people $10 a day, and all acts and contracts made by it during the time it neglects to make such filing "shall be void and invalid as to such corporation," renders a mortgage given it before such filing merely voidable.—Mutual Benefit L. I. Co. v. Winne, 20 Mont. 20; 49 Pac. 446.

162. Civ. Code, § 1034, does not repeal the statute of frauds as to such a corporation, or make legal any invasion by it of vested rights, or confirm ultra vires acts, but merely permits it, on filing statement and certificate, to enforce contracts which it has made without such filing, notwithstanding the statute declaring that its contracts made before such filing should be void and invalid as to it—Mutual Benefit L. I. Co. v. Winne, 20 Mont. 20; 49 Pac. 446.

163. Where plaintiff, a foreign corporation, was licensed to do business at the time it contracted with defendant for the preparation of an abstract, and it was not contended that plaintiff had not complied with the law at the time the mortgage taken on the faith of such abstract was foreclosed, and at the time action was brought to recover damages sustained from an omission in such abstract, it was immaterial that a short period existed in the meantime, during which plaintiff's license to do business had expired, and remained unrenewed.—Western Loan & Sav. Co. v. Abstract Co., 31 Mont. 448; 78 Pac. 774.

C. ACTIONS, 164-169.

164. Foreign corporations doing business in the territory, having an accredited agent on whom legal process may be served, who exercises openly his authority as such, may have the benefit of the statute of limitations.—King v. National M. & E. Co., 4 Mont. 1; 1 Pac. 727.

165. It is not necessary for a plaintiff foreign corporation, bringing action on a domestic contract, to allege that it has complied with the statutory conditions precedent to doing business in the state, where the petition shows facts making the transaction prima facie interstate commerce.—Zion C. M. Ass'n v. Mayo, 22 Mont. 100; 55 Pac. 915.

166. As against creditors of the mortgagor, a decree of foreclosure in favor of a foreign corporation is not void because in the foreclosure proceedings the corporation falsely alleged that it had complied with the state laws governing foreign corporations.—Miller v. Gates, 22 Mont. 305; 56 Pac. 356.

167. As against a mortgagor's creditors, who obtained no lien prior to a foreclosure sale to the mortgagee, who had attached before the recording of the sheriff's deed, the decree of foreclosure is not void on the ground that the mortgagee was a foreign corporation, and did not comply with the state laws governing such corporations.—Id.

168. Since it is unnecessary for a foreign corporation plaintiff, bringing action on a domestic contract, to allege that it complied with the statutes of the state entitling it to do business therein, the question of its non-compliance therewith can only be raised by answer. —American H. S. S. Co. v. O'Rourke, 23 Mont. 530; 59 Pac. 910.

169. A private citizen can not as such, and through the medium of a civil action, try the issue as to whether a foreign corporation is doing business within the state in violation of law, as such question must be determined by or in behalf of the state through the attorney general.—MacGinniss v. Mining Co., 29 Mont. 428; 75 Pac. 89.

COSTS.

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B. Power to award costs, 2.
C. Nature and grounds of right, 3-14.
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I. NATURE, GROUNDS, AND EXTENT OF RIGHT, 1-14.

A. Source of Right, 1.
B. Power to Award Costs, 2.
C. Nature and Grounds of Right, 3-14.

A. SOURCE OF RIGHT, 1.

1. The right to costs is dependent on statutory provisions, there being no right thereto at common law.—Orr v. Haskell, 2 Mont. 350.

B. POWER TO AWARD COSTS, 2.

2. In a divorce suit the costs are in the discretion of the court.—Black v. Black, 5 Mont. 15; 2 Pac. 317.

C. NATURE AND GROUNDS OF RIGHT, 3-14.

3. Where a clerk enters costs in a judgment, the presumption is that they were properly ascertained and taxed.—Marden v. Wheelock, 1 Mont. 49.

4. Where the gist of the action appears to be the title or prior right to the use of water, and the defendants admit the diversion of water but deny the title, plaintiff's recovery of the title to the water entitles him to costs.—Harris v Shontz, 1 Mont. 212.

5. In an action to recover damages for the diversion of water, and asking for a decree of title and perpetual injunction, the verdict that plaintiff was entitled to the water was a finding on the material issue, and entitled him to a judgment for costs and the relief sought.—Id.

6. Costs constitute a part of the judgment in an action, and can be reviewed by an appeal from the judgment.—Orr v. Haskell, 2 Mont. 350.

7. When a cause is reversed and remanded for new trial, and defendant is ordered to plead to a supplemental complaint on or before a certain date, but failed to do so, and offered no excuse for the failure, it is a matter of discre-

tion with the court to permit defendant to afterwards answer to the merits upon payment of the costs.—Roush v. Fort, 3 Mont. 175.

8. Comp. Stat., p. 192, § 495, provides that plaintiff may have costs when judgment is in his favor in an action to recover land, in an action to recover personal property of the value of $50, in an action for money or damages where $50 are recovered, and in special proceedings in the nature of an action. Sec. 498 provides that, in actions not mentioned in § 495, costs may be allowed or not, in the discretion of the court, but that in an action in the district court for money or damages, in which less than $50 is recovered, or for personal property of less value than $50, no costs shall be allowed. Laws 1889, p. 120, provides that costs shall be awarded by the district court to plaintiff in an action to recover damages for trespass upon real property, regardless of the damages recovered. *Held*, that an action for injury to land caused by the deposit of deleterious substances put into a stream by a minor is an action for nuisance, rather than for trespass, and, less than $50 being recovered, plaintiff is not entitled to costs.—Durfee v. Mining Co., 13 Mont. 181; 33 Pac. 3.

9. Where defendant paid $1,095 after suit brought, and in a stipulation admitted a balance due plaintiff of $6.64, but made no offer to allow judgment for that amount, it was error to refuse to allow plaintiff a judgment for costs on his obtaining judgment for the $6.64, under Code Civ. Proc., § 1851.—Pape v. Chauvin, 25 Mont. 417; 65 Pac. 424.

10. Where plaintiff is entitled to a portion of the proceeds of land sold by the owner of the legal title, no demand is necessary before suit, in order to entitle plaintiff to costs, even though no trust relation exists between the parties.—Chowen v. Phelps, 26 Mont. 524; 69 Pac. 54.

11. Under Code Civ. Proc., §§ 1851-1853, costs were properly allowed defendant on his recovering $35 under a counterclaim.—Spencer v. Mungus, 28 Mont. 357; 72 Pac. 663.

12. A finding that a survey was necessary to enable a party to properly present his case was an adjudication of costs attendant on procuring the order for the survey.—King v. Allen, 29 Mont. 5; 73 Pac. 1107.

13. A decree disposing of the issues involved, and leaving nothing but an accounting, was a final judgment in the case, so that the successful parties were entitled to their attorney's fee, without waiting until the accounting was taken.—Forrester v. Mining Co., 30 Mont. 181; 76 Pac. 2.

14. Where actions are consolidated as authorized by Code Civ. Proc., § 1894, the court should determine what costs, if any, should be charged to either party in the original suits, costs subsequently accruing being taxable only in the consolidated action.—Handley v. Sprinkle, 31 Mont. 57; 77 Pac. 296.

II. PERSONS LIABLE, 15.

15. If a defendant voluntarily joins with the husband in contesting the wife's right to a divorce, and thereby compels the wife to employ council, he ought to be jointly liable, if the decree be granted, for the costs made necessary by his own act. Black v. Black, 5 Mont. 15; 2 Pac. 317.

III. SECURITY FOR PAYMENT, 16-18.

16. Civ. Pr. Act, § 562, provides that defendant may file a motion asking the court to dismiss the action or rule the plaintiff to give security, and that the motion shall be accompanied by an affidavit "to the effect that the plaintiff is insolvent, or is not able to pay the costs liable to accrue upon said case." *Held*, that the affidavit of defendant to the effect that he is acquainted with the financial condition of plaintiff, and that, to the best of his knowledge and belief, plaintiff is unable to pay the costs likely to accrue, is sufficient to warrant a dismissal under said section.—Marsh v. Kinna, 2 Mont. 547.

17. Civ. Pr. Act, § 562, provides that defendant may file a motion asking the court to dismiss the action or rule the plaintiff to give security, and that thereupon, the motion being accompanied by a certain affidavit, the court shall dismiss the action unless plaintiff justifies or gives a sufficient bond or deposits money with the clerk, or makes an affidavit setting forth certain facts entitling him to prosecute his action without prepaying the costs. *Held*, that the court properly dismissed the action on the refusal of plaintiff, after a reasonable time, to perform any of said acts.—Id.

18. Under Code Civ. Proc., §§ 1871, 1872, 1822, where defendant did not apply for an order requiring plaintiff to give security for costs until the day on which the cause was set for trial, an order denying a stay until security was given, on the ground that the application was made too late, was proper.—Brazell v. Cohn, 32 Mont. 556; 81 Pac. 339.

IV. AMOUNT, RATE, AND ITEMS, 19-27.

19. It is a presumption that the costs entered by the clerk in a judgment, have been properly ascertained and taxed.—Marden v. Wheelock, 1 Mont. 49.

20. A referee will not be permitted to exact exorbitant fees under color of a contract, under Comp. Stat., p. 193, § 501, providing that the fees of referees shall be $8 a day to each, "but the parties may agree in writing upon any other rate of compensation, and thereupon such rate shall be allowed."—In re Haldorn, 10 Mont. 281; 25 Pac. 438.

21. The parties having agreed to pay the referee $18 per day for each day's attendance, and 20 cents for each folio of transcript and 10 cents for each folio of copy, his compensation was properly reduced to $8 per day.—Id.

22. Comp. Stat., p. 194, § 509, provides that if any party shall include in his verified memorandum of costs and disbursements necessarily incurred any item to which he is not entitled, and his adversary shall prevail with a motion to retax," there shall be taxed as a part of the costs of such motion a docket fee of $25." *Held*, mandatory in favor of the party moving to retax, and not within the court's discretion.—First Nat'l Bank v. Neill, 13 Mont. 377; 34 Pac. 180.

23. Under Code Civ. Proc., § 1866, awarding the legal fees paid stenographers for per diem or for copies as costs to the party entitled to costs, and § 373, prescribing the legal fees of stenographers for copies of the testimony transcribed from their notes, since the clerk can not transcribe the stenographic notes into longhand the fee paid the stenographer for such transcription is chargeable as part of the costs.—State v. District Court, 25 Mont. 1; 63 Pac. 402.

24. Code Civ. Proc., § 1866, does not authorize the taxation of fees paid to provide stenographers who attended the trial of an action in the place of the official stenographer by the consent of the parties and of the court.—M. O. P. Co. v. Mining Co., 27 Mont. 288, 70 Pac. 1114.

25. A party to whom costs are awarded is entitled to mileage for witnesses who appeared

and testified, irrespective of whether they were legally subpoenaed, under Pol. Code, §§ 4648, 1866.—McGlauflin v. Wormser, 28 Mont. 177; 72 Pac. 428.

26. Where the court allowed, as costs, a fee paid to a witness called to testify in a proceeding, it should also have allowed the sheriff's fee for summoning the witness.—King v. Allen, 29 Mont. 5; 73 Pac. 1107.

27. Fees paid a witness testifying on the hearing for an order of survey, fees paid a witness at the hearing of an order to show cause, fees for summoning such witnesses, and the expense of procuring a map, are prima facie proper items of costs, under Code Civ. Proc., §§ 1866, 1317.—Id.

V. TAXATION, 28-43.

28. Civ. Pr. Act, §§ 369, 380, specify the orders or judgments which are the subject of appeal, but an order overruling a motion to tax or retax costs is not included among them. *Held*, that such an order is not appealable.
Rader v. Nottingham, 2 Mont. 157.
Hibbard v. Tomlinson, id 220.
Orr v. Haskell, id 350.

29. An order taxing costs is not one that may be appealed from the district court to the supreme court.—Rader v. Nottingham, 2 Mont. 157.

30. Under our statutes no right of appeal is given from an order overruling a motion to tax or retax costs, but when an appeal is made from the judgment on the merits of the case such order is properly brought before the appellate court.—Hibbard v. Tomlinson, 2 Mont. 220.

31. A motion to retax costs must be supported by the records of the case or affidavits, or a statement showing the illegal charges.—Id.

32. An appeal can not be maintained upon an order overruling a motion to retax costs.—Orr v. Haskell, 2 Mont. 350.

33. Under Civ. Pr. Act, § 558, requiring the clerk to insert the costs, within two days after they have been taxed or ascertained, in the blank left in the judgment for that purpose, the act of the clerk in inserting in the blank a sum for costs three years thereafter, is void.—Id.

34. Where a party is dissatisfied with the action of the clerk as to costs, his remedy is by an appeal from the taxation.—Mining Co. v. Weinstein, 7 Mont. 346; 17 Pac. 108.

35. The illegality of the taxing of attorney's fees will not be determined on an appeal from the taxation, where the record only contains a statement that only part of the costs allowed are attorney's fees, and part witness fees, such record not being signed by the judge nor made part of the judgment roll by the bill of exceptions or statement on appeal.—Id.

36. Under Comp. Stat., p. 194, §§ 507, 508, providing that the party in whose favor judgment is rendered shall, within two days, deliver to the clerk of the court a verified memorandum of costs and necessary disbursements, and that such memorandum need not include the legal fees or costs of any officer of the court, sheriff's expenses for rent, gas, water, fuel, etc., necessarily incurred in levying attachment writs, need not be included in such memorandum.—First Nat'l Bank v. Boyce, 15 Mont. 162; 38 Pac. 829.

37. Where an item in a cost bill is, "To statement on appeal, $100," it is insufficient to enable the supreme court to say that the trial court erred in disallowing it.—Waite v. Vinson, 18 Mont. 410; 45 Pac. 552.

38. Where, in cost bills, there are two items for "printing brief" in the same case, and the trial court allows the larger item, it will be presumed on appeal that the court found that there was only one brief, and the larger charge included the smaller, in the absence of a showing that there was more than one brief.—Id.

39. Under Code Civ. Proc., § 1867, where plaintiff did not serve his memorandum of costs until eight days after the decision in his favor, and the records did not show that he did not have notice of the decision until within five days of such service, defendant's motion to strike out the memorandum of costs should be sustained.—Reins v. King, 27 Mont. 511; 71 Pac. 763.

40. Where a statute or rule of court requires a party claiming costs to serve a verified memorandum thereof on his adversary, and file the same with the clerk, such memorandum is prima facie evidence that the items were necessarily expended, and are properly taxable, unless, as a matter of law, they appear otherwise on their face.—King v. Allen, 29 Mont. 5; 73 Pac. 1107.

41. The burden of proof of overcoming the prima facie evidence as to taxable costs established by filing memorandum of costs is on the adverse party.—Id.

42. Whether the expense of making a map was reasonable or necessary to facilitate a hearing upon an injunction proceeding is a question of fact, in reference to which the court, in taxing costs, should admit all competent evidence, including testimony of witnesses explanatory of what the map was intended to show, their statements as to whether it actually represented the facts intended to be shown by it, the map itself, and testimony as to its reasonable cost.—Id.

43. Under Code Civ. Proc., § 774, where an order taxing costs in favor of plaintiff, and included in a judgment for him, did not include a certain item claimed by him, and the judgment was affirmed on appeal by defendant, the trial court had no authority after the affirmance to make an order taxing such costs, claimed by plaintiff, though the failure to tax them originally was an oversight on the part of the court; since the statute applies only to a party's own neglect.—State v. District Court, 32 Mont. 20; 79 Pac. 410.

VI. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR, 44-62.

A. Nature and Grounds of Right, 44-47.
B. Acts or Omissions of Parties as Affecting Right, 48-49.
C. Expense of Printing Transcript or Brief, 50-55.
D. Damages and Penalties for Frivolous Appeals and Delays, 56-58.
E. Taxation of Appellate Costs, 59-61.
F. New Trial and Motion Therefor, 62.

A. NATURE AND GROUNDS OF RIGHT, 44-47.

44. Pr. Act, § 417, providing that if a party appealing to the district court shall fail to reduce or enlarge the judgment appealed from $10 or more, or reverse it, in the district court, he shall not recover any costs on appeal, does not give a party who appeals to the district court from a judgment rendered against him in the probate court, and reduces the amount of damages more than $10, a right to his costs on the appeal.—Hibbard v. Tomlinson, 2 Mont. 220.

45. Though an order overruling a motion for

judgment for costs, and an order overruling a motion to retax costs, are not appealable, yet an appeal from the judgment on the merits of the case brings such orders before the court for its consideration.—Id.

46. On appeal to the district court judgment against defendant was reduced more than $10. Plaintiff did not move that the costs be divided, but filed a memorandum, including all the costs incurred in the appeal. *Held*, not error to sustain defendant's motion to retax costs, and to charge plaintiff with a docket fee of $25,—in view of Comp. Stat., p. 193, § 502, providing that, when judgment of a court below shall be affirmed in part, the court shall divide the costs according to the justice of the case; and § 825, providing that, if a party on appeal fails to reduce the judgment $10 or more, he shall not recover the costs of the appeal; and § 509, authorizing a docket fee of $25 to be charged against a party including an item to which he is not entitled in a memorandum of costs required to be filed by § 507. —Parrott v. Morase, 20 Mont. 61; 49 Pac. 386.

47. Under rule 13, providing that in all cases the cost of appeal shall be taxed against the unsuccessful party, no formal entry of judgment for costs is necessary, but the rule itself disposes of such costs as effectually as though a formal judgment therefor were entered. —State v. District Court, 27 Mont. 40; 69 Pac. 244.

B. ACTS OR OMISSIONS OF PARTIES AS AFFECTING RIGHT, 48-49.

48. Where defendant fails to call the attention of the court below to an error in the judgment in allowing interest, he should be charged with the costs of an appeal on which the error is corrected, but on which the judgment is otherwise affirmed.—Palmer v. Murray, 8 Mont. 312; 21 Pac. 126.

49. Where, on appeal, a decree for plaintiff is modified in amount, and defendants have not attempted below to have it equitably modified, nor offered to do equity, but have sought in both courts to defeat plaintiff's whole claim, they will not be allowed costs of appeal.—Lang v. Caldwell, 13 Mont. 458; 34 Pac. 957.

C. EXPENSE OF PRINTING TRANSCRIPT OR BRIEF, 50-55.

50. Under Comp. Stat., p. 192, § 494, providing that there shall be allowed to the prevailing party in the supreme court his necessary disbursements in the action, a party is entitled to the cost of printing his brief.—Ryan v. Maxey, 17 Mont. 164; 42 Pac. 760.

51. The cost of expressing briefs to the supreme court is not properly taxable as part of the costs.—State v. District Court, 25 Mont. 1; 63 Pac. 402.

52. The expense of printing briefs in the supreme court is chargeable as part of the costs.—Id.

53. Fees paid stenographers in taking dictation of briefs for the supreme court and typewriting them are not taxable to the defeated party.—Id.

54. Where appellant unnecessarily incorporated formal parts of pleadings, writs and other papers in the transcript on appeal in violation of rule 7, he was not entitled to recover the expense of printing that portion of the transcript so incorporated.—Greene v. Brewing Co., 28 Mont. 380; 72 Pac. 751.

55. Where appellant filed a brief containing 283 pages, much of which consisted of long arguments, extended excerpts from reported cases, and irrelevant matter, the cost of printing such brief would not be allowed on reversal of the judgment.—Finlen v. Heinze, 28 Mont. 548; 73 Pac. 123.

D. DAMAGES AND PENALTIES FOR FRIVOLOUS APPEALS AND DELAYS, 56-58.

56. Where there is no merit in an appeal, and it seems to the court to have been taken merely for delay, this court will award damages. —Ramsey v. Cattle Co., 6 Mont. 498; 13 Pac. 247.

57. Where it is apparent that the only object of an appeal was the delay and vexation of plaintiff, the judgment of the lower court should be affirmed, and a penalty added for frivolous appeal.—Burns v. Paulsen, 16 Mont. 333; 40 Pac. 789.

58. An appeal from a judgment of the district court, entered on appeal from a justice's court taken to review an order of the district court refusing to tax in favor of appellant a docket fee on retaxing the costs, will be *held* frivolous, where the record fails to show the items of costs, and no argument is made.— McGuire v. Sweeney, 17 Mont. 541; 43 Pac. 924.

E. TAXATION OF APPELLATE COSTS, 59-61.

59. Subject to a motion to strike out disputed items, the filing of the memorandum has the same effect as a formal entry of judgment, and the trial court has no further function to perform after execution thereon than it has in case of an execution on a final judgment.—State v. District Court, 27 Mont. 40; 69 Pac. 244.

60. Where a party to whom the costs of an appeal were awarded erroneously included in the memorandum thereof, filed and served pursuant to Code Civ. Proc., § 1869, items of cost on the trial below, the adverse party, by failing to make a seasonable motion to strike out such items, and by moving to quash on other grounds the execution issued on such memorandum, waived objection to the erroneous items. —Id.

61. Code Civ. Proc., § 1869, provides that, if a party to whom an appellate court has awarded costs wishes to claim them, he must, within 30 days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed by § 1867, and that thereafter he may have an execution therefor as on a judgment *Held*, that though such order does not require service of the memorandum on the adverse party, by analogy such service should be made, and disputes settled as provided by § 1867.—Id.

F. NEW TRIAL AND MOTION THEREFOR, 62.

62 The expense of the stenographer's transcript of the evidence in preparing a motion for new trial is a necessary disbursement within Comp. Stat., p. 192, § 494, giving the prevailing party his "costs and necessary disbursements."—Waite v. Vinson, 18 Mont. 410; 45 Pac. 552.

VII. PAYMENT AND REMEDIES FOR COLLECTION, 63.

63. Code Civ. Proc., § 1869, provides that if a party to whom an appellate court has awarded costs wishes to claim them, he must, within 30 days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed by § 1867, and that thereafter he may have execution therefor as upon a judgment. *Held*, that

when a party to whom such costs are awarded has complied with the statute, the clerk must issue execution for his costs whenever he demands it.—State v. District Court, 27 Mont. 40; 69 Pac. 244.

VIII. IN CRIMINAL PROSECUTIONS, 64-72.

A. Source of Right, 64.
B. Liability of County, 65-66.
C. Attorney's Fees, 67.
D. Payment and Remedies for Collection, 68-72.

A. SOURCE OF RIGHT, 64.

64. Pen. Code, § 2224, was not in any manner repealed by Laws 1897, p. 81, providing for the imprisonment of one convicted of gambling until the fine and costs were paid, not exceeding five years in the state penitentiary, for the latter act did nothing more than exempt judgments on convictions of gambling from the operation of the general law; and hence, after its repeal, a person convicted of gambling was properly sentenced under the general law.—State v. Towner, 26 Mont. 339; 67 Pac. 1004.

B. LIABILITY OF COUNTY, 65-66.

65. An attorney appointed by the court to defend an indigent prisoner charged with commission of a felony, is required to perform this duty, but can not recover compensation for his services from the county in which the trial occurs.—Johnston v. Lewis and Clarke, 2 Mont. 159.

66. Under a statute providing that in cases less than felony, where defendant is discharged, the costs shall be taxed to the prosecution or the person on whose oath the case was instituted, unless the officer making the examination shall certify that there was probable cause, the county commissioners have no authority to review such certificate; it is a judicial act and can be reviewed only by judicial authority.—Hedges v. Commissoners, 4 Mont. 280; 1 Pac. 748.

C. ATTORNEY'S FEES, 67.

67. Laws 1889, p. 147, §§ 8, 9, provided that the county attorney should be compensated by a salary and certain fees, the total not to exceed $3,000. Laws 1891, p. 235, § 1, provides that the fees of all county officers named therein shall be turned into the county treasury, but the county attorney is not named as one of such officers. Sec. 3 provides that the "officers named in § 1 of this act shall be allowed to receive as annual compensation * * * as follows:" and the list given includes the county attorney and his salary. *Held*, that the fees of the county attorney taxable under Laws 1889 can not be taxed against a defendant convicted in a criminal case for the purpose of being collected and turned into the county treasury.—State v. Middleton, 13 Mont. 368; 34 Pac. 184.

D. PAYMENT AND REMEDIES FOR COLLECTION, 68-72.

68. Under Comp. Stat., p. 432, § 153, providing that every indictment for a misdemeanor must have the name of the prosecutor endorsed thereon, and § 413, requiring the jury acquitting upon the trial of such indictment to return with their verdict whether the prosecutor or the county shall pay the costs, a complaint against the county for costs must allege either that the trial under which the costs were incurred was not a misdemeanor, or, if so, that the verdict made the county liable for costs.—First Nat'l Bank v. Custer, 7 Mont. 464; 17 Pac. 551.

69. Comp. Stat., p. 142, § 313, requires the sheriff to satisfy a judgment imposing a fine or costs upon a defendant in a criminal prosecution out of the real property belonging to defendant on the day when the judgment is docketed, or at any time thereafter. Sec. 464 provides that nothing in the statute shall prohibit the issuing of execution, and enforcing the collection thereof out of any other property of defendant than that enumerated. *Held*, that where defendant conveys the land after arrest, but before the judgment is docketed, an execution is not the only method of enforcing the judgment; but an action may be brought against the grantee to sell the land.—Silver Bow v. Straumbaugh, 9 Mont. 81; 22 Pac. 453.

70. Under Comp. Stat., p. 511, § 58, which provides that an assault shall be punished by a fine of not less than $5 nor more than $50, when defendant has been found guilty, and has paid the fine assessed against him, he can not be imprisoned for non-payment of the costs of the prosecution.—State v. Sulliyan, 9 Mont. 490; 24 Pac. 23.

71. When costs of prosecution are required by the statute (Comp. Stat., p. 576, § 261) under which the conviction is had to be included in the fine assessed, defendant may properly be imprisoned under a judgment including such cost as part of the fine.—State v. Reynolds, 14 Mont. 383; 36 Pac. 449.

72. Pen. Code, § 2224, permitted the court in every case where a defendant, on conviction of crime, was adjudged to pay a fine, to also imprison him "until the fine and costs were satisfied," not exceeding one day for every $2 of the fine and costs. Laws 1901, p. 167, § 2, provides for the punishment, on conviction of gambling, by a fine and "imprisonment until the fine and costs were paid." *Held*, that the word "paid" in the latter act was synonymous with the word "satisfied," as used in the general act, and hence a person convicted of gambling could be imprisoned not to exceed one day for every $2 of the fine and costs.—State v. Towner, 26 Mont. 339; 67 Pac. 1004.

COUNTERFEITING.

1. An indictment for making counterfeit coin, which does not allege the number of coins made, does not sufficiently describe the offense, and is demurrable.—United States v. Weikel, 8 Mont. 124; 19 Pac. 396.

2. Where the coin alleged to have been counterfeited is excluded as evidence, and no witness testifies that it is counterfeit, or that it was made or uttered by defendant, the jury should be instructed to acquit.—Id.

COUNTIES.

I. Creation and Alteration, 1-6.
II. Government and Officers, 7-31.
  A. Removal of county seat, 7-12.
  B. County board, 13-14.
  C. Officers and agents, 15-31.

II. Government and Officers, 7-31.—Continued.
C. Officers and agents, 15-31.—Continued.
1. Acquisition, tenure, and relinquishment of office, 15-19.
2. Compensation and fees, 20-22.
3. Powers and duties, 23.
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5. Liabilities on official bonds, 27-31.
III. Property, Contracts, and Liabilities, 32-39.
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A. General indebtedness, 40-44.
B. Adjustment of accounts with other municipalities, 45.
C. Warrants and certificates of indebtedness, 46-51.
D. Bonds, 52.
V. Claims Against County, 53-58.
VI. Actions, 59-63.

I. CREATION AND ALTERATION, 1-6.

1. The provision of the act creating Yellowstone county out of a part of Custer county, that an apportionment of the debt of Custer county should be made, based on "taxable property," means property liable to taxation, and not exempt property, although such property appeared on the assessment roll.—Custer v. Yellowstone, 6 Mont. 39; 9 Pac. 586.

2. The act creating Yellowstone county and providing for an apportionment to it of part of the debt of Custer county, did not, by providing that the county commissioners should meet and adjust the indebtedness, constitute them the sole tribunal for the purpose; and, on their refusal to act, the courts might be resorted to.—Id.

3. Cascade county being created out of Choteau county, and liable for part of the latter's debts, the commissioners of Cascade county were required by statute to issue bonds for the debt at their first meeting. The commissioners failed to do this. At the second meeting, June 6, 1888, Choteau county demanded warrants upon the general fund, or money in payment, and the commissioners refused to give either. *Held*, a case of money "withheld by an unreasonable and vexatious delay," under Comp. Stat., p. 991, § 1237, and interest at the rate of 10% per annum should be charged from June 6, 1888.—Territory v. Commissioners, 8 Mont. 396; 20 Pac. 809.

4. Laws 1887, p. 105, creating the county of Cascade from Choteau and Meagher counties, apportioned a part of the debt of Choteau county to Cascade county, amounting to $30,000, and provided that the commissioners of Cascade county should cause to be issued at their first regular session warrants on the general fund for said amount; which warrants, if not paid when presented to the treasurer, should be endorsed, "Not paid for want of funds," and thereafter bear interest; or the commissioners "may issue coupon bonds of said county bearing interest at not more than 6% per annum, payable in seven years, and due in 15 years, in payment of said debt, and to pay current expenses for the first year. Said bonds shall not be sold for less than par, and shall be issued as near as may be in conformity with general law." *Held*, that the act did not give the commissioners of Cascade county the right to elect to pay the indebtedness by issuing coupon bonds and turning them over to Choteau county in payment; but if they elected to issue coupon bonds, they were required to negotiate them, and pay the proceeds to Choteau county.—Id.

5. Under Const., art. 16, § 3, making a new county liable for its proportion of all the existing liabilities of the counties from which it is formed, Sweet Grass county, created out of three other counties by act Mar. 5, 1895, is liable for interest on the amount of its share of the bonded interest bearing debt of one of such counties from the date of the adjustment of such indebtedness pursuant to the provisions of the act, until the warrants therefor required by the act are issued and paid.—Holliday v. Sweet Grass, 19 Mont. 364; 48 Pac. 553.

6. Act Mar. 5, 1895, creating Sweet Grass county out of territory formerly included in three counties, and fixing definite dates for meetings of its commissioners with others to adjust debts with each, and requiring (§ 4) the commissioners of the new county to cause to be issued to each of the other counties, "from time to time," warrants for payment of its share of their debts, contemplates the issuance of warrants in each case at the meeting held to adjust the debts.—Id.

II. GOVERNMENT AND OFFICERS, 7-31.

A. Removal of County Seat, 7-12.
B. County Board, 13-14.
C. Officers and Agents, 15-31.

A. REMOVAL OF COUNTY SEAT, 7-12.

7. The offer of a public building if the county seat is changed is in no sense bribery; the building is a benefit to the public and not to individuals, and the party to be influenced is a whole county.—Wells v. Taylor, 5 Mont. 202; 3 Pac. 255.

8. A statute authorizing a special election to determine whether or not the county seat should be changed was not inoperative because it made no provision for a canvassing board, but merely required "the canvassing board" to make an abstract of the returns. Under such a provision the votes were properly canvassed by the board provided by the general law.—Id.

9. Where the county seat was changed by an election, the result of such election could not be defeated by the failure of the county commissioners to order the removal of the books and offices to the newly designated town, and if the county officers effected the removal on their own motion they can not be compelled by mandamus to return and await the order which the statute required the commissioners to give.—Id.

10. Where a board of county commissioners, in pursuance of Pol. Code, §§ 4157, 4158, decides whether a petition presented to them for the submission of the removal of the county seat to the electors is signed by a sufficient number to require them to submit the question to an election, it exercises judicial functions, within the meaning of Code Civ. Proc., § 1941, providing that a writ of review may be granted when an inferior board exercising judicial functions, has exceeded its jurisdiction.—State v. Ravalli, 21 Mont. 469; 54 Pac. 939.

11. An affidavit for a writ of certiorari to review a decision of county commissioners that a petition was signed by the required number

of electors to justify their submitting the question of removing the county seat to an election, stated that the board refused to receive evidence of the right of the persons signing the petition; that there was no evidence of the number of signatures required, nor of how many signers were qualified; but it was not stated that objection was made to the petition, nor that any evidence was offered; nor that the board was not advised of the number of signatures required. It also stated that before the petition was acted on the affiant's offer of evidence that a large number of signers was disqualified was rejected, but it did not indicate that, if proven, it would reduce the number qualified to less than was required, nor show that affiant objected to the petition while it was pending before the board, though he had opportunity to attack it. *Held*, that the affidavit was insufficient, where the petition bore the required number of names, and recited that the signers were qualified, since, in the absence of an objection and of fraud, which did not appear, it indicated that the board had regularly pursued its authority, and, by Code Civ. Proc., § 1947, the review on such a right was to determine whether they had or not.—Id.

12. Where an allegation of a complaint, assailing an order of county commissioners submitting the question of the removal of the county seat to an election, was that the commissioners refused to receive evidence as to the qualifications of signers to the petition on which the order was made, though proof was offered to show that a large number were not qualified, the allegation does not show that they exceeded their authority in making the order, since it was not alleged that the number which it was offered to prove disqualified were sufficient to invalidate the petition.—Buck v. Fitzgerald, 21 Mont. 482; 54 Pac. 942.

B. COUNTY BOARD, 13-14.

13. The approval of the bond of the county treasurer, under art. 6, § 87, Cod. Stat., must be by the full board.—Commissioners v. McCormick, 4 Mont. 115; 5 Pac. 287.

14. Acts of the county board in making a loan exceeding the constitutional limit, and issuing warrants therefor, being illegal, and not merely an abuse of discretion in a matter within the discretion of the board, the proper remedy for an aggrieved taxpayer is by injunction, and not by an appeal under Comp. Stat., p. 846, § 764, providing that anyone aggrieved by the action of the board may appeal to the district court.—Hoffman v. Gallatin, 18 Mont. 224; 44 Pac. 973.

C. OFFICERS AND AGENTS, 15-31.

1. ACQUISITION, TENURE, AND RELINQUISHMENT OF OFFICE, 15-19.
2. COMPENSATION AND FEES, 20-22.
3. POWERS AND DUTIES, 23.
4. ACCOUNTING AND SETTLEMENT WITH COUNTY OR SUCCESSOR, 24-26.
5. LIABILITIES ON OFFICIAL BONDS, 27-31.

1. Acquisition, tenure, and relinquishment of office, 15-19.

15. Const., art. 16, § 4, provides that there shall be elected, in each county, commissioners to serve for a term of four years. Act Feb. 16, 1893, created Ravalli county, and named three persons as commissioners, to serve until the next general election in 1894. *Held*, that the officers then elected were entitled to serve for the full constitutional term, which begins at the first general election succeeding the creation of the county, and is not quadriennially from the adoption of the constitution in 1889—State v. Mayhew, 21 Mont. 93; 52 Pac. 981.

16. Where the act creating a new county also named persons to act, who did qualify and act as its officers until their successors were elected, no vacancy in such offices existed on the passage of the act creating them.—Id.

17. The power to fill county offices provisionally by legislative appointment is a necessary incident of the legislative power to create new counties, although the constitution provides generally for the election or appointment of such officers otherwise than by the legislature.—Id.

18. Laws 1891, p. 227, created the office of county auditor in counties having an assessed valuation of not less than $8,000,000. Pol. Code, § 2922, as originally passed, enumerating the county officers, omitted all reference to county auditor. Secs. 5181-5186 declared Laws 1891, p. 227, to be in full force. Secs. 4560-4570 contained the provisions of Laws 1891, p. 227. Sec. 4312 amended §§ 2922 et seq., and creafed the office of county auditor in counties of the first, second and third classes only. Sec. 4328 classified the counties into eight classes, depending upon their assessed valuation; the third class consisting of counties having an assessed valuation of more than $10,000,000 and less than $15,000,000. Secs. 5185, 5186, repealed conflicting acts enacted prior to 1895. *Held*, that § 4312 repealed Laws 1891, p. 227 (Pol. Code, § 4560), creating the office of county auditor in certain counties, and therefore an auditor could not be elected in a county of a class below the third class.—State v. Dickinson, 26 Mont. 391; 68 Pac. 468.

19. Pol. Code, § 1171, in so far as it relates to officers named in Const., art. 16, § 5, providing that such officers shall hold their offices for two years, and until their successors are elected and qualified, is invalid, as in contravention of such section.—State v. Acton, 31 Mont. 37; 77 Pac. 299.

2. Compensation and fees, 20-22.

20. Under Act Jul. 22, 1879, county clerks are not entitled to any extra compensation for any services, and the county is prohibited from paying them any other compensation than the salary provided by such act.—Raymond v. Commissioners, 5 Mont. 103; 2 Pac. 306.

21. A county surveyor is not entitled to an allowance from the county for his reasonable expenses in making a survey, as for hire and board of team, since, under Comp. Stat., p. 882, § 900, the compensation of the county surveyor is fixed at $7 per day while making a survey, no provision being made for expenses, as is the case with many other county and state officers.—Wright v. Meagher, 16 Mont. 479; 41 Pac. 271.

22. Laws 1897, p. 71, § 13, enacts that a county surveyor shall receive $5 a day as full compensation for the performance of his duties. Pol. Code, § 4590, enacts "that members of the legislative assembly, state officers, county officers, township officers, jurors, witnesses and other persons who may be entitled to mileage," shall be entitled to collect 10 cents per mile for the distance actually traveled, "and no more." *Held*, that the county surveyor is not entitled to mileage, since the purpose of the section was not to create a right to mileage, but simply to fix a uniform rate of mileage, and, besides, the phrase "who may be entitled to mileage" not only limits the phrase "other persons," but refers back and qualifies "county officers" as well.—Wade v. Lewis and Clarke, 24 Mont. 335; 61 Pac. 879.

3. Powers and duties, 23.

23. So far as the duties of county officers are not prescribed by the constitution, they may

be by legislative enactment.—Missouri River Power Co. v. Steele, 32 Mont. 433; 80 Pac. 1093.

4. Accounting and settlement with county or successor, 24-26.

24. In an action on the bond of a county treasurer it is no defense to allege that the commissioners compromised and settled the claim of the county, accepting part of the moneys due, and in consideration thereof releasing such treasurer and his sureties from liability for the balance.—Commissioners v. Lineberger, 3 Mont. 231.

25. The failure of a county treasurer and his sureties to pay over to the county, upon demand, money which had been stolen from said treasurer, is an "unreasonable and vexatious delay," within Cod. Stat., p. 497, § 2, and entitles the county to recover interest.—Id.

26. The board has no right or authority, in settlement with the county treasurer, to accept and count as money the checks of third parties. —Commissioners v. McCormick, 4 Mont. 115; 5 Pac. 287.

5. Liabilities on official bonds, 27-31.

27. The sureties upon the bond of a county treasurer are not liable for a deficit of their principal occurring after they had been released and a second bond had been accepted and approved by the commissioners.—Missoula v. Edwards, 3 Mont. 60.

28. An official bond voluntarily given by a county treasurer for the faithful performance of his duties, though erroneously given to the territory instead of to the commissioners as required by law, is good and binding as a common law bond.—Commissioners v. Lineberger, 3 Mont. 231.

29. In an action upon the bond of a county treasurer given to the territory instead of to the commissioners as required by law, the county is the real party in interest, and its authorized representatives can maintain such action.—Id.

30. It is no defense to an action on the bond of a county treasurer to allege that the office and safe furnished by the county were broken open and robbed without any want of reasonable care on the part of the treasurer. —Id.

31. A probate judge having taken office and given bond at a time when the statutes prescribed that probate judges should receive a salary as their sole compensation, should pay into the county treasury all fees received by them, and should issue bounty certificates for the killing of certain animals, the act of Mar. 5, 1887, enacted during his term of office, extending the list of bounty animals, and providing for the destruction of their skins by the judge, enlarged his duties in degree, and not in kind, and he and his bondsmen are liable to the county for the fees received by him for such services.—Territory v. Carson, 7 Mont. 417; 16 Pac. 569.

III. PROPERTY, CONTRACTS, AND LIABILITIES, 32-39.

32. When the law itself imposes a duty on county commissioners as such, the county will not be liable for their breach of duty, or for their nonfeasance or misfeasance in relation to such duty.—Territory v. Commissioners, 8 Mont. 396; 20 Pac. 809.

33. One contracting with county commissioners is charged with knowledge of the limits of their authority.—Lebcher v. Custer, 9 Mont. 315; 23 Pac. 714.

34. An adjudication that a sale to a county is void, because the seller is a county commissioner, leaves the title in such seller, so that he can sell the property to another, who, in turn, can sell it to the county, and recover of it therefor.—Morse v. Granite, 19 Mont. 450; 48 Pac. 745.

35. Pol. Code, §§. 279, 1460, make it the duty of every male person over 18 years old to join the posse comitatus on being required by any sheriff or other officer to do so, as authorized by § 4381 Secs. 4286, 4681, provide that the commissioners shall not allow any account for official services for which no specified fees are fixed by law. *Held*, that as there is no statutory authority for compensation for services and expenses incurred by members of the posse comitatus, a county is not liable therefor.—Sears v. Gallatin, 20 Mont. 462; 52 Pac. 204.

36. Laws 1897, p. 48, § 12, provided that the commissioners of B county should contract with the lowest responsible bidders for transcribing certain records. The board, without advertising for bids, or any notice of intention to let a contract, entered into an agreement with relators, whereby they agreed to do the indexing at a stipulated wage per month. *Held*, that the contract was void.—State v. Coad, 23 Mont. 131; 57 Pac. 1092.

37. Pol. Code, § 4230, does not authorize the commissioners to employ counsel to prosecute a suit by an employee of the board against an officer of the county, where the county is not a party to the suit.—Williams v. Commissioners, 28 Mont. 360; 72 Pac. 755.

38. A contract of employment, entered into by the chairman of the board individually, is not binding on the county, where the only record of the board's action thereon is a resolution to pay part of the claim presented after the rendition of the services; the commissioners having power to bind the county only where they act as a legal entity. Pol. Code, §§ 4210, 4216, 4220.—Id.

39. Const., art. 8, § 27, provides that criminal charges must be preferred in the name of the state and prosecuted by its authority. Pol. Code, § 4450, imposes on the county attorney the duty of conducting prosecutions on behalf of the state, expenses incurred by him in such cases being, by § 4681, subd. 3, a county charge. By § 460 the attorney general is given supervisory power over the county attorney, and in certain cases must assist any county attorney in performing his duties, and must also appear in the supreme court to prosecute and defend causes to which the state is a party. By § 4190 a county has only such powers as are expressly provided by law, or necessarily implied from those expressed. *Held*, that after a criminal case has been appealed to this court, the duties of the county attorney therein and his power to contract expenses for the county cease, and the duty of the attorney general begins, and, there being no code provision authorizing it, he has no power to contract on behalf of the county, and the county has no power lawfully to pay, expenses incurred in printing briefs filed on behalf of the state in the appeal.—Independent Pub. Co. v. Lewis and Clark, 30 Mont. 83; 75 Pac. 860.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURETIES, AND TAXATION, 40-52.

A. General Indebtedness, 40-44.
B. Adjustment of Accounts With Other Municipalities, 45.
C. Warrants and Certificates of Indebtedness, 46-51.
D. Bonds, 52.

A. GENERAL INDEBTEDNESS, 40-44.

40. Const., art. 12, § 8, declares that the legislature may provide for the funding of the debts of public corporations, including funded debts and obligations. Art. 13, § 5, declares that no county shall incur any indebtedness for any single purpose to an amount exceeding $10,000, without the approval of a majority of the electors. Comp. Stat., p. 859, § 808, as amended by Laws 1891, p. 226, provides that the commissioners of a county may issue coupon bonds to an amount sufficient to enable them to redeem any outstanding bonds or warrants; that they may also, whenever authorized by the electors, issue bonds for the purpose and to the amount authorized; and that whenever it shall be deemed advisable to incur an indebtedness exceeding $10,000, the question shall be submitted to the electors. *Held*, that the issue of bonds to redeem outstanding bonds or warrants is not the incurring of an indebtedness, within the inhibition of the constitution, and need not, therefore, be submitted to the electors. —Hotchkiss v. Marion, 12 Mont. 218; 29 Pac. 821.

41. A contract by county commissioners for the construction of a court house, the cost of which alone is to be less than $10,000, but which, together with the cost of the ground, plans, and the hire of a supervising architect, greatly exceeds that sum, and which has not been authorized by any election, is within Const., art. 13, § 5, prohibiting a county from incurring any indebtedness for any single purpose to an amount exceeding $10,000, without the approval of the majority of the electors thereof.—Hefferlin v. Chambers, 16 Mont. 349; 40 Pac. 787.

42. Under Const., art. 13, § 5, providing that counties shall not incur indebtedness for any single purpose exceeding $10,000, without the approval of a majority of the electors, a county board can not, by splitting the amount into several sums of $10,000 or less, make in one day a loan of $30,000 from a bank.—Hoffman v. Gallatin, 18 Mont. 224; 44 Pac. 973.

43. Const., art. 13, § 5, prohibits counties from contracting an indebtedness exceeding $10,000, for any purpose, without the approval of a majority of the electors voting at elections to be provided by law. Pol. Code, § 4270, authorizes the county commissioners to submit such question to vote. *Held*, that a favorable majority of all the votes cast on the question of incurring the indebtedness, at a general election at which the question is submitted, is sufficient to authorize the indetbedness, though such majority is not a majority of all the electors voting at such election.—Tinkel v. Griffin, 26 Mont. 426; 68 Pac. 859.

44. Const., art. 13, § 5, prohibits counties from contracting an indebtedness exceeding $10,000, for any purpose, without the approval of a majority of the electors voting at elections to be provided by law. Pol. Code, § 4270, authorizes the county commissioners to submit such question to vote. Sec. 4272 provides for the giving of notice of such election, and provides that the election shall be in the manner prescribed by law in regard to the submission of questions under the general election law. Sec. 4273 only requires that there shall be printed on the ballot the words "for the loan" and "against the loan." *Held*, that ballots so printed in such an election were sufficient, without further specifying the purpose and nature of the proposed loan, as § 1354, requiring questions to be voted on to be presented to the people in such a manner as to enable them to vote thereon in the manner provided in the title in which the section is found, does not apply thereto.—Id.

B. ADJUSTMENT OF ACCOUNTS WITH OTHER MUNICIPALITIES, 45.

45. Under Pol. Code, §§ 4864, 4870, providing that the county treasurer shall collect all taxes in cities and towns, unless they shall otherwise provide by ordinance, except cities of the first class, and pay over same to the town treasurer, a town may recover from a county treasurer municipal taxes which he has collected and refuses to pay over.—White Sulphur Springs v. Pierce, 21 Mont. 130; 53 Pac. 103.

C. WARRANTS AND CERTIFICATES OF INDEBTEDNESS, 46-51.

46. Under Acts Feb. 9, 1865, and Nov. 19, 1867, it was the duty of the treasurer to make payment on a warrant presented when there was money in his hands outside of the one-fifth of the revenue authorized to be applied for other purposes, and an order of the commissioners to the contrary was void.—Thomas v. Smith, 1 Mont. 21.

47. Act Nov. 22, 1867, authorizing county commissioners to call in outstanding warrants and issue bonds in lieu thereof, did not authorize the commissioners to compel the surrender of warrants in exchange for bonds, but the holder of a warrant who did not wish to exchange was entitled to payment of his warrant.—Id.

48. Under Act Feb. 8, 1865, providing that, when county warrants are presented to the county treasurer and endorsed by him, "Not paid for want of funds in the treasury," they shall bear interest from the date of such endorsement, and the neglect of the treasurer to properly endorse a warrant presentd for payment will not release the county from payment of interest after it is presented.—Territory v. Gilbert, 1 Mont. 371.

49. Under Act Feb. 8, 1865, entitled "An Act authorizing county commissioners to pay interest on county warrants," and providing that they shall bear interest after presentation to the county treasurer and endorsement by him, "Not paid for want of funds in the treasury," the duty of making the endorsement devolves on the county treasurer, and he can be compelled to make it as of the date the holder was entitled thereto.—Id.

50. Act Jan. 11, 1872, providing that county warrants should not bear interest after its passage, was repealed by Act Jan. 12, 1872, providing that warrants should bear interest after they had been presented to the county treasurer and duly endorsed not paid for want of funds. —Higgins v. Edwards, 2 Mont. 585.

51. One can not maintain an action against a county on a county warrant, in view of Pol. Code, § 4290, requiring the treasurer to pay warrants in the order of presentation, thereby making mandamus the remedy of the holder of a warrant, which the treasurer refuses to pay, though the refusal is based on the ground of payment by check, as Code Civ. Proc., §§ 1960-1973, authorize a trial of issues raised by a traverse of a return to the writ.—Greeley v. Cascade, 22 Mont. 580; 57 Pac. 274.

D. BONDS, 52.

52. Under Const., art. 12, § 8, providing for the funding of the debts of public corporations, and Comp. Stat., p. 859, § 808, as amended by Laws 1891, p. 226, providing that county commissioners may issue coupon bonds to an amount sufficient to enable them to redeem any outstanding bonds or warrants, even though some of the bonds or warrants which are to be redeemed do not bear interest, it is not illegal for the commissioners to issue coupon bonds therefor.—Hotchkiss v. Marion, 12 Mont. 218; 29 Pac. 821.

V. CLAIMS AGAINST COUNTY, 53-58.

53. Discretionary powers conferred upon the county commissioners in the allowance of claims against the county must be controlled by legal consideration and can not be exercised arbitrarily.—Davis v. Commissioners, 4 Mont. 292; 1 Pac. 750.

54. Laws 1889, p. 232, § 8, providing for the establishment of a boundary commission, and for the auditing of the expenses of a survey defining the boundary lines between certain counties, authorizes the boundary commission to ascertain the expense, and to certify the amount to the county commissioners, and, when so ascertained and certified, the county commissioners have no power to review the action of the boundary commission, or to demand from the surveyor an itemized bill of such expenses. —Kornburg v. Deer Lodge, 10 Mont. 325; 25 Pac. 1041.

55. The claim of plaintiff's assignor against a county was allowed by the county board, and a warrant issued and assigned to plaintiff, and thereafter an appeal was taken by T, a taxpayer, to the district court, which was entered therein under the title, "T, appellant, vs. Board, etc., respondents," and, default of defendants having been entered, judgment was entered declaring the warrant void, and ordering it to be cancelled. There was no inquiry respecting the merits of the claim, and no statement of facts upon which to render the decision. *Held*, in mandamus proceedings to compel the treasurer to pay the warrant, that the default judgment was no defense, it being contemplated in such appeal, the statute requiring no notice to be given to the holder of the warrant, that the district court will review the proceedings of the board; Comp. Stat. p. 846, §§ 764, 765, providing that a taxpayer may appeal from an unjust allowance made by the board, by giving a notice to be served on the clerk of such board, and that such an appeal will be entered, treated and determined as appeals from justices' courts. —State v. Minar, 13 Mont. 1; 31 Pac. 723.

56. Comp. Stat. p. 846, § 764, requires, on appeal by a taxpayer from an allowance of a claim against the county by the board that a written notice be served on the county clerk by the sheriff within 30 days after the allowance, after which the clerk is required to transmit the proceedings to the district court. *Held*, that the clerk, by transmitting the proceedings, waives any informality, irregularity, or insufficiency of the service of the notice.—Twohy v. Granite, 17 Mont. 461; 43 Pac. 494.

57. An appeal may be taken by a taxpayer from separate items of the allowance of a claim against a county without taking an appeal from the whole allowance.—Id.

58. Service of notice of appeal by a taxpayer from an allowance of a claim against a county on the person in whose favor the allowance was made is not necessary to give the district court jurisdiction of the appeal, though the court, after acquiring jurisdiction, should notify such person of the pendency of the case. —Id.

VI. ACTIONS, 59-63.

59. Under Comp. Stat., p. 846, § 762, providing that no account shall be allowed by the board of county commissioners unless it sets out the separate items and their nature, with an affidavit of their truth, a complaint which fails to allege the performance of these conditions is fatally defective.—First Nat'l Bank v. Custer, 7 Mont. 464; 17 Pac. 551.

60. Comp. Stat., p. 846, §§ 762-764, provide that no "account" shall be allowed by the commissioners unless itemized and verified, showing that it is just and unpaid, but that the board may disallow any "account," in whole or in part; that county orders shall specify the nature of the "claim" for which they were issued: that whenever a "claim" shall be disallowed, or any taxpayer shall feel aggrieved by the allowance, he may appeal to the district court. In other sections the words "any account or claim against the county" are used, and the board is empowered to authorize payment of the debt by an order on the treasurer, who can pay money only on such order, except as otherwise provided by law. *Held*, that such statute applies to a claim for the repayment of taxes paid under protest, and that its presentation to the board is a condition precedent to the commencement of an action against the county to recover such taxes.—Powder R. C. Co. v. Custer, 9 Mont. 145; 22 Pac. 383.

61. Comp. Stat., p. 843, § 751, provides that execution shall not issue on a judgment against a board of county commissioners, but that "the same shall be levied and paid by tax or other county charges; * * * provided, that execution may issue if payment be not made within 60 days after the time required for the payment of county taxes to the county treasurer." *Held*, that the judgment recovered against such a board, after the annual tax levy, is not entitled to payment until after the next levy.—State v. Cascade, 16 Mont. 271; 40 Pac. 595.

62. Comp. Stat. p. 846, § 764, and Pol. Code, § 4288, giving a claimant against a county a right to appeal from a rejection of the claim by the commissioners, do not preclude the maintenance of an independent action on the rejected claim, in view of Code Civ. Proc., § 517, providing that actions on rejected claims against a county must be commenced within six months after the first rejection.—Greeley v. Cascade, 22 Mont. 580; 57 Pac. 274.

63. Under Code Civ. Proc., § 517, requiring actions on rejected claims against a county to be commenced within six months after the first rejection, a claim that was rejected before the passage of the act is barred if no action is commenced thereon within six months after its passage.—Id.

COUNTY AND PROSECUTING ATTORNEYS.

I. Deputies and Assistants, 1-2.
II. Compensation and Fees, 3-9.
III. Duties, 10.

I. DEPUTIES AND ASSISTANTS, 1-2.

1. The statutes declaring who shall be charged with the duty of prosecuting persons charged with crime does not exclude power in the court to appoint counsel from members of the bar to assist in the prosecution.—State v. Whitworth, 26 Mont. 107; 66 Pac. 748.

2. Pol. Code, §§ 4318, 4319, providing that county officers, except county commissioners and justices of the peace, may appoint necessary deputies for the prompt discharge of the duties of the offices, have no application to the appointment by the court of counsel to assist a county attorney in prosecuting persons charged with crime.—Id.

II. COMPENSATION AND FEES, 3-9.

3. District attorneys are entitled to a fee for drawing an indictment which is returned by the grand jury endorsed, "not a true bill."—Williams v. Jefferson, 2 Mont. 26.

4. Act Feb. 9, 1865, allowed the district at-

torney a fee for drawing each indictment, provided that no fee should be allowed for drawing any indictment that might be quashed. *Held*, that district attorneys are not entitled to fees for drawing indictments which have been quashed.—Id.

5. Under act Feb. 9, 1865, allowing district attorneys fees for convictions of misdemeanors and felonies and docket fees in all cases not specified, the district attorney is not entitled to docket fees in criminal cases.—Id.

6. Comp. Stat., p. 870, § 847, providing that the county attorney shall receive "for collections made for the county or territory" a certain per cent of the amount collected, and "all fees in this section to be taxed as costs," applies to a proceeding by mandate to compel the performance of a duty to pay money into the treasury, and such fees are taxable as costs.—Territory v Commissioners, 8 Mont. 396; 20 Pac. 809.

7. Under Comp. Stat., p. 870, § 846, providing that "in no case shall the fees allowed * * * exceed in amount the sum of $1,200 in any county," the county attorney can not receive a greater sum as fees than $1,200.—Id.

8. Since deputy county attorneys are included in Pol. Code, § 4596 fixing the maximum salary of county officers, the board of county commissioners have power to fix the salaries of deputy county attorneys, under Laws 1893, p. 60, establishing the number of deputy county officers, and providing that their compensation shall be determined by the county commissioners, within the maximum limits fixed by the act, though deputy county attorneys are not provided for therein.—Penwell v. Lewis and Clark, 23 Mont. 351; 59 Pac. 167.

9. Pol. Code, § 4596, declares that the maximum compensation of any deputy is as follows, setting out various officers whose salaries are declared "not to exceed" the sum fixed, but in providing for the salary of chief deputy county attorney the words "not to exceed" were omitted. *Held*, that since the act provided that all the amounts fixed should be "the maximum compensation" allowed, the words "not to exceed" before the statement of each amount were surplusage, and hence the salary of the chief deputy county attorney was not fixed by the act at the sum stated, but might be established at any sum less than such amount.—Id.

III. DUTIES, 10.

10. Where a criminal cause is removed to another county, the attorney of the county to which the cause is removed must prosecute it. —State v. Whitworth, 26 Mont. 107; 66 Pac. 748.

COURTS.

I. Nature, Extent, and Exercise of Jurisdiction in General, 1-4.
II. Establishment, Organization, and Procedure in General, 5-23.
A. Creation and constitution of court officers, 5-11.
B. Terms, vacations, and place and time of holding court, 12-14.
C. Rules of court and conduct of business, 15-21.
D. Rules of decision, 22-23.
III. Courts of General Original Jurisdiction, 24-25.
IV. Courts of Limited or Inferior Jurisdiction, 26.
V. Courts of Probate Jurisdiction, 27-30.
VI. Courts of Appellate Jurisdiction, 31-48.
A. Constitutional and statutory provisions, 31-36.
B. Original jurisdiction, 37-42.
C. Supervisory jurisdiction, 43-48.
VII. Federal Courts, 49-67.
A. Jurisdiction dependent on nature of subject matter, 49-51.
B. Territorial courts, 52-67.
VIII. Concurrent and Conflicting Jurisdiction, and Comity, 68-73.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL, 1-4.

1. No agreement of parties can confer upon the court a jurisdiction which is not given by law.
Wilson v. Davis, 1 Mont. 98.
Sanders v. Farwell, Id. 599.

2. Org. Act. § 9, confers upon the legislative assembly power to regulate the probate jurisdiction of the probate courts.—Deer Lodge County v. Kohrs, 2 Mont. 66.

3. The common law jurisdiction conferred by § 2 of the amendment to Org. Act, approved Mar. 2, 1867, is the right to hear and determine every case at law except suits in equity and admiralty, and matters in court martial.—Territory v. Flowers, 2 Mont. 531.

4. The district court being a proper court of general jurisdiction, want of jurisdiction must affirmatively appear, to overthrow the presumption that the court had jurisdiction of the subject matter of the action.—Beach v. Water Co., 25 Mont. 379; 65 Pac. 111.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL, 5-23.

A. Creation and Constitution of Court Officers, 5-11.
B. Terms, Vacations, and Place and Time of Holding Court, 12-14.
C. Rules of Court and Conduct of Business, 15-21.
D. Rules of Decision, 22-23.

A. CREATION AND CONSTITUTION OF COURT OFFICERS, 5-11.

5. Since the adoption of the constitution, abolishing probate courts (art. 8, § 11), and transferring jurisdiction in probate matters to the district courts, Comp. Stat., p. 174, § 421, relating to appeals from district courts, and providing that an appeal may be taken from an order granting or refusing a new trial, governs in matters of probate appeals, instead of Comp. Stat., p. 354, § 324, which regulated appeals from the probate court.—In re Davis' Estate, 11 Mont. 1; 27 Pac. 342.

6. Code Civ. Proc., § 372, requires the court stenographer to write out at length all objections, rulings and exceptions occurring on the trial, and file them with the clerk, after which they may be used in a bill of exceptions. Sec. 1153 authorizes the court to direct him to make a complete transcript of his notes, to be used in a bill of exceptions, if, in its opinion, the questions and answers given are necessary, in full, to present the objections. Secs. 373, 375 provide that the court reporter shall receive a fixed salary, and a certain rate per folio for verbatim transcripts of his notes, and a dif-

ferent rate for narrative transcripts. *Held*, that § 372 requires the reporter, in addition to writing out the ruling and exception, to write out the question, answer, or other part of the evidence to which the objection and ruling apply, so as to identify them, without other compensation than his salary.—State v. Supple, 22 Mont. 184; 56 Pac. 20.

7. The reporter is not required to furnish a complete transcript of the testimony, or any substantial part thereof, without payment of his fees.—Id.

8. The assertion of the stenographer that the attorney general did not need the transcript for the preparation of a bill of exceptions for which it was demanded would not excuse the refusal to deliver it, since the raising or solving of that question was not delegated to the stenographer.—State v. Ledwidge, 27 Mont. 197; 70 Pac. 511.

9. The stenographer had entered into an agreement with a third party for the preparing of the transcript, under which he did not feel at liberty to deliver any of the transcripts in his hands to the attorney general without the pay in advance. *Held*, that his legal duty could not be controlled by his contract with the third party.—Id.

10. Code Civ. Proc., § 1874, provides that an officer, when prosecuting an action on behalf of the state, shall not be required to pay or deposit any fees with any officer. The attorney general conducting a proceeding on behalf of the state demanded of the stenographer a transcript of his notes taken therein. *Held*, that it was the stenographer's ministerial duty to deliver them without demanding his fees in advance.—Id.

11. Pen. Code, § 1531, authorizes the presentment by the grand jury of an accusation against any county officer for wilful or corrupt misconduct or malfeasance in office, and the chapter of which it forms a part authorizes the removal of an officer for such cause, and prescribes the procedure; § 1543 providing that an appeal from a judgment of removal may be taken to the supreme court in the same manner as from a judgment in a civil action, and that, until such judgment is reversed, defendant is suspended from his office. By a rule of the district court of a certain county, all matters of a criminal nature were to be heard in Department 3 of that court. An accusation under the above statute was filed in Department 1, and the judge of that department denied an application for a transfer of the cause to Department 3. *Held*, that the supreme court would not issue a writ of supervisory control to compel the removal of the cause to Department 3, where it did not appear that, if Department 1 should proceed to a determination of the accusation, accused would suffer any injury for which an appeal would not furnish an adequate remedy.—State v. District Court, 30 Mont. 442; 76 Pac. 1005.

B. TERMS, VACATIONS, AND PLACE AND TIME OF HOLDING COURT, 12-14.

12. In the absence of any statute to the contrary, the district courts have power to adjourn from time to time, though such adjournment should carry such term beyond the time fixed for holding court in another county in the same district.—Higley v. Gilmer, 3 Mont. 90.

13. When, by a mistake in the law, a judge is required to hold court in two counties on the same day, it is in his discretion to select one of the two counties in which to hold court.—Carland v. Commissioners, 5 Mont. 579; 6 Pac. 24.

14. Const., art. 8, § 17, provides that, unless otherwise provided by law, district judges shall fix the terms of court in districts composed of two or more counties; and Code Civ. Proc., § 38, requires the district judge in districts composed of more than one county, within a stated time, to fix the terms of court to be held in each county of the district during the ensuing year, and provides that no change in the time of holding any of the terms so fixed shall be made, but that a term may be adjourned to a future date. *Held*, that an order fixing the terms of court in a district composed of more than one county, made within the prescribed time, can not, even within the time allowed the judge for fixing the terms of court, be revoked, and the terms originally fixed changed.—State v. Bristol, 21 Mont. 578; 55 Pac. 107.

C. RULES OF COURT AND CONDUCT OF BUSINESS, 15-21.

15. When the power of the court to make reasonable rules and regulations for governing and facilitating practice and procedure, in reference to all matters not provided for by law, has been exercised, and a rule adopted, courts, as well as members of the bar, should respect the same, and regulate their conduct in conformity therewith.—Martin v. De Loge, 15 Mont. 343; 39 Pac. 312.

16. A court has power to change its own calendar.—Merchants Nat'l Bank v. Greenhood, 16 Mont. 395; 41 Pac. 250.

17. A brief filed while rules 1896, rule 5, § 3, subd. 2, requiring the full substance of evidence claimed to be wrongfully admitted or rejected to be quoted in the brief, was in force, which fails to quote evidence objected to, will not present such questions for review, though the rule was subsequently repealed.—Murray v. Mining Co., 25 Mont. 14; 63 Pac. 719.

18. Where a brief filed while such rule was in force, does not quote the evidence alleged to have been wrongfully admitted or rejected, but so far complies with the present rules by referring to the transcript as to enable the court to examine the questions without additional labor, it will be considered on appeal.—Id.

19. Under Const., art. 8, §§ 2, 3, conferring appellate jurisdiction on the supreme court "under such regulations as may be prescribed by law," if the legislature fails to provide the necessary appellate procedure, the court may adopt rules for itself in the place thereof.—Finlen v. Heinze, 27 Mont. 107; 69 Pac. 820; 70 Pac. 517.

20. Under Code Civ. Proc., § 111, rules of a district court regulating the distribution of business between the departments, adopted under the limitations of the statute, are binding on the court and litigants, unless released for good cause shown.—State v. Donlan, 32 Mont. 256; 80 Pac. 244.

21. In the absence of any rules of court, after business had been distributed among different departments by an order of court concurred in by all the judges, the order should be held binding until revoked or modified by the same authority.—Id.

D. RULES OF DECISION, 22-23.

22. A decision of the supreme court of the United States construing a statute which is, in effect, the same as a statute of Montana, and rendered while the latter was a territory, is controlling upon this court.—Choate v. Spencer, 13 Mont. 127; 32 Pac. 651.

23. This court decided that an appeal would lie from a certain order, and, though the order was called a "temporary restraining order," it was in fact an injunction pendente lite, and subsequently a petition was filed for an order of supersedeas to stay a temporary restraining

order on the ground that an appeal would lie from such an order. *Held*, that the rule of stare decisis did not apply, since the prior decision was not in fact a restraining order.—Wetstein v. Mining Co., 25 Mont. 135; 63 Pac. 1043.

III. COURTS OF GENERAL ORIGINAL JURISDICTION, 24-25.

24. A proceeding against an administrator, charged with having committed waste, to recover the penalty imposed upon him therefor by the act concerning executors and administrators, Laws of 1871-72, p. 365, § 274, making an executor or administrator guilty of waste liable for twice the value of the estate wasted, and authorizing the probate court to determine the issue whether there be waste or not in the manner in which the validity of disputed claims against the estate is tried, is not a civil action, within the amendment to the Org. Act, § 2, vesting the probate court with jurisdiction of civil cases in which the amount in controversy does not exceed $500, and hence it has jurisdiction of such proceedings, though the amount claimed exceeds that sum.—Deer Lodge v. Kohrs, 2 Mont. 66.

25. The district courts of the territory are courts of general jurisdiction; they are clothed with chancery as well as common law powers, and having acquired jurisdiction of a case for one purpose, they may retain it for all purposes. —Broadwater v. Richards, 4 Mont. 52; 2 Pac. 544.

IV. COURT OF LIMITED OR INFERIOR JURISDICTION, 26.

26. The amount of costs forms no part of the matter in dispute, and can not be considered as a question of jurisdiction.—Payne v. Davis, 2 Mont. 381.

V. COURTS OF PROBATE JURISDICTION, 27-30.

27. A judge of the probate court has no power to issue and attest a summons under his own hand, if there is no law providing for a clerk or seal of the court, and no jurisdiction is acquired by such summons.—Murphy v. Ames, 1 Mont. 276.

28. Under Civ. Pr. Act, § 627, probate courts can make necessary orders for the settlement of the estates of deceased persons, but can not render judgments against administrators for receiving moneys belonging to estates and failing to account therefor.—Deer Lodge v. Kohrs, 2 Mont. 66.

29. It not being one of the functions of a special administrator to audit and pay claims against the estate, the district court, as a court of probate, is without jurisdiction to order him to pay any claim in advance of general administration.—State v. District Court, 18 Mont. 481; 46 Pac. 259.

30. Under Org. Act and Comp. Stat., div. 2, enacted pursuant to the authority conferred by Org. Act, probate courts possess no powers other than those expressly conferred.—Davidson v. Wampler, 29 Mont. 61; 74 Pac. 82.

VI. COURTS OF APPELLATE JURISDICTION, 31-48.

A. CONSTITUTIONAL AND STATUTORY PROVISIONS, 31-36

B. ORIGINAL JURISDICTION, 37-42.

C. SUPERVISORY JURISDICTION, 43-48.

A. CONSTITUTIONAL AND STATUTORY PROVISIONS, 31-36.

31. Const., art. 8, § 11, does not limit the appellate jurisdiction of the district court to appeals from justices' and inferior courts only, and prohibit the legislature from providing for appeal to the district court by the party aggrieved by the action of the state board of medical examiners in revoking the license of a physician to practice medicine and surgery.—State v. District Court, 13 Mont. 370; 34 Pac. 298.

32. Under Const., art. 8, §§ 2, 3, conferring appellate jurisdiction upon the supreme court, the power of limitation given the legislature does not extend to the right of appeal from final judgments, or to the power of the court on such appeals, but merely to the time when and within which appeals may be taken, to matters of procedure, and to the extent of relief to be granted on appeals from interlocutory orders. —Finlen v. Heinze, 27 Mont. 107; 69 Pac. 829; 70 Pac. 517.

33. Const., art. 8, §§ 2, 3, confer appellate jurisdiction on the supreme court under such limitations as may be prescribed by law, with authority to issue original writs in aid of such jurisdiction. Code Civ. Proc., § 21, authorizes such court to affirm, reverse or modify any judgment or order appealed from. Sec. 23 authorizes such court to continue in force an injunction or grant an injunction pending an appeal from an order refusing or dissolving an injunction. Secs. 1722, 1723, as amended by Laws 1899, p. 146, enumerate appealable orders, and authorize the supreme court to stay any of the orders so enumerated; and § 1742 authorizes such court to review on appeal any intermediate order not itself appealable. *Held*, that the statutes do not limit the right of appeal from final judgment, or the power of the supreme court on such appeals, but merely provide for independent appeals from interlocutory judgments and the extent of relief to be granted thereon.—Id.

34. Const., art. 8, § 3, provides that "the appellate jurisdiction of the supreme court shall extend to all cases at law and in equity, subject, however, to such limitations and regulations as may be prescribed by law." Sec. 15 declares that "writs of error and appeals shall be allowed from the decisions of the said district courts to the supreme court under such regulations as may be prescribed by law." *Held*, that the power of limitation given to the legislature by § 3 does not authorize it to limit absolutely the appellate jurisdiction of this court, to the extent of cutting off all right of appeal, but merely enables the legislature to enact reasonable regulations as to the time in which and the mode by which an appeal is to be taken. —Id.

35. Const., art 3, § 29, declares that the provisions of the constitution are mandatory and prohibitory, unless expressly declared to be otherwise. Art. 8, § 3, provides that the supreme court shall have discretionary power to issue, hear and determine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and injunction. Substitute to Senate Bill 71, Eighth Session, provides that the supreme court shall order the substitution of one district judge for another on a petition signed by the district judge properly presiding, and stating that petitioner can not have an impartial trial without such substitution. *Held*, invalid as an attempt to extend the jurisdiction of the supreme court beyond the limits fixed by the constitution.—In re Weston, 28 Mont. 207; 72 Pac. 512.

36. Const., art. 8, § 2, giving the supreme court appellate jurisdiction, etc., does not justify the issuance of the order contemplated

by the Senate Bill; the proceedings for the order not being in the nature of an appeal, nor involving a review of the decision of the lower court on any matter of law.—Id.

B. ORIGINAL JURISDICTION, 37-42.

37. Const., art. 8, § 3, confers power on the supreme court to issue and to hear and determine writs of prohibition. Code Civ. Proc., § 1980, provides that the writ of prohibition is the counterpart of the writ of mandate, and arrests the proceedings of any tribunal, corporation, board or person, "whether exercising functions judicial or ministerial," when such proceedings are without or in excess of the jurisdiction of such tribunal, etc. An application was filed in the supreme court for a writ of prohibition to prevent the secretary of state from certifying a certain person as a candidate for a judicial office, and an application for a separate writ to prevent the county clerk from printing the names of certain persons on the official ballot. *Held*, that the supreme court had no jurisdiction to issue the writs, since its original jurisdiction in such cases is confined to arresting proceedings of a judicial character. —State v. Hogan, 24 Mont. 379; 62 Pac. 493.

38. Where a county clerk was about to print on an official ballot a ticket not lawfully authorized, the supreme court had original jurisdiction to issue a writ of injunction to restrain such officer from thus exceeding his powers, since substantial civil rights of citizens and candidates, and not their political rights alone, were involved.—State v. Moran, 24 Mont. 433; 63 Pac. 390.

39. Where the state treasurer refused to pay certain warrants drawn on the school of mines building fund, directed by the statute to be paid therefrom, the mere fact that it was a state officer refusing to perform a ministerial duty was not a sufficient reason for invoking the original jurisdiction of the supreme court by an application for mandamus.—State v. Barrett, 25 Mont. 112; 63 Pac. 1030.

40. Under Const., art. 8, § 3, authorizing the supreme court to issue such original and remedial writs as may be necessary to the complete exercise of its appellate jurisdiction, this court may enjoin the operation of a mine, and require it to be preserved in statu quo pending an appeal in a case involving the title thereto.—Finlen v. Heinze, 27 Mont. 107; 69 Pac. 829; 70 Pac. 517.

41. This court will not entertain an original proceeding to contest, by an injunction to restrain the state text book commission from advertising for bids, the constitutionality of a statute relating to the uniform system of text books, and requiring the books contracted for to bear the union label; no pressing necessity appearing for a speedy determination of the question, the court calendar being three years in arrears, and the matter being equally within the jurisdiction of the district court—Snell v. Welch, 28 Mont. 37; 72 Pac. 308.

42. Code Civ. Proc., § 21, as amended by Acts 2d Ex. Sess., 1903, p. 7, is not unconstitutional, as imposing original jurisdiction on the supreme court; it requiring only a review of the facts as presented in the record.—Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

C. SUPERVISORY JURISDICTION, 43-48.

43. Const., art. 8, § 2, provides that the supreme court, except as otherwise provided in the constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, and shall have general supervisory control over all inferior courts, and shall have power, in its discretion, to issue, hear and determine writs of certiorari and other original writs. *Held*, that this court has no authority, by virtue of its supervisory control, to vacate under a writ of certiorari an order of the district court discharging a prisoner in habeas corpus proceedings, since the supervisory control constitutes a grant of power independent of the court's appellate jurisdiction or power to issue original writs, and can not be exercised under an original writ,—State v. District Court, 24 Mont. 339; 63 Pac. 395.

44. Const., art. 8, § 2, confers on this court a general supervisory control over all inferior courts, under such regulations and limitations as may be prescribed by law. Code Civ. Proc., § 205, provides that, when jurisdiction is conferred on a court or judicial officer by the constitution, or this code, or any other statute, all the means necessary to carry it into effect are also given; and in the exercise of its jurisdiction, if the course of proceeding be not specifically pointed out by the code or the constitution, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code. *Held*, that the contention that the supervisory control of this court was dormant because there was no legislation prescribing the mode of its exercise can not be sustained, since § 205 was sufficient legislation on the subject.—Id.

45. Under Const., art. 8, § 2, giving this court a general supervisory control over all inferior courts, a writ of supervisory control will not be granted to command a district court to sustain a motion for judgment on the pleadings, since the party has a remedy if he should be finally defeated in the action.—State v. District Court, 25 Mont. 31; 63 Pac. 686.

46. Const., art. 8, §§ 2, 3, gives this court general supervisory control over other courts, under such regulations as may be prescribed by law, and conferring power to issue and hear writs of mandamus, etc., and such other original and remedial writs as may be necessary to the exercise of its appellate jurisdiction. Code Civ. Proc., § 205, declares that, when jurisdiction is conferred on a court, and the course of proceeding is not specifically pointed out, any suitable process conformable to the spirit of the code may be adopted. *Held*, that the power of supervisory control was a distinct power, and might be exercised to control the discretion of an inferior court in making an order from which no appeal would lie, and for which the writs appertaining to the appellate jurisdiction furnished no remedy.—State v. District Court, 25 Mont. 504; 65 Pac. 1020.

47. Where defendant sued relators, alleging that they were removing ore from certain premises the right to which was in defendant, but the evidence showed that the prima facie right was in relators, an order granting defendant and his employees right to enter and inspect all of relators' underground surrounding mines for the period of 40 days for the purpose of obtaining evidence, being an order not appealable nor subject to control by any of the specified writs within the jurisdiction of the court, it was a proper case for the court to exercise the power of "supervisory control" over the inferior court, conferred by Const., art. 8, § 2. —Id.

48. Substitute for Senate Bill 71, Eighth Session, provides that the supreme court shall order the substitution of one district judge for another, on a petition signed by the district judge properly presiding and stating that petitioner can not have an impartial trial without such substitution. *Held*, that the issuance of such an order was not authorized by Const., art. 8, § 2, providing that the supreme court shall have general supervisory control over all inferior courts, as such power extends to the courts only, and not to the judges thereof.—In re Weston, 28 Mont. 207; 72 Pac. 512.

VII. FEDERAL COURTS, 49-67.

A. JURISDICTION DEPENDENT ON NATURE OF SUBJECT MATTER, 49-51.

B. TERRITORIAL COURTS, 52-67.

A. JURISDICTION DEPENDENT ON NATURE OF SUBJECT MATTER, 49-51.

49. An action or controversy which turns upon the existence, effect and operation of an act of congress is an action arising under such act, and a suit brought to determine such controversy is properly commenced in the district courts of the territory, sitting to hear and determine causes arising under the constitution and laws of the United States; and especially is this the case when the action is brought by or against a corporation chartered by an act of congress.—Northern Pacific v. Carland, 5 Mont. 146; 3 Pac. 134.

50. An action brought for violation of 23 Stat. 321, forbidding the enclosure of public lands by one who has no claim or color of title thereto, is within the jurisdiction of a territorial district court, sitting to hear causes arising under the constitution and laws of the United States.—United States v. Bisel, 8 Mont. 20; 19 Pac. 251.

51. A suit to obtain conveyance of an interest in an invention, to enjoin disposal of such interest, and to compel defendant to account for a sale to a third party of an interest therein—the sole issue being whether defendant had sold an interest to plaintiff—was not a suit arising under the patent laws.—Miller v. Matheson, 208 Mont. 132; 72 Pac. 414.

B. TERRITORIAL COURTS, 52-67.

52. The district courts of the territory, exercising the jurisdiction of the circuit courts of the United States, have no jurisdiction of a suit in equity between citizens of the territory.—Sanders v. Farwell, 1 Mont. 599.

53. The district courts of a territory, created by congress, are not courts of the United States, and are not entitled to that appellation in pleadings.—Id.

54. Territorial district courts created by congress are statutory courts, and not federal courts, within the United States constitution.
Sanders v. Farwell, 1 Mont. 599.
United States v. Upham, 2 Mont. 113.

55. A court has no jurisdiction in this territory to try a common law action as a suit in equity, and it can not try an equitable action as an action at common law. (See Hornbuckle v. Toombs, 18 Wall. 648.)—Creighton v. Hershfield, 1 Mont. 639. (Overruled, same case, 2 Mont. 386.)

56. The district courts of the territory have jurisdiction in actions by the assignee of a bankrupt to recover the possession or value of property against one who has received the same in violation of the bankruptcy law.—McKiernan v. King, 2 Mont. 72.

57. By Org. Act the jurisdiction and practice of the district and circuit courts of the United States in cases arising under the constitution and laws of the United States, is conferred on the district courts of the territory.—United States v. Upham, 2 Mont. 113.

58. The title "United States District Court of the Territory of Montana" is a misnomer. The courts of the territory are statutory courts, and although exercising the jurisdiction of district courts of the United States, they can not therefore be styled such.—Id.

59. Civ. Pr. Act, which prescribes the mode of appealing to this court, is not applicable to cases arising under the constitution and laws of the United States.—United States v. McElroy, 2 Mont. 237. (Overruled, same case, 2 Mont. 494.)

60. The grant of common law jurisdiction to the supreme court by Org. Act carries with it jurisdiction in mandamaus, which can not be taken away by the legislature. (See 2 Otto 358.)—Chumasero v. Potts, 2 Mont. 242.

61. Civ. Pr. Act applies to cases in which the district court exercises the jurisdiction of the United States circuit and district courts, and in which the United States is a party.—United States v. Ensign, 2 Mont. 396.

62. Civ. Pr. Act, abrogating the common law forms of procedure, including scire facias, and rendering a complaint necessary in all civil actions, is sustained by the provisions of Org. Act that jurisdiction of the district courts shall be as limited by law.—Id.

63. The district courts of the territory are courts of general jurisdiction, and appearance and answer in one of them gives jurisdiction of the person irrespective of defects in service.—Stephens v. Hartley, 2 Mont. 504.

64. Under U. S. R. S., §§ 1868, 1910, vesting in the circuit and district courts of the territories named therein the same jurisdiction as is exercised by the circuit and district courts of the United States, the district courts of Montana are vested with "all the chancery powers which formerly belonged to chancery in England."—Zimmerman v. Zimmerman, 7 Mont. 114; 14 Pac. 665.

65. The Montana Practice Act, which provides for but one form of action, applies to the territorial courts, when sitting to hear causes arising under the federal laws, as well as when sitting as territorial courts; and a complaint praying for a removal of an enclosure of public lands erected in violation of an act of congress, and for an injunction to restrain defendant from again erecting it, is not improper.—United States v. Bisel, 8 Mont. 20; 19 Pac. 251.

66. The date of filing papers is when they are deposited with the proper custodian, and not when they are marked "Filed"; and, where papers on appeal from the probate to the district court allowed by the statute of Montana territory were deposited in the district court before admission of the territory as a state, that court acquired jurisdiction which could not be affected by the provisions of the state constitution transferring to the district courts all matters pending in the probate courts.—In re Dewar's Estate, 10 Mont. 426; 25 Pac. 1026.

67. Comp. Stat., p. 354, §§ 324, 325, passed by the territorial legislature, which provide for appeals directly from the probate to the territorial supreme court, are void, as being in conflict with U. S. R. S., §§ 1869, 1982, which limit the appellate jurisdiction of the territorial supreme court to appeals from the district court, and which gave the district court jurisdiction of appeals from the probate court.—In re McFarland's Estate, 10 Mont. 445; 26 Pac. 185.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY, 68-73.

68. Act Cong., approved Mar. 2, 1867, establishing a uniform system of bankruptcy throughout the United States, does not confer on the district and circuit courts of the United States exclusive jurisdiction in bankruptcy proceedings.—McKiernan v. King, 2 Mont. 72.

69. Under Comp. Stat., p. 261, § 779, relating to the certification by a justice to the district court of a case in which title to real estate is involved, the district court obtains the same jurisdiction over a case thus certified as

if it had been originally commenced therein, and may render a judgment for damages in excess of the amount to which the jurisdiction of a justice is limited. (See 149 U. S. 17.)—Gassert v. Bogk, 7 Mont. 585; 19 Pac. 281.

70. The court, after having appointed a receiver for a corporation, will restrain the enforcement of a judgment, afterwards obtained in a court of co-ordinate jurisdiction in another district, against property in the hands of the receiver, by levy and sale thereof.—Gardner v. Caldwell, 16 Mont. 221; 40 Pac. 590.

71. One court can not restrain by injunction the execution of a judgment of a court of concurrent jurisdiction, except in cases where the court in which the action is pending can not, for lack of jurisdiction, grant the relief desired.—Beck v. Fransham, 21 Mont. 117; 53 Pac. 96.

72. An injunction bond given in a federal court may be sued on in a state court without leave of the federal court, when a final disposition of the injunction suit has been made by the entry of judgment of dismissal, with costs against the plaintiff.—Montana Mining Co. v. Mining Co., 23 Mont. 311; 58 Pac. 870.

73. The transfer of a case from one department to another of a district court is controlled by the rules adopted by such departments.—Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

COVENANTS.

I. Construction and Operation, 1-2.
II. Performance or Breach, 3-5.
III. Actions for Breach, 6-10.

I. CONSTRUCTION AND OPERATION, 1-2.

1. The facts that the grantors in a deed were trustees, and held the title for third persons, and that the consideration had passed to such third persons, *held* not to affect their liability. They were liable on their personal covenants, notwithstanding their character as trustees.—Taylor v. Holter, 1 Mont. 688.

2. A deed contained a covenant as follows: "The party of the first part, and his heirs, do hereby covenant that he will forever warrant and defend his right, title and interest in and to said premises, and the quiet and peaceable possession thereof, unto the party of the second part, his heirs and assigns, against the acts and deeds of said party of the first part, and all and every person and persons whomsoever lawfully claiming or to claim the same." *Held*, that the warranty was sufficient to compel the grantor to answer for taxes lawfully assessed on the premises, and existing as a lien thereon, at the time he made and delivered the deed.—Milot v. Reed, 11 Mont. 568; 29 Pac. 343.

II. PERFORMANCE OR BREACH, 3-5.

3. Under the occupying claimant's statute of Kansas, the rendition of a judgment against the occupying claimant is equivalent to an eviction, constituting a breach of the covenants of warranty in the deed under which he holds.—King v. Merk, 6 Mont. 172; 9 Pac. 827.

4. The United States is a person, within a covenant, in a deed from one whose title rested on a defective Sioux half-breed scrip entry, to warrant title against all persons lawfully claiming the land.—Giddings v. Holter, 19 Mont. 263; 48 Pac. 8.

5. After execution and delivery of a warranty deed, wherein the vendors covenanted that the premises were free from taxes, and on the same day the vendee gave the vendors a mortgage on the premises, in which he expressly agreed to pay all taxes "then subsisting" or which might thereafter be imposed on the property. At the time these instruments were executed the property was unencumbered by taxes. *Held*, that the agreement in the mortgage, in the absence of fraud or mistake, superseded the covenant in the deed, and released the vendors from liability.—Frank v. Cobban, 20 Mont. 168; 50 Pac. 423.

III. ACTIONS FOR BREACH, 6-10.

6. The measure of damages for breach of warranty in a deed is the value of the property at the time of the conveyance, together with interest thereon, and the necessary costs and expenses incurred in defending the title, and such costs and expenses include a reasonable counsel fee.—Taylor v. Holter, 1 Mont. 688.

7. The value of improvements made by the grantee after the purchase is not an element of damage.—Id.

8. A reasonable counsel fee is recoverable as a part of the damages for breach of the covenants of warranty where the grantee has unsuccessfully defended the title.—Id.

9. The contingent liability of a grantor holding under a defective Sioux half-breed scrip entry, on his warranty of title, becomes fixed when the entry is cancelled.—Giddings v. Holter, 19 Mont. 263; 48 Pac. 8.

10. In an action by the vendee against the vendors on their covenant that the premises were free from taxes, defendants set forth as part of their answer a mortgage given by plaintiff defendants at the time the deed containing the covenant sued on was executed, said mortgage containing a covenant to pay taxes, and alleged that his payment thereof was made under the obligation thereby imposed. *Held*, sufficient to enable defendants to avail themselves of the defense of release without specially pleading it.—Frank v. Cobban, 20 Mont. 168; 50 Pac. 423.

CREDITOR'S SUIT.

I. Nature and Grounds, 1.
II. Property Which May be Subjected, 2.
III. Conditions Precedent, 3-4.
IV. Creditors Entitled to Relief, 5.
V. Proceedings and Determination, 6-8.

I. NATURE AND GROUNDS, 1.

1. A court of equity will interfere to protect an attachment lien.—Montana Nat'l Bank v. Bank, 19 Mont. 586; 49 Pac. 149.

II. PROPERTY WHICH MAY BE SUBJECTED, 2.

2. Property of a debtor, subject to execution, in possession of an assignee under a conveyance void as to creditors, may not be reached through proceedings in equity until such creditors have obtained a specific lien on the property.—Wilson v. Harris, 21 Mont. 374; 54 Pac. 46.

III. CONDITIONS PRECEDENT, 3-4.

3. Where the property is ascertained, and the claims of its possessors understood, a creditor's bill need not be preceded by proceedings supplementary to execution, these being merely intended as a summary process to discover property concealed and withheld without substan-

tial claim of right.—Ryan v. Maxey, 14 Mont. 81; 35 Pac. 515.

4. Comp. Stat., p. 157, § 356, relating to supplemental proceedings, provides that, if it appear that a person having property of a debtor claims an adverse interest therein, the court may authorize the judgment creditor to sue to recover such interest, and may forbid a transfer thereof until an action can be commenced and prosecuted to judgment. *Held*, that the necessity of obtaining a lien on property capable of manual delivery, in possession of an assignee under an assignment alleged to be in fraud of creditors, before suit to subject such property to the claims of creditors, is not obviated by an order of court in supplemental proceedings authorizing such suit, nor does the order protect the plaintiff in such suit from attack for want of equity, as construed by the rules applicable to similar suits not preceded by such order.—Wilson v. Harris, 21 Mont. 374; 54 Pac. 46.

IV. CREDITORS ENTITLED TO RELIEF, 5.

5. A creditors' bill will lie to enforce a decree granting a divorce and alimony, such decree being a decree in equity. (See 135 U. S. 232.) —Twell v. Twell, 6 Mont. 19; 9 Pac. 537.

V. PROCEEDINGS AND DETERMINATION, 6-8.

6. Where it is alleged in a creditor's bill that the judgment debtor is absolutely insolvent, and that there are no effects subject to execution, or that can be found, the complaint need not show that an execution was issued, and returned nulla bona.—Ryan v. Spieth, 18 Mont. 45; 44 Pac. 403.

7. A creditor's bill, alleging the return unsatisfied of an execution issued on plaintiff's judgment before the filing of the suit, sufficiently shows that at that time the debtor was not the owner of sufficient unexempt property to satisfy the judgment.—Whiteside v. Hoskins, 20 Mont. 361; 51 Pac. 739.

8. In a creditor's suit, when the question is as to a lien claimed by plaintiffs by virtue of garnishment proceedings, an averment that any moneys, goods and effects in possession of the garnishee have been attached, which omits to state that the garnishee had such property in his possession at the time of service, is insufficient.—Wilson v. Harris, 21 Mont. 374; 54 Pac. 46.

CRIMINAL LAW.

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XVI. Punishment and Prevention of Crime, 413.

I. NATURE AND ELEMENTS OF CRIME, 1.

1. Under Crim. Laws, § 185, providing that all offenses recognized by the common law as crimes and not enumerated in the statutes are punishable, all criminal acts punishable at common law are included, irrespective of what name is attached thereto.—Territory v. Ye Wan, 2 Mont. 478.

II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME, 3-4.

3. Since Pen. Code, §§ 20, 21, provide that in every crime there must exist a joint operation of act and intent, or criminal negligence, and that the intent is manifested by the circumstances of the offense and the sound mind and discretion of the accused, an insane person, in criminal law, is one who is mentally unable to form a criminal intent.—State v. Keerl, 29 Mont. 508; 75 Pac. 362.

4. On the issue of insanity in homicide, instructions that an insane delusion must be such that if things were as the person possessed of such delusion imagined them to be they would justify the act springing from the delusion, and that one suffering from a partial delusion was in the same situation as to responsibility as if the facts with respect to which the delusion existed were real, were radically wrong.—Id.

III. PARTIES TO OFFENSES, 5-6.

5. On the trial of one who, at common law, would have been an accessory before the fact, the record of conviction of the principal is prima facie evidence of the latter's guilt.—State v. Gleim, 17 Mont. 17; 41 Pac. 998.

6. Under Pen. Code, § 1852, the distinction between accessories before the fact and principals is abrogated, and all are treated as principals.—State v. De Wolfe, 29 Mont. 415; 74 Pac. 1084.

IV. JURISDICTION, 7-13.

7. The amendment to Org. Act, approved Mar. 2, 1867, § 2, which confers upon the probate court jurisdiction of certain criminal cases, does not deprive the district court of its jurisdiction of the same, but in such cases the jurisdiction is concurrent.—Territory v. Flowers, 2 Mont. 531.

8. Nothing can be presumed in favor of the jurisdiction of justices of the peace; their jurisdiction is not general, but is limited by law.—Deer Lodge v. At, 3 Mont. 168.

9. The jurisdiction of the United States over a military reservation is not exclusive, and does not deprive the territorial courts of jurisdiction to try an indictment, in the name of the territory, and under the territorial laws, for a

murder committed on such reservation.—Territory v. Burgess, 8 Mont. 57; 19 Pac. 558.

10. Under Const., art. 8, § 11, providing that the district court shall have original jurisdiction in all cases of misdemeanor not otherwise provided for, the district court does not have original, but only appellate jurisdiction to try the misdemeanor of assault and battery, as jurisdiction to try such misdemeanor is conferred by law upon the justice's court.—State v. Myers, 11 Mont. 365; 28 Pac. 650.

11. The first paragraph of § 6, Comp. Stat., p. 404, conferring upon the district and justices' courts concurrent jurisdiction in all misdemeanors, is in conflict with Const., art. 8, § 11, which confers upon the district court jurisdiction only of those misdemeanors which are not otherwise provided for, and therefore did not become a law of the state upon the adoption of the constitution by force of art. 20, § 1.—Id.

12. Under Comp. Stat., p. 262, § 780, providing for change of venue from one justice of the peace to another if at any time before trial it appears to the satisfaction of the justice before whom the action is brought, by affidavit of either party, that he is a material witness, or if either party make affidavit that he can not have a fair trial, an application on the ground of prejudice of the justice is made in season when made on the day to which the case had been continued, after defendant had entered a plea of not guilty.—State v. Evans, 13 Mont. 239; 33 Pac. 1010.

13. Neither title to, nor sovereignty over, that part of section 36, T. 13, N. R. 20 W., upon which some of the buildings of Fort Missoula were erected, ever passed to the state of Montana, under Act Cong., Feb. 22, 1889, granting land to the proposed state of Montana, and hence a state court had no jurisdiction over a homicide committed on such part of said section 36.—State v. Tully, 31 Mont. 365; 78 Pac. 760.

V. VENUE, 14-18.

14. The court did not err in refusing to grant an application for a change of venue, when such application was supported by the affidavits of defendant and his attorney, alleging that owing to the flaming reports printed in the newspapers there was a deep-rooted prejudice against defendant in various portions of the county. Change of venue should not be awarded without the most satisfactory showing of prejudice.—Territory v. Corbett, 3 Mont. 51.

15. Affidavits that deponents have heard the case frequently discussed, and do not believe that defendant can have an impartial trial in the county because the inhabitants are prejudiced against him, are insufficient for change of venue.—Territory v. Manton, 8 Mont. 95; 19 Pac., 387.

16. It is permissible for the court to take an application for change of venue under advisement until an effort is made to obtain a jury.—Id.

17. Where a forged instrument is mailed in one county and received in another, the venue of the offense of uttering the forged instrument is in the latter county, and Comp. Stat., p. 409, § 32, providing that when a crime has been committed partly in one county and partly in another, or the acts or facts constituting or requisite to the consummation of the offense occur in several counties, the jurisdiction is in either, does not apply.—State v. Hudson, 13 Mont. 112; 32 Pac. 413.

18. On indictment for murder, defendant's application for a change of venue was supported by affidavits of his counsel showing that while the jury was being secured a large proportion of them stated that they had formed and expressed opinions as to defendant's guilt or innocence; that such statements made in the presence of jurors who had not been challenged for cause had the effect to prejudice them against defendant; that the people of the town where the trial was being held were prejudiced against defendant; and that this prejudice was likely to be communicated to the persons summoned as jurors from its immediate vicinity. *Held*, that it was not an abuse of discretion to refuse a change of venue.—State v. Russell, 13 Mont. 164; 32 Pac. 854.

VI. FORMER JEOPARDY, 19-23.

19. Comp. Stat., p. 515, §§ 73, 74, define burglary as the entering any building, etc., with intent to commit larceny or any felony. *Held*, that one convicted on an indictment for larceny has not been in jeopardy for the crime of burglary, as larceny is the felonious taking of goods with intent to deprive the owner thereof and to convert them, and, under Comp. Stat., p. 552, § 188, forbidding an indictment to charge more than one offense, he could not have been convicted in the former case of burglary.—Territory v. Willard, 8 Mont. 328; 21 Pac. 301.

20. A conviction of displaying a deadly weapon in a rude, angry and insolent manner in the presence of others will not bar a prosecution for assault with a deadly weapon with intent to inflict bodily harm.—Territory v. Stocker, 9 Mont. 6; 22 Pac. 496.

21. Under Comp. Stat., p. 444, § 223, which provides that, "if the defendant is formally acquitted on the ground of a variance between the indictment and the proof, or upon an objection to the form or substance of the indictment, it shall not be deemed an acquittal of the same offense," an acquittal on the ground that the indictment charged an assault on "John Moyr" and the proof showed one on "John Maze," is not a bar to a subsequent prosecution for the same offense.—State v. Sullivan, 9 Mont. 490; 24 Pac. 23.

22. A defendant once convicted, who obtains a new trial on his own motion, can not plead the former conviction in bar to the second trial, on the ground that by the second trial he would "be twice put in jeopardy for the same offense."—State v. Thompson, 10 Mont. 549; 27 Pac. 349.

23. Where persons steal two animals, taking one from each of two different herds having different owners, and taking one about an hour after the other, and driving both off together, there are two acts and two offenses, and an acquittal as to one is not an acquittal as to the other.—State v. English, 14 Mont. 399; 36 Pac. 815.

VII. PRELIMINARY PROCEEDINGS, 24-29.

24. The right to object to the verification of the complaint made before the committing magistrate is waived by pleading to the merits in the district court.—State v. McCaffery, 16 Mont. 33; 40 Pac. 63.

25. Under Const., art. 3, § 8, allowing criminal actions to be prosecuted by information "after examination and commitment by a magistrate, or after leave granted by the court," an information may be filed with leave of court without examination and commitment.—State v. Brett, 16 Mont. 360; 40 Pac. 873.

26. A complaint for vagrancy, which was otherwise sufficient, should not have been dismissed on the ground that it contained scandalous matter, in that it also charged defendant with "being a first class pimp." The court of its own motion should have stricken out the objectionable words, and rebuked the persons

who used them, or permitted them to be used. —Butte v. Peasley, 18 Mont. 303; 45 Pac. 210.

27. Const., art. 3, § 7, providing that no warrant of arrest shall issue without probable cause, reduced to writing, and supported by oath, is satisfied where an information charging a public offense is signed and filed by the county attorney, who has taken an oath to perform the duties imposed upon him by law, among which is that of filing informations.—State v. Clancy, 20 Mont. 498; 52 Pac. 267.

28. Under Pen. Code, § 1436, an order of commitment was not insufficient because it did not fix the term of imprisonment.—State v. Kennie, 24 Mont. 45; 60 Pac. 589.

29. On a preliminary examination for perjury before a committing magistrate, where the decree in the cause in which the alleged false testimony was given is offered in evidence, but the judgment roll is not admitted or considered, the evidence fails to show that the alleged false testimony was material to any issue in the cause, and the party can not be held for trial.—State v. District Court, 26 Mont. 275; 67 Pac. 943.

VIII. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE, 30-34.

30. The magistrate's docket of the former trial is admissible, though it shows that a certain person made the charge, while the magistrate testifies that another made it, and explains the mistake, as the question of who made the complaint is immaterial where the only question is as to the identity of the offense.—Territory v. Stocker, 9 Mont. 6; 22 Pac. 496.

31. On a plea of former conviction, oral testimony of the magistrate before whom the former trial took place is admissible to show the contents of the complaint on which it was based, and that such complaint was sworn to before him, on his testifying that he has diligently searched for the complaint, and that it can not be found.—Id.

32. Where the jury, on a trial for assault with a deadly weapon, did not deliver any verdict into court, evidence, on a plea of former jeopardy interposed at a second trial, that on the former trial the jurors agreed to acquit defendant of the charge, and find him guilty of simple assault only, and that their disagreement was as to the amount of the fine to be imposed, is inadmissible.—State v. McCaffery, 16 Mont. 33; 40 Pac. 63.

33. The record showed that defendant refused to plead, whereupon the court ordered a plea of not guilty to be entered to all the charges n the information. *Held*, that the record sufficiently showed that a plea to the information was entered, and a substantial compliance with Pen. Code, § 1948.—State v. Clancy, 20 Mont. 498; 52 Pac. 267.

34. On a prosecution for robbery, the question whether defendant was, by reason of insanity, incapable of having the criminal intent necessary to the commission of the crime, was raised by a plea of not guilty.—State v. Howard, 30 Mont. 518; 77 Pac. 50.

IX. EVIDENCE, 35-113.

A. Judicial Notice, Presumptions, and Burden of Proof, 35-38.
B. Facts in Issue and Relevant to Issues, and Res Gestae, 39-54.
C. Character of Accused, 55.
D. Materiality and Competency in General, 56-57.
E. Best and Secondary and Demonstrative Evidence, 58-60.
F. Declarations, Admissions, and Hearsay, 61-68.
G. Acts and Declarations of Conspirators and Co-Defendants, 69-74.
H. Documentary Evidence, and Exclusion of Parol Evidence Thereby, 75-76.
I. Opinion Evidence, 77-84.
J. Testimony of Accomplices and Co-Defendants, 85-98.
K. Confessions, 99-104.
L. Evidence at Preliminary Examination, 105.
M. Weight and Sufficiency, 106-113.

A. JUDICIAL NOTICE, PRESUMPTIONS, AND BURDEN OF PROOF, 35-38.

35. The burden of proof is not shifted by the defense of an alibi, and defendant can not be convicted if the evidence raises a reasonable doubt of his presence at the time and place where the crime was committed.—State v. McClellan, 23 Mont. 532; 59 Pac. 924.

36. The court cannot take judicial notice of the system employed by cities in numbering houses, nor of the relative location of buildings, nor whether there are buildings on certian lots and blocks.—State v. Rodgers, 31 Mont. 1; 77 Pac. 293.

37. Judicial notice may be taken of the fact that the M military reservation is situated in M county.—State v. Tully, 31 Mont. 365; 78 Pac. 760.

38. Under Code Civ. Proc., § 3150, the courts take judicial notice of executive orders of the federal government creating the Fort Missoula military reservation.—Id.

B. FACTS IN ISSUE AND RELEVANT TO ISSUES, AND RES GESTAE, 39-54.

1. Relevancy in General, 39.
2. Facts Relevant to Facts in Issue, and Evidence Thereof, 40-46.
3. Res Gestae, 47-54.

1. Relevancy in general, 39.

39. In a criminal case it is not error for the court to exclude as immaterial a question put to a witness on direct examination by defendant as to whether he had not been subpœnaed by the state.—State v. Tighe, 27 Mont. 327; 71 Pac. 3.

2. Facts relevant to facts in issue, and evidence thereof, 40-46.

40. Defendant, as a witness, denied that on Thursday or Friday before the killing on Saturday night, March 31, he went to one B's house with deceased and another; that he then stated to B that he had two Norwegian boys outside, and that they had money, and he wanted B to help fix them by putting them to sleep, to get the money. *Held*, that B could testify in rebuttal that, four or five days before the killing defendant came to her house with two men; that defendant came in and told her he had a good chance to make some money; that he had two fellows lately from Norway, who had money; that he asked her for a spare room; that he wanted her to fix them,—put them to sleep,—and asked her if she did not know how; and that she refused to have anything to do with it, and defendant left.—State v. Osnes, 14 Mont. 553; 37 Pac. 13.

41. Evidence that defendant's house was maliciously burned several days prior to the homicide is irrelevant, it not appearing that the deceased participated in the burning.—State v. Gay, 18 Mont. 51; 44 Pac. 411.

42. Where a witness based her testimony, that threats against deceased were made by defendant, on her recognition of his voice, it was not error to exclude evidence tending to show that such witness had mistaken the voice of another person on a different occasion, where it was not shown that the conditions were the same.—State v. Hurst, 23 Mont. 484; 59 Pac. 911.

43. Where defendant, in jail on a charge of rape, sends a note to the prosecutrix, also detained as a witness, in which he urges her to deny everything, not to sign or say anything, and remember her promise, and she testifies on the trial that the promise referred to was that she would tell nothing concerning the sexual intercourse between them, the note is relevant, and properly admitted in evidence against defendant.—State v. Mahoney, 24 Mont. 281; 61 Pac. 647.

44. Where deceased, departing from home, took with him a satchel, leaving behind a packed trunk, testimony as to the similarity of the laundry marks on linen contained in a satchel found after his death and those on linen contained in the trunk was admissible to identify the contents of the satchel as deceased's.—State v. Lucey, 24 Mont. 295; 61 Pac. 994.

45 Testimony of the sheriff that, when arrested, defendant turned away, "as though he was about to be devoured," was admissible, in the absence of a specific objection that the expression was vague.—Id.

46. Evidence of efforts made to apprehend defendant after the discovery of a crime was admissible to show defendant's flight and concealment, from which guilt might be inferred.—Id.

3. Res gestae, 47-54.

47. On the trial of a party indicted for an assault with a deadly weapon, with intent to inflict upon B a bodily injury, it is not a defense, nor a part of the res gestæ, that D, before the assault was committed, had wrongfully deprived defendant of the use of water, and thereby prevented him from working his mining ground.—Territory v. Drennan, 1 Mont. 41.

48. State's witness testified that he was standing at the head of the hall stairs, and heard defendant say, when going out of the door, that he would kill the son of a ----; that defendant was talking to P; he did not say whom he would kill. It was uncontradicted that the accused parties had had a difficulty in said hall with deceased, and that they passed downstairs a few minutes before defendant shot deceased. Another witness testified that he saw defendant and P at the foot of the stairs, and heard defendant say to P "smash the son of a ——— when he comes down stairs." *Held*, that the evidence was admissible as part of the res gestæ.—State v. King, 9 Mont. 445; 24 Pac. 265.

49. On trial for assault with intent to kill one W, it appeared that W attempted to do hauling across defendant's mining claim, on a road which, though broken, was not public, and that W's party found defendant at work in a shaft in the road, which rendered it impassable, and began to fill up the shaft with stones, when a quarrel ensued. *Held*, that evidence that W's team could not turn out and pass the shaft which defendant was digging was admissible as a part of the res gestæ to show the surroundings.—State v. Donyes, 14 Mont. 70; 35 Pac. 455.

50. Where defendant, immediately after shooting deceased, fled, and was captured about a quarter of a mile away, his statements to the captors that deceased hit him before he shot, and the statement of deceased, a short time after the shooting, that defendant applied to him opprobious epithets, and he struck him, are narrative, and no part of the res gestæ.—State v. Pugh, 16 Mont. 343; 40 Pac. 861.

51. In a prosecution for murder, exclamations of deceased and witnesses of the homicide as defendant approached the house in which the difficulty occurred, and which he had just left, that "there he comes with a gun," are admissible as res gestæ.—State v. Biggerstaff, 17 Mont. 510; 43 Pac. 709.

52. A declaration made by deceased 30 minutes before the homicide, that he had had a difficulty with defendant, and that he was not armed and was afraid of defendant, is inadmissible as a part of the res gestæ.—State v. Shafer, 22 Mont. 17; 55 Pac. 526.

53. The conversation had between defendant and deceased, before starting on a journey which, according to the state's theory, was planned by defendant to entice deceased to his death, was admissible as a part of the res gestæ, notwithstanding it had no apparent significance.—State v. Lucey, 24 Mont. 295; 61 Pac. 994.

54. On a prosecution for murder, deceased having been killed in an affray with defendant, evidence of the conduct and acts of the parties from the inception of the affray to its end, and that neither called for aid or assistance while struggling was admissible as part of the res gestæ.—State v. Tighe, 27 Mont. 327; 71 Pac. 3.

C. CHARACTER OF ACCUSED, 55.

55. Evidence that defendant had preached in a church at divers times is inadmissible to prove his good character.—State v. Brooks, 23 Mont. 146; 57 Pac. 1038.

D. MATERIALITY AND COMPETENCY IN GENERAL, 56-57.

56. Defendant testified that he remained at the place of the shooting for some time, and then rode to the home of deceased, and notified the family, after which he started to deliver himself to the sheriff, and, meeting a person on the way, delivered the gun to him. The latter testified only to the identity of the gun. *Held*, that the testimony of defendant, as to what he said when he delivered the gun, does not come within the rule allowing a party to give any portion of a conversation already introduced in evidence by the other side, nor is such testimony competent as a part of the res gestæ.—Territory v. Clayton, 8 Mont. 1; 19 Pac. 293.

57. Defendant introduced in evidence part of the testimony of a state's witness given by her at the preliminary examination, and which, after being reduced to writing, had been read to and signed by her. *Held*, that the state was thereafter properly allowed to introduce the whole of it, within Comp. Stat., p. 224, § 626.—State v. Jackson, 9 Mont. 508; 24 Pac. 213.

E. BEST AND SECONDARY AND DEMONSTRATIVE EVIDENCE, 58-60.

58. On a trial for murder, evidence by a coroner that he took clothes presented in evidence off the body of deceased, and by another witness that she knew the clothes worn by deceased when killed, and that those in evidence were them, sufficiently identifies them to make them admissible to show the course of the bullet.—State v. Cadotte, 17 Mont. 315; 42 Pac. 857.

59. Where, on a trial of one charged with being an accomplice in a murder, the state proved that letters had passed between defend-

ant and the wife of his co-defendant, and defendant testified that he had destroyed the letters received by him, and that he had no reason for destroying them, except that that was his usual custom, sufficient foundation is laid for defendant to prove the contents of the letters. —State v. Welch, 22 Mont. 92; 55 Pac. 927.

60. The proper manner of proving a prior conviction is not by the introduction of the commitment, but by the record of the judgment. Code Civ. Proc. § 3193.—State v. Howard, 30 Mont. 518; 77 Pac. 50.

F. DECLARATIONS, ADMISSIONS, AND HEARSAY, 61-68.

61. A statement to a third party by an interpreter, of admissions by the accused, though made in their presence, can not bind them, when it appears that they did not understand the language in which it was made.—Territory v. Big Not on Head, 6 Mont. 242; 11 Pac. 670.

62. Evidence of a statement made by an interpreter as to admissions made to him is hearsay evidence, and inadmissible.—Id.

63. In a prosecution for larceny, the admission of testimony of witnesses as to what the complaining witness told them about defendant's taking the money, not made in the presence of defendant, is clearly erroneous.—State v. Judd, 20 Mont. 420; 51 Pac. 1033.

64. It is error to allow a declaration made by deceased 30 minutes before the homicide that he had had a difficulty with defendant, that he was not armed and was afraid of defendant, to show that deceased was not armed at the time he was shot by defendant.—State v. Shafer, 22 Mont. 17; 55 Pac. 526.

65. In a murder trial, testimony that a third person had told witness that defendant had told such person that he had tried on several occasions to kill deceased, and would try again, is hearsay and inadmissible.—State v. Welch, 22 Mont. 92; 55 Pac. 927.

66. Where there is no evidence showing that a defendant charged with murder was insane, evidence of his declarations and conduct is inadmissible to prove insanity, unless the purpose of such evidence is disclosed.—State v. Brooks, 23 Mont. 146; 57 Pac. 1038.

67. On a prosecution for murder, deceased having been killed in an affray with defendant, it was the theory of the defense that defendant did not intend to stab deceased, but that the knife, which he had seized from an instinct of self defense, must have come in contact with deceased accidentally while they struggled, and defendant offered to show that in less than a minute after the fatal wound, and while he was being led away in a highly exhausted and angry condition and with a bleeding face, at a point 40 or 50 feet from the spot where the killing occurred, a person remarked that he was going for a physician for deceased, and defendant answered, "H—, he doesn't need a doctor; he isn't hurt." *Held* error, under Code Civ. Proc., §§ 3126, 3146, not to admit the offered declaration, the question whether it was part of the res gestæ being for the jury.—State v. Tighe, 27 Mont. 327; 71 Pac. 3.

68. Insanity can not be proved by reputation.—State v. Lagoni, 30 Mont. 472; 76 Pac. 1044.

G. ACTS AND DECLARATIONS OF CONSPIRATORS AND CO-DEFENDANTS, 69-74.

69. Defendant and three others got guns from the stable of D, who was one of their number, and fired them off in the direction where prosecutor was erecting a fence between his farm and that of D. The party then came to prosecutor, and D claimed title to his land, and called out "Fire, boys!" Defendant then fired four shots at prosecutor, and wounded him. *Held*, that what D said at the time was part of the res gestæ, and was admissible, as the evidence tended to show a conspiracy.—Territory v. Campbell, 9 Mont. 16; 22 Pac. 121.

70. On a trial for larceny, statements by one who participated with defendant in the larceny, made after the offense was completed, and not in defendant's presence, and not a part of the res gestæ, are not admissible.—State v. English, 14 Mont. 399; 36 Pac. 815.

71. On prosecution for conspiracy to steal and butcher cattle and sell the beef, statements and acts by one of the conspirators, after the theft, but before the sale, are, as part of the res gestæ, admissible as against the other conspirators.—State v. Byers, 16 Mont. 565; 41 Pac. 708.

72. Declarations of M before the commission of the crime that he was going to the place where deceased resided, and that he intended to kill the latter and thereby bring about the release of defendant, were admissible against the latter, as tending to show the purpose of M to carry out the conspiracy between himself and defendant.—State v. Dotson, 26 Mont. 305; 67 Pac. 938.

73. Where, by a pre-arranged plan, accused and his associates were to commit a larceny, and sell the property, possession of the property by the associates, pursuant to the criminal purpose, may be properly considered against accused, as any act done by one of the parties in a criminal conspiracy during the pursuit of the common purpose is competent against the others as res gestæ.—State v. Stevenson, 26 Mont. 332; 67 Pac. 1001.

74. Where the state, in a prosecution for larceny of horses, tries the case on the theory that the horses were stolen in pursuance of a conspiracy between defendant and others, proof of declarations of defendant's co-conspirators must be confined to those made while the conspiracy was pending, and in furtherance of it.—State v. De Wolf, 29 Mont. 415; 74 Pac., 1084.

H. DOCUMENTARY EVIDENCE, AND EXCLUSION OF PAROL EVIDENCE THEREBY, 75-76.

75. Where a prosecutrix in a rape case receives a note urging her to deny everything, not to sign or say anything, and to remember her promise that "we" will be happy yet, and she testifies that she has seen defendant's handwriting, and thinks the note is in his handwriting, though unable to swear positively that it is so, such testimony is a sufficient foundation for the reception of the note in evidence against defendant.—State v. Mahoney, 24 Mont. 281; 61 Pac. 647.

76. Where, on a criminal prosecution, the state offered in evidence a letter claimed to have been written by accused, and a witness testified that he was familiar with defendant's handwriting, and that the letter looked like his writing, and that the signature was his signature, there was a sufficient identification of the letter as one written by defendant.—State v. Howard, 30 Mont. 518; 77 Pac. 50.

I. OPINION EVIDENCE, 77-84.

77. On a trial for murder, non-professional witnesses for the prosecution, after testifying as to their acquaintance with defendant, and as to his acts, habits and manners as observed by them, may be permitted to give their opinion

as to his sanity.—Territory v. Hart, 7 Mont. 489; 17 Pac. 718.

78. A question asked a witness for the prosecution, as to whether he thought he would have seen it, if deceased had had a pistol on him at the time of the shooting, is not objectionable, as asking a matter of opinion.—Territory v. Clayton, 8 Mont. 1; 19 Pac. 293.

79. It is not error to admit non-expert testimony as to the mental capacity of defendant, where the witnesses stated that they were well acquainted with him, and that their opinions were based on observations made during the period of their acquaintance.—Territory v. Roberts, 9 Mont. 12; 22 Pac. 132.

80. A non-expert witness, who was not present at a homicide, can not express his opinion as to the sanity of the accused, based both on his previous knowledge of accused and hearsay knowledge of the facts attending the homicide.—State v. Peel, 23 Mont 358; 59 Pac. 169.

81. A question on the subject of insanity, put to an expert in a criminal trial, need not embrace all the elements of insanity, but may limit the inquiry to the degree of intelligence possesed by defendant under the circumstances of the act.—Id.

82. Where defendant had an unfriendly feeling towards deceased, and, failing in an attempt to procure deceased's prosecution, went into the street and killed him, and insanity was pleaded as a defense, it was proper for the state to ask an expert his opinion of one's consciousness and knowledge of right and wrong and unlawfulness of his act, "if he had a grudge against another, and had rationally conversed with officers about it, and should go from them, and lie in wait for his enemy until he came within the vicinity, and should shoot him, saying, 'take that,' and, having shot him, should turn and say that he would go to jail, and give himself up, and within 20 months after the shooting should talk in a reasonable manner, apparently as conscious as he ever had been," since the state in putting the hypothetical question, had a right to assume that the evidence tending to support its theory was true.—Id.

83. As an exception to the general rule excluding opinion evidence, a witness may be permitted to state his conclusion upon matters with which he is especially acquainted, but which can not be specifically described.—State v. Lucey, 24 Mont. 295; 61 Pac. 994.

84. On a prosecution for murder a witness testified that the expression on the face of deceased at the time of the killing indicated fear; that he "seemed to be scared;" and another witness testified that prior to the homicide defendant, while speaking about deceased, was emphatic in his language, and that the expression of his face showed anger. *Held*, that the testimony, in so far as it concerned anger and fear, was not objectionable as statements of inferences from facts rather than facts themselves, but each statement was admissible, being "a shorthand rendering of facts."—State v. Tighe, 27 Mont. 327; 71 Pac. 3.

J. TESTIMONY OF ACCOMPLICES AND CO-DEFENDANTS, 85-98.

1. Accomplices, Within Rules of Evidence, 85.
2. Admissibility and Effect of Testimony, 86-88.
3. Corroboration of Accomplices, 89-98.

1. Accomplices, within rules of evidence, 85.

85. The fact that the witness is charged with the same offense jointly with accused does not of itself make him an accomplice.—State v. Spotted Hawk, 22 Mont. 33; 55 Pac. 1026.

2. Admissibility and effect of testiomny, 86-88.

86. Under Cod. Stat., p. 271, § 14, an accomplice may be called upon to testify against his accomplice, whether he gives his consent or not.—Territory v. Corbett, 3 Mont. 51.

87. Under Pen. Code, § 2443, an accomplice is a competent witness against an accused, although his testimony was obtained by threats or inducements.—State v. Geddes, 22 Mont. 68; 55 Pac. 919.

88. Where a witness in a homicide case, who is impeachable as an accomplice, details certain incriminating statements made by defendant before the commission of the crime, and states that he repeated the conversations to others, his testimony as to when he did so is relevant and admissible on behalf of the state as introductory evidence which may be adduced to show whether the witness was an accomplice.—State v. Dotson, 26 Mont. 305; 67 Pac. 938.

3. Corroboration of accomplices, 89-98.

89. The testimony of an accomplice need not be corroborated in every particular.—Territory v. Corbett, 3 Mont. 51.

90. On trial of A indicted for sodomy with B, proof that A asked B to go to a certain town with him to get wages A owed B, that they went, and while there passed a night at a hotel in the same bed, and that when A was arrested he stated to the officer, before being told for what he was arrested, that it would be a very interesting case and that B was a boy prostitute. *Held*, to be sufficiently corroborative to give effect to the testimony of B as an accomplice.—Territory v. Mahaffey, 3 Mont. 112.

91. One accomplice can not corroborate the testimony of another accomplice.—State v. Spotted Hawk, 22 Mont. 33; 55 Pac. 1026.

92. Under Pen. Code, § 2089, requiring an accomplice to be corroborated by independent evidence tending to connect accused with the crime, evidence that witness saw accused and an accomplice steal a cow, and, while in the act of committing the larcency, they were seen by a white man; that accused was seen in company of the accomplices, armed and riding horses, at about the time that deceased disappeared; that four weeks later a white man was found on the range, shot in the arm and breast; near the body were found three empty shells, tracks of three horses, and a dead dog; and that accused asked witness "not to tell it," pointing in a direction not disclosed.—is an insufficient corroboration of an accomplice's testimony that he and accused, having been discovered stealing a cow by a white man, followed him, and killed him and his dog, placing the two bodies together, where the only identification of the locality is that it was on the same stream, and country being unsettled cattle country.—Id.

93. Testimony of the accomplice, who committed the murder, that defendant had procured him to do it on account of a grudge against deceased, and in order to prevent deceased from testifying in an action which he had commenced against defendant, is not sufficiently corroborated to sustain a conviction by evidence that deceased had filed an information and complaint against defendant for asault, and that the latter had told several persons that he had committed the assault, and was sorry that he did not kill deceased; that, when he presented his side of the case, it would appear in a different light; that he would get even with deceased, and, if he did not stop talking about

defendant, something would happen.—State v. Geddes, 22 Mont. 68; 55 Pac. 919.

94. Defendant, accused of having instigated a murder, was 50 miles away when it was committed. The murderer, between whom and defendant a hatred existed, testified that, some time before, defendant had told him that he was going to kill deceased. The only corroborating evidence was that defendant was very intimate with the person for whose benefit the murder was alleged to have been committed, and particularly with the latter's wife, with whom he corresponded, and to whom he had sent money two days after the murder. *Held*, insufficient, under Pen. Code, § 2089, providing that testimony of an accomplice must be corroborated by evidence tending to connect defendant with the crime.—State v. Welch, 22 Mont. 92; 55 Pac. 927.

95. Under Pen. Code, § 2089, it is not essential that the evidence in corroboration must be sufficient, when standing alone, to connect the defendant with the crime, but it is sufficient if it tends to do so.—State v. Calder, 23 Mont. 504; 59 Pac. 903.

96. Where the jury might have found from the evidence that the alleged accomplice was not an accomplice, a conviction can be rightly had upon his uncorroborated testimony.—State v. Fisher, 23 Mont. 540; 59 Pac. 919.

97. On a second trial for murder it was not error to read the testimony of a deceased witness, including an erroneous ruling of the court on the evidence, where no objection to the reading if the ruling was raised at the time.—State v. Shadwell, 26 Mont. 52; 66 Pac. 508.

98. Under Pen. Code, § 2089, corroborating evidence tending to establish, independently of the accomplice's statements, the commission of the offense and accused's connection therewith, is sufficient, though, if the accomplice's testimony were not considered, the corroborating evidence would be insufficient to convict.—State v. Stevenson, 26 Mont. 332; 67 Pac. 1001.

K. CONFESSIONS, 99-104.

99. Confessions to an officer, if admitted in evidence, should be so admitted with the greatest care and caution, and after the possibility of any and every inducement has been removed.—Territory v. McClin, 1 Mont. 394.

100. The voluntary and unbiased confession of a prisoner is insufficient without other evidence, to authorize his conviction.—Id.

101. Where there is no evidence in a case, except the bare, naked confession of the defendant, as shown by the record, it is extremely doubtful if a conviction could be worked out upon such testimony alone.—Id.

102. A defendant in a criminal case can not be convicted when the only evidence is his confession of the crime.—Territory v. Farrell, 6 Mont. 12; 9 Pac. 536.

103. A confession made on a statement by an officer having the prisoner under arrest, that it would be better for him to tell the prosecuting witness all about it; that the officer thought the prosecuting witness would withdraw the prosecution, or make it as light as possible; and that the prosecuting witness would help the prisoner out if he would give evidence against his accomplices, can not be given in evidence.—Territory v. Underwood, 8 Mont. 131; 19 Pac. 398.

104. Testimony of accused at the coroner's inquest is inadmissible against him, he having testified under the belief that he was required to answer the questions put to him.—State v. O'Brien, 18 Mont. 1; 44 Pac. 399.

L. EVIDENCE AT PRELIMINARY EXAMINATION, 105.

105. A copy of the stenographic report of the evidence of a witness on a preliminary examination, sworn by the stenographer to be a correct copy of his shorthand notes, is admissible against the defendant on trial for the offense, where defendant was present at the preliminary examination, and cross examined the witness, and the witness is dead.—State v. Byers, 16 Mont. 565; 41 Pac. 708.

M. WEIGHT AND SUFFICIENCY, 106-113.

106. The refusal by the prosecuting attorney to call as a witness one who was present during the commission of the crime, is ground for reversal of the judgment.—Territory v. Hanna, 5 Mont. 248; 5 Pac. 252.

107. Where there is no direct testimony that accused, who was indicted for the murder of his child by beating, did the killing, and the circumstances do not point to him more than to any other of the persons capable of committing the crime (of whom there were several about the premises at the time it was done) as its perpetrator, the evidence is not sufficient to satisfy the mind of the guilt of accused to a moral certainty, and a new trial should be granted.—Territory v. Rehberg, 6 Mont. 467; 13 Pac. 132.

108. To warrant a conviction on circumstantial evidence alone, the same degree of certainty is required as where the evidence is direct, viz., the evidence must satisfy the jury beyond a reasonable doubt.—State v. Ryan, 12 Mont. 297; 30 Pac. 78.

109. The burden of establishing the defense of insanity by a preponderance of evidence is never cast upon defendant, since the state must prove defendant's guilt beyond a reasonable doubt.—State v. Peel, 23 Mont. 358; 59 Pac. 169.

110. The refusal of an instruction casting upon the state any greater burden than that of showing by a preponderance of the evidence the circumstances establishing defendant's guilt was proper, since the universal rule is that in all such cases the prosecution must establish such circumstances beyond a reasonable doubt.—State v. Schnepel, 23 Mont. 523; 59 Pac. 927.

111. Defendant is only required to introduce sufficient evidence to raise a reasonable doubt as to whether the homicide was not justifiable.—State v. Felker, 27 Mont. 451; 71 Pac. 668.

112. In a prosecution for murder, evidence considered, and *held*, to show that the crime was committed in the county alleged in the indictment.—State v. Hardee, 28 Mont. 18; 72 Pac. 39.

113. Where the warden of the penitentiary testified that defendant had been confined there, and there was admitted in evidence a commitment against him, and it appeared that the date of his commitment and release corresponded with the requirements of the commitment, and other witnesses testified that they knew defendant when he was in the penitentiary, an objection that defendant was not identified as the man to whom the commitment referred was of no merit.—State v. Howard, 30 Mont. 518; 76 Pac. 50.

X. TIME OF TRIAL, 114-115.

114. The speedy trial to which a person charged with crime is entitled is a trial at such a time, after the finding of the indictment, as shall afford the prosecution a reasonable opportunity for trial.—United States v. Fox, 3 Mont. 512.

115. Const., art. 3, § 16, provides that in criminal prosecutions the accused shall have the right to a speedy trial. Comp. Stat., p. 460, § 303, provides that if a person indicted for an offense, and committed to prison, shall not be brought to trial before the end of the second term of court after the finding of the indictment, he shall be discharged. *Held*, that where one was twice brought to trial within the prescribed time, but, pending an appeal by the state from the granting of a new trial, two terms elapsed without further trial, there was no failure to give speedy trial, though it was finally decided that the state had no right to appeal.—State v. Conrow, 13 Mont. 552; 34 Pac. 240.

XI. CONTINUANCE, 116-123.

A. In General, 116-117.
B. Grounds for, and Diligence Essential to, Granting Continuance, 118-120.
C. Admissions to Prevent Continuance, 121-123.

A. IN GENERAL, 116-117.

116. Granting or refusing an application for a continuance is a matter within the discretion of the trial court.
Territory v. Perkins, 2 Mont. 467.
State v. Howard, 30 Mont. 518; 77 Pac. 50.

117. Cr. Pr. Act, § 270, providing that "any case which could be considered a good one for a continuance in a civil case shall be considered sufficient in a criminal action," makes the provisions of Cr. Pr. Act relating to the postponement of the trial of civil actions applicable to criminal cases.—Territory v. Perkins, 2 Mont. 467.

B. GROUNDS FOR, AND DILIGENCE ESSENTIAL TO, GRANTING CONTINUANCES, 118-120.

118. An application for a continuance, on the ground that an absent witness will contradict the testimony of a witness on a former trial, that "defendant gathered up all the papers he could get, made a bundle of them, and put them in his pocket," by testifying that the latter witness afterwards searched the premises, and burned all the papers of any value found there, is properly denied, as the statements are inconsistent.—Territory v. Manton, 8 Mont. 95; 19 Pac. 387.

119. On a trial for murder, it is no abuse of discretion to deny a motion for continuance on the ground of absent witnesses, where it appears that defendant only expects to prove by the witnesses that they were acquainted with him 45 years ago, and knew him for 20 years succeeding that time, and that he "was then afflicted with a disease which some times produced mental troubles," and that 25 years ago "his reputation for peace and quiet was good."—Territory v. Roberts, 9 Mont. 12; 22 Pac. 132.

120. Where defendant's affidavit for a continuance, which is corroborated, shows that he has used due diligence to secure the testimony of an absent witness, who was present at the killing, but who had left the state, but had only succeeded in locating him three weeks before the trial, and since then had been diligent in attempting to get his deposition, it is error to refuse a continuance.—State v. Metcalfe, 17 Mont. 417; 43 Pac. 182.

C. ADMISSIONS TO PREVENT CONTINUANCE, 121-123.

121. Where an affidavit for a continuance, in behalf of the prosecution, on account of absent witnesses, deposed that they would testify that they saw defendant commit the act charged, defendant, in open court, offered to admit that the witnesses, if present, would testify to the facts stated in the affidavit, the affidavit is admissible.—United States v. Sacramento, 2 Mont. 239.

122. Where defendant applies for a continuance on the ground of absent witnesses, and the prosecution admits that a witness, if present, would testify to the facts as stated in the affidavit, it is not error, after such admission, to refuse a continuance. —Territory v. Perkins, 2 Mont. 467.

123. Defendant in a criminal case has no right to a continuance on account of the absence of material witnesses, if the prosecution is willing to admit that, if the witnesses were present, they would testify as set forth in the affidavits, and to allow the statements in the affidavits to be read in evidence as and for the testimony of the absent witnesses.—Territory v. Harding, 6 Mont. 323; 12 Pac. 750.

XII. TRIAL, 124-232.

A. Preliminary Proceedings, 124-128.
B. Course and Conduct of Trial, 129-135.
C. Reception of Evidence, 136-143.
D. Objections to Evidence, Motions to Strike Out, and Exceptions, 144-148.
E. Argument and Conduct of Counsel, 149-155.
F. Province of Court and Jury in General, 156-170.
G. Necessity, Requisites, and Sufficiency of Instructions, 171-212.
H. Requests for Instructions, 213-217.
I. Exceptions to Instructions, 218-219.
J. Custody, Conduct, and Deliberations of Jury, 220-229.
K. Waiver and Correction of Irregularities and Errors, 230-232.

A. PRELIMINARY PROCEEDINGS, 124-128.

124. Laws 1891, p. 249, § 3, provides that there shall be endorsed on each information, at the time of filing the same, the names of all witnesses known to the prosecuting officer; and, at such time before the trial of any case as the court may prescribe, he shall also endorse thereon the names of such other witnesses as shall then be known to him. *Held* that where, on the opening of a trial, the prosecuting officer asked that the name of a witness be endorsed on the information, and stated what he intended to prove by the witness, and defendant's counsel knew that the witness was to be called, and the court placed at the disposal of defendant's counsel the power to obtain any witness he might desire to rebut the testimony of the proposed witness, and defendant examined a witness for that purpose, defendant was not prejudiced by the admission of the evidence of the state's witness.—State v. Black, 15 Mont. 143; 38 Pac. 674.

125. Under Pen. Code, § 1734, where the name of a witness known to the county attorney at the filing of the information was omitted, but there was no evidence of bad faith, the court properly permitted it to be endorsed on the day before trial.—State v. Calder, 23 Mont. 504; 59 Pac. 903.

126. Under Pen. Code, § 1734, the act of the county attorney at the trial in endorsing new witnesses on the information is not error, as such witnesses were subject to be examined

whether their names were endorsed on the information or not.—State v. Schnepel, 23 Mont. 523; 59 Pac. 927.

127. Under Pen. Code, § 2521, the necessity of the trial of the issue of insanity, is in the discretion of the court.—State v. Peterson, 24 Mont. 81; 60 Pac. 809.

128. Under Pen. Code, § 1893, defining an arraignment, and requiring a "copy" of the information to be delivered to defendant, a true copy is meant.—State v. DeWolfe, 29 Mont. 415; 74 Pac. 1084.

B. COURSE AND CONDUCT OF TRIAL, 129-135.

129. After the re-convening of court after a recess, a witness for the state was asked one question while accused was absent, but, before he answered it, the court stopped the proceedings until accused was brought in. *Held*, that accused was not prejudiced.—State v. Spotted Hawk, 22 Mont. 33; 55 Pac. 1026.

130. Accused need not be present in court during the argument of a demurrer to the information, or while a motion to set the information aside is being disposed of, such proceedings being no part of the "trial."—Id.

131. The presence of accused is not necessary at a proceeding to obtain leave of court to file an information against him.—State v. Little Whirlwind, 22 Mont. 425; 56 Pac. 820.

132. Accused need not be present in court during the argument of a motion to quash the information, since such proceeding is not a part of the "trial."—Id.

133. In a criminal case it was proper to permit an attorney to appear as an assistant for the prosecuting officer and participate in the trial, though he was being paid by private persons.—State v. Tighe, 27 Mont. 327; 71 Pac. 3.

134. Pen. Code, § 2097, limits the inspection which the jury may make of the place where the offense was committed to inanimate objects.—State v. Landry, 29 Mont. 218; 74 Pac. 418.

135. On a criminal prosecution, the county attorney made certain statements as to what, in his opinion, the evidence showed. Objection was made to such line or argument, and the court said that the county attorney had a right to state his theory of the case, and what the evidence showed, or tended to show, as a matter of argument, but that the jury should understand that what he had said was in argument, and not as a statement of fact. *Held*, that such remarks by the court were not erroneous.—State v. Tully, 31 Mont. 365; 78 Pac. 760.

C. RECEPTION OF EVIDENCE, 136-143.

1. RIGHT OF ACCUSED TO CONFRONT WITNESSES, 136-137.
2. COMPELLING CALLING OF WITNESSES, 138-141.
3. ELECTION BETWEEN ACTS, 142.
4. PRESENTATION AND INTRODUCTION OF EVIDENCE, 143.

1. Right of accused to confront witnesses, 136-137.

136. A party who has been indicted for the commission of a misdemeanor, waives his constitutional right to be confronted with the witnesses against him by admitting that witnesses, if present, would testify to certain facts stated in the affidavit of the district attorney for a continuance, and thereby preventing the postponement of the trial.—United States v. Sacramento, 2 Mont. 239.

137. On a trial for larceny, the prosecuting witness being absent from the state, the committing magistrate was allowed to testify as to his evidence on the preliminary hearing. *Held* error, under Const., art 3, § 16, providing that the accused shall have the right to meet the witnesses face to face, and Comp. Stat., p. 404, § 9, providing that the accused shall be entitled to be confronted with the witnesses against him.—State v. Lee, 13 Mont. 248; 33 Pac. 690.

2. Compelling calling of witnesses, 138-141.

138. Where the prosecuting attorney had endorsed the name of a witness on the information, but it appeared that she was not an eye witness to the shooting, and the materiality of her evidence was not shown, it was not error to refuse to require the prosecuting attorney to call her as a witness.—State v. Russell, 13 Mont. 164; 32 Pac. 854.

139. Where, in a prosecution, the evedince relied on for conviction is circumstantial, it is error for the state to fail to call a witness who, though not an eye witness of the killing, was near enough to hear the conversation between defendant and deceased preceding the killing, though the prosecuting attorney was under the belief that such witness was too drunk to understand what was going on.—State v. Metcalfe, 17 Mont. 417; 43 Pac. 182.

140. Where the secretary of the senate is charged with secreting a bill which had passed the senate, it is not error to require the state to introduce as its witness the clerk who made the last endorsement on the bill, reciting that it had been read the third time and concurred in, and to whom the bill was handed immediately after its passage, where the secretary afterwards obtained possession of it, though the evidence of wilful wrong on the part of the secretary is circumstantial.—State v. Bloor, 20 Mont. 574; 52 Pac. 611.

141. Under Pen. Code, § 2082, it is not error for the court in a criminal case to refuse to require all of the eye-witnesses to be sworn.—State v. Tighe, 27 Mont. 327; 71 Pac. 3.

3. Election between acts, 142.

142. Under Pen. Code, §§ 1922, 1930, 2200, an objection to an information for grand larceny that it joins several distinct offenses, each of which alone would constitute petit larceny, was addressed to the jurisdiction of the court, rather than to the form of the information, and therefore might be raised by an objection to the introduction of any evidence and a motion to compel an election.—State v. Mjelde, 29 Mont. 490; 75 Pac. 87.

4. Presentation and introduction of evidence, 143.

143. Where evidence objected to as irrelevant is held on appeal to be relevant for a certain purpose, it is unnecessary to determine its relevancy for other purposes.—State v. Dotson, 26 Mont. 305; 67 Pac. 938.

D. OBJECTIONS TO EVIDENCE, MOTIONS TO STRIKE OUT, AND EXCEPTIONS, 144-148.

1. OBJECTIONS, 144-147.
2. EFFECT OF FAILURE TO EXCEPT, 148.

1. Objections, 144-147.

144. An objection to the admission of certain letters in evidence is insufficient if no grounds of objection are stated.—Territory v. Bryson, 9 Mont. 32; 22 Pac. 147.

145. Where the only objection to a question is that it is immaterial and irrelevant, it is proper to admit it, if the evidence sought is per-

tinent to any phase of the case.—State v. Black, 15 Mont. 143; 38 Pac. 674.

146. An objection to a question of defendant as to whether he was ever convicted of a felony, as being "improper cross examination, irrelevant and immaterial," does not include the objection that the record of conviction was the best evidence.—Id.

147. Where a witness for the prosecution made statements as to what he had heard, and an objection to a further question was sustained because the witness was not testifying from his own knowledge, the ruling practically withdrew the answer to the previous question, and defendant, if he desired a more specific withdrawal, ought to have moved to strike the evidence from the record.—State v. Rodgers, 31 Mont. 1; 77 Pac. 293.

2. Effect of failure to except, 148.

148. Where one of defendant's attorneys, before testifying for the defense, did not ask permission to argue the case, as required by a rule of court, it was not error to refuse to permit him to do so.—State v. Gleim, 17 Mont. 17; 41 Pac. 998.

E. ARGUMENT AND CONDUCT OF COUNSEL, 149-155.

149. On indictment for murder, where the defense is insanity, the court may, in its discretion, permit counsel for the prosecution to read to the jury decisions of English and American courts on such defense.—Territory v. Hart, 7 Mont. 42; 14 Pac. 768.

150. Where counsel for the state, addressing the jury, said that the accused had threatened to assault him, but, upon objection, immediately withdrew the statement, "and was willing to admit that" it "was not a part of the evidence, and was not true," defendant was not prejudiced.—State v. Gibbs, 10 Mont. 213; 25 Pac. 289.

151. The prosecuting attorney should not be allowed to state to the jury that, if any wrong is done defendant in his being convicted, he has his redress by appeal to the supreme court. —State v. Biggerstaff, 17 Mont. 510; 43 Pac. 709.

152. Accused did not introduce witnesses to show his good character, as he had declared in his opening statement to the jury that he would do. After defendant had rested the county attorney asked why such witnesses were not introduced, and an exception to the remark was sustained, and the jury admonished to disregard it. During his closing argument the county attorney said that accused did not care introduce the witnesses, because he (the county attorney) had witnesses ready to contradict them, and the court overruled an objection thereto, and the county attorney continued to discuss the matter, when the defendant again objected, and the court then admonished the jury to disregard the remarks. Next morning the jury were instructed "to absolutely disregard" said remarks. *Held*, that defendant was not prejudiced.—State v. Bloor, 20 Mont. 574; 52 Pac. 611.

153. A defendant accused of secreting a legislative bill reducing the salaries of county officers, before it had reached its final passage, is not so prejudiced as to warrant a reversal by the remarks of the county attorney, made in his opening statement and during his closing argument, that defendant prevented the passage of the bill, which would have caused a great saving to taxpayers if it had passed, where the court admonished the jury to disregard the remarks.—Id

154. The prosecution's reference in argument on a trial for larceny to accused's stealing other property is not reversible error where the court cautioned the jury to be governed by the evidence, and admonished counsel to keep within the record, and accused reserved no exceptions, nor requested any instruction that the jury disregard the remarks.—State v. Stevenson, 26 Mont. 332; 67 Pac. 1001.

155. In a capital case it is error for the court to limit the time which counsel for defendant may employ in his argument to the jury.—State v. Tighe, 27 Mont. 327; 71 Pac. 3.

F. PROVINCE OF COURT AND JURY IN GENERAL, 156-170.

1. Questions of Law or Fact, 156-161.
2. Direction of Verdict, 162.
3. Instructions Invading Province of Jury, 163-170.

1. Questions of law or fact, 156-161.

156. When a witness shows that he has some knowledge of a man's character, for truth and veracity, in the neighborhood where he lives, the rule should be, that the jury must judge as to the weight to be given to his testimony.—Territory v. Paul, 2 Mont. 314.

157. In a prosecution for false pretenses, an instruction that the fact that defendant testified in an insolvency proceeding did not deprive him of his right to refuse to answer questions tending to incriminate him, and an admission made by him in such proceeding was voluntary and competent evidence in a criminal prosecution, where he was not in custody or charged with a criminal offense when he made such admissions, was not objectionable as a charge on the weight of evidence.—State v. Burrell, 27 Mont. 282; 70 Pac. 982.

158. The right of counsel to appear in a case is a question of law for the court.—State v. De Wolfe, 29 Mont. 415; 74 Pac. 1084.

159. The question whether defendant was affected with insanity to such a degree as would excuse him from the commission of an act otherwise criminal is one of fact for the jury.—State v. Keerl, 29 Mont. 508; 75 Pac. 362.

160. On a prosecution for robbery, the question whether defendant was, by reason of insanity, incapable of having the criminal intent necessary to the commission of the crime, was a question of fact for the jury.—State v. Howard, 30 Mont. 518; 77 Pac. 50.

161. The jurors are the judges of the credibility of witnesses and of the weight to be given the testimony.—State v. Jones, 32 Mont. 442; 80 Pac. 1095.

2. Direction of verdict, 162.

162. Where there is a total failure of evidence to convict defendant, it is the duty of the court to direct a verdict of not guilty.—State v. Welch, 22 Mont. 92; 55 Pac. 927.

3. Instructions invading province of jury, 163-170.

163. The jury being the sole judge of the weight of the evidence, it was error to charge that defendant's voluntary admissions, proved by competent testimony, were entitled to great weight.—State v. Gleim, 17 Mont. 17; 41 Pac. 998.

164. It is error to refuse to instruct that the fact that accused "is the defendant is not of itself sufficient to impeach or discredit his testimony or evidence," but in weighing his evidence the jury may consider the fact that he is the defendant.—State v. Metcalfe, 17 Mont. 417; 43 Pac. 182.

165. Where, in a prosecution for homicide,

decedent's identity was in issue, it was error to refuse defendant's request to charge that a witness having but a casual acquaintance with a party is entitled to comparatively little weight after a comparatively short lapse of time, since the request amounted to a charge on the weight of evidence.—State v. Pepo, 23 Mont. 473; 59 Pac. 721.

166. An instruction giving special directions as to how the evidence of defendant's witnesses should be weighed was properly refused, as invading the province of the jury.—State v. Schnepel, 23 Mont. 523; 59 Pac. 927.

167. Where instructions requested by defendant contain comments on the weight of the testimony, and directions and advice as to inferences of fact to be drawn from the evidence, such instructions are properly refused.—State v. Mahoney, 24 Mont. 281; 61 Pac. 647.

168. The refusal of the court in a criminal case to charge that each juror should act upon his own judgment, and should not surrender his own conviction, unless convinced, and that while he should discuss the evidence, and be open to conviction by argument, he should not surrender his conviction merely because the majority were against him, was not error.—State v. Howell, 26 Mont. 3; 66 Pac. 291.

169. In a prosecution for homicide, a charge stating that certain testimony is corroborative of other testimony is a comment on the weight of the evidence, and invades the province of the jury.—State v. Keerl, 29 Mont. 508; 75 Pac. 362.

170. In a prosecution for rape, to instruct that evidence of previous good character is conclusive in favor of defendant, and that it raises a presumption in his favor, is for the court to invade the province of the jury, and determine the weight or effect to be given to particular evidence.—State v. Jones, 32 Mont. 442; 80 Pac. 1095.

G. NECESSITY, REQUISITES, AND SUFFICIENCY OF INSTRUCTIONS, 171-212.

1. DUTY OF JUDGE IN GENERAL, 171.
2. PRINCIPALS AND ACCESSORIES, 172-174.
3. INSANITY, 175-178.
4. ALIBI, 179.
5. CHARACTER, 180.
6. PRESUMPTIONS AND BURDEN OF PROOF, 181-183.
7. TESTIMONY OF ACCOMPLICES, 184.
8. RULES OF EVIDENCE, AND DETERMINATION OF ITS SUFFICIENCY, IN GENERAL, 185-186.
9. CIRCUMSTANTIAL EVIDENCE, 187-189.
10. CREDIBILITY OF WITNESSES, 190.
11. CREDIBILITY OF TESTIMONY OR STATEMENT OF ACCUSED, 191-192.
12. REASONABLE DOUBT AND DEGREE OF PROOF, 193-198.
13. FORMAL REQUISITES OF INSTRUCTIONS, 199-202.
14. CONFUSED, MISLEADING, OR CONTRADICTORY INSTRUCTIONS, 203-204.
15. UNDUE PROMINENCE OF PARTICULAR MATTERS, 205-206.
16. APPLICATION TO ISSUES OR EVIDENCE, 207-208.
17. DEFECTS, OBJECTIONS, AND CORRECTION, 209-212.

1. Duty of judge in general, 171.

171. The instructions to the jury must be applicable to the case; they must contain no abstract propositions of law outside of and wholly disconnected with the proof. A party can not suggest an imaginary state of facts and then demand of the court an instruction as to the law arising upon such imaginings, but the law as given by the court must naturally arise from, and be called forth by, the facts as they exist in the evidence.—Territory v. McAndrews, 3 Mont. 158.

2. Principals and accessories, 172-174.

172. Though the distinctions between accessories before the fact and principals are abolished, an indictment first setting out the guilt of the principal offender, and then charging that, "before the commission of said felony, defendant did * * * counsel, aid, incite and procure" said principal to commit the felony, is unobjectionable.—State v. Gleim, 17 Mont. 17; 41 Pac. 998.

173. An instruction should follow the language of the statute, and state that accessories are those who "advise and encourage," instead of "advise or encourage," the commission of crime.—State v. Geddes, 22 Mont. 68; 55 Pac. 919.

174. It is improper to charge, in a prosecution for grand larceny, as to accessories after the fact, in the language of Pen. Code, § 1854, in the absence of evidence on which to base such charge.—State v. DeWolfe, 29 Mont. 415; 74 Pac. 1084.

3. Insanity, 175-178.

175. In a prosecution for homicide, a charge "that if defendant knew, when committing the act, that it was wrong, and he was eminently capable of choosing to do or not to do the act, and to govern his conduct accordingly, that he was guilty, even though he was not perfectly sane at the time of the act; and that, if his mental powers were so deficient that he had no will, consciousness, or controlling mental power, or if, from violence or mental disease, his intellectual power was at the time obliterated, then he was not criminally responsible, the question being whether, at the time of the act, he had mental capacity to entertain a criminal intent, and whether he did in fact entertain it," is not erroneous in failing to charge as to irresistible impulse, where the only evidence of such impulse was defendant's statement that a few months before the homicide he was attacked by a dizzy spell, and had no recollection of what occurred thereafter until the next day; since from his statement his act must have been the result of unconsciousness or delirium, while irresistible impulse implies knowledge of right and wrong in some degree.—State v. Peel, 23 Mont. 358; 59 Pac. 169.

176. In a prosecution for homicide, a charge stating that lunatics and insane persons are incapable of committing crimes, and if defendant was an insane person he should be acquitted, should have been qualified by adding, after the words "insane person," a definition of the term "insanity," as used in criminal law.—State v. Keerl, 29 Mont. 508; 75 Pac. 362.

177. On the issue of insanity in homicide, the court should instruct in the language of the statute (Pen. Code, § 20, 21), providing that in every crime there must be a union of act and intent, and intent is manifested by the circumstances and sound mind of accused, and define insanity as any weakness or defect of the mind rendering it incapable of entertaining in the particular instance the criminal intent, supplementing the definition by the comment that criminal responsibility is to be determined solely by defendant's capacity to conceive and entertain the intent to commit the particular crime, or similar language, and should not give further

instructions, but should leave the fact to be determined by the jury.—Id.

178. Pen. Code, § 2521, provides that when an action is called for trial, or at any time during the trial, or when defendant is brought up for judgment, if a doubt arises as to the sanity of defendant, the court must order the question as to his sanity to be submitted to a jury. *Held*, that the doubt mentioned in the statute is one arising in the mind of the judge, and one which he must determine.—State v. Howard, 30 Mont. 518; 77 Pac. 50.

4. Alibi, 179.

179. An instruction that an alibi is a proper defense if proven, and if, in view of all the evidence, the jury have a reasonable doubt as to the presence of accused at the time and place of the commission of the crime, is not erroneous, as requiring defendant to establish his alibi, it merely requiring him to furnish proof tending to establish it.—State v. Spotted Hawk, 22 Mont. 33; 55 Pac. 1026.

5. Character, 180.

180. The court charged that in doubtful cases like that on trial, where the testimony was conflicting, evidence of previous good character was conclusive in favor of accused; that if the jury were in doubt as to defendant's guilt, or his intent, and were satisfied that he was a man of good character up to the time of the alleged offense, the presumption was in favor of his innocence, and they should acquit. *Held*, that, though the instruction be erroneous, as the evidence was all in favor of defendant's good character, he was not prejudiced.—Territory v. Burgess, 8 Mont. 57; 19 Pac. 558.

6. Presumptions and burden of proof, 181-183.

181. The court properly instructed the jury that the law raises no presumption against the prisoner, and every presumption is in favor of his innocence; and, in order to convict, every material fact necessary to constitute the crime must be proved beyond a reasonable doubt, and that, if they entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, it was their duty to acquit. —Territory v. Burgess, 8 Mont. 57; 19 Pac. 558.

182. In a prosecution for larceny by a bailee, an instruction that the burden of proof was on defendant, to show that he had no guilty intent, was error.—State v. Judd, 20 Mont. 420; 51 Pac. 1033.

183. The presumption of innocence has the weight and effect of evidence in the defendant's behalf—introduced by the law in his behalf—and the mere definition of a reasonable doubt does not supply the lack of an instruction upon the presumption of innocence.—State v. Harrison, 23 Mont. 79; 57 Pac. 647.

7. Testimony of accomplices, 184.

184. An instruction that a certain witness was an accomplice, and, on the testimony of an accomplice or one jointly charged with accused, there can not be a conviction, unless the jury are satisfied of its truth, and can rely on it, is erroneous, as assuming that one jointly charged with accused is an accomplice.—State v. Spotted Hawk, 22 Mont. 33; 55 Pac. 1026.

8. Rules of evidence, and determination of its sufficiency in general, 185-186.

185. The refusal to instruct that the policy of the law deems it better that many guilty persons should escape, rather than that one innocent person should be convicted and punished, is not error.—Territory v. Burgess, 8 Mont. 57; 19 Pac. 558.

186. An instruction defining the term, "preponderance of the evidence," has no place in a criminal trial.—State v. Felker, 27 Mont. 451; 71 Pac. 668.

9. Circumstantial evidence, 187-189.

187. An instruction that "each fact necessary to the conclusion must be distinctly and independently proved by competent evidence beyond a reasonable doubt; all facts must be consistent with each other, and with the main fact sought to be proved, and the circumstances taken together must be of a conclusive nature, and leading, on the whole, to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused and no other person committed the offense charged; and when a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other conclusion." is sufficient and proper.—Territory v. McAndrews, 3 Mont. 158.

188. On a trial for murder, the refusal to charge specifically as to the burden of proof resting on the state to establish beyond reasonable doubt the existence of each link in the chain of circumstantial evidence was not error, where there was direct evidence of the main fact, and the indirect evidence was merely in corroboration.—State v. Calder, 23 Mont. 504; 59 Pac. 903.

189. An instruction requested by defendant, that, to warrant a verdict on a criminal charge on circumstantial evidence alone, the circumstances must be such as to produce "nearly" the same degree of certainty as that which arises from direct testimony, and sufficient to exclude all reasonable doubt of guilt, is bad, in being qualified by the word "nearly," and is properly refused.—State v. Dotson, 26 Mont. 305; 67 Pac. 938.

10. Credibility of witnesses, 190.

190. Under Code Civ. Proc., § 3390, a charge in a prosecution for grand larceny which tells the jury that they have the right to disregard any or all of the testimony of a witness who has wilfully and intentionally testified falsely as to any material matter in the case is erroneous.—State v. De Wolfe, 29 Mont. 415; 74 Pac. 1084.

11. Credibility of testimony or statement of accused, 191-192.

191. Failure to charge that the jury had no right to disregard defendant's testimony merely because he was charged with a crime was not error where the court charged that the defendant had the right to testify, and the jury were the sole judges of his credibility and the weight to be given his testimony.—State v. McClellan, 23 Mont. 532; 59 Pac. 924.

192. An instruction that defendant may testify in his own behalf, but the jury, in judging the credibility and weight of his testimony, "must" take into consideration the fact that he is defendant, and the enormity of the crime, is not erroneous, in using the word "must" instead of "may," even though Pen. Code, § 2442, before its change in phraseology in 1895, declared that the jury "shall" take into consideration the fact that the witness is a defendant, and the enormity of the offense.—State v. Dotson, 26 Mont. 305; 67 Pac. 938.

12. Reasonable doubt and degree of proof, 193-198.

193. A reasonable doubt is such a one that, before a juror should find defendant guilty of crime, he ought to be so convinced of his guilt by the evidence as that he would be willing to act upon such conviction in matters of the highest interest and greatest concern to himself. So long as moral certainty is not reached a

reasonable doubt may be said to remain in the mind. This degree of moral certainty is required in criminal cases, and instructions admitting a lower degree of doubt, or that are contradictory and irreconcilable, furnish good ground for reversal.—Territory v. Owings, 3 Mont. 137.

194. An instruction defining moral certainty should state that the juror must be so convinced by the evidence of the truth of the fact that he himself would venture to act upon such conviction in matters of the highest concern and importance to his own interests.—State v. Gleim, 17 Mont. 17; 41 Pac. 998.

195. A charge that the law did not require the jury to be satisfied beyond a reasonable doubt of each link of the chain of circumstances relied upon to establish defendant's guilt; that it was sufficient if, taking all of the testimony together, the jury was satisfied beyond a reasonable doubt of defendant's guilt,—was erroneous. —Id.

196. Defendant was not prejudiced by a charge that a reasonable doubt, to authorize an acquittal, must be a substantial doubt, and not a mere possibility of innocence; that a reasonable doubt exists when the jury do not feel an abiding conviction, to a moral certainty, of the truth of the charge; where the evidence does not satisfy the judgment with such certainty that a prudent man would feel safe in acting upon it in his own most important affairs, or unless the evidence convinces the understanding, so that there is an abiding conviction, to a moral certainty, of the truth of the charge; that the evidence need not exclude every possible hypothesis but the guilt of defendant.—State v. Clancy, 20 Mont. 498; 52 Pac. 267.

197. It is error to refuse to charge that accused is presumed innocent until proven guilty beyond a reasonable doubt, though the court gave an instruction defining reasonable doubt. —State v. Harrison, 23 Mont. 79; 57 Pac. 647.

198. A reasonable doubt is a substantial doubt, based on reason and induced by the facts and circumstances attending the particular case, growing out of the testimony, and leaving one's mind, after a careful examination of all the evidence, in such a condition that he can not say that he has an abiding conviction to a moral certainty, of accused's guilt.—State v Harrison, 23 Mont. 79; 57 Pac. 647.

13. Formal requisites of instructions, 199-202.

199. On a trial for murder it is not reversible error that the court divided its instructions into two sections, and read them separately, unless they were conflicting, though the better practice is to read all the instructions on one branch of the case consecutively.—State v. Shadwell, 22 Mont. 559; 57 Pac. 281.

200. The provisions of Pen. Code, § 2070, requiring written instructions, and forbidding oral instructions unless by agreement of both the state and the accused, are mandatory, and the violation thereof is reversible error.—State v. Fisher, 23 Mont. 540; 59 Pac. 919.

201. A charge is oral if not in writing; although it be taken down by the official stenographer, as required by Code Civ. Proc. § 371.—Id.

202. The practice of the court in submitting to the jury written instructions, with the signature of the several counsel attached to them, is not to be commended.—State v. McDonald, 27 Mont. 230; 70 Pac. 724.

14. Confused, misleading, or contradictory instructions, 203-204.

203. Where instructions on a material point in a criminal case are inconsistent, some correct and others incorrect, a conviction will be reversed.—State v. Peel, 23 Mont. 358; 59 Pac. 169.

204. In a prosecution for homicide, instructions on the issue of insanity, based solely on the "right and wrong" test, are in irreconcilable conflict with others based on that test as modified by the "irresistible impulse" test, and vitiate the conviction.—State v. Keerl, 29 Mont. 508; 75 Pac. 362.

15. Undue prominence of particular matters, 205-206.

205. There is no error in refusing an instruction in a criminal case which singles out one witness and directs the jury to consider his condition in particular at the time of the transaction concerning which he testified.—State v. McClellan, 23 Mont. 532; 59 Pac. 924.

206. In a prosecution for rape, an instruction calling attention to the testimony of one witness, singling her out from the other witnesses, is erroneous.—State v. Jones, 32 Mont. 442; 80 Pac. 1095.

16. Application to issues or evidence, 207-208.

207. The court is not bound to charge upon murder in the second degree, or upon a lower grade of homicide, when there is no evidence, direct or circumstantial, to which the instruction could apply.—State v. Calder, 23 Mont. 504; 59 Pac. 903.

208. Where the evidence before the jury was such as would have warranted defendant's conviction of any degree of felonious homicide, an instruction to find him guilty of manslaughter or to acquit was properly refused.—State v. Tighe, 27 Mont. 327; 71 Pac. 3.

17. Defects, objections, and correction, 209-212.

209. A charge that "by 'reasonable doubt' is meant 'actual, substantial doubt.' It is that state of the case which, after a comparison and consideration of the evidence, leaves the minds of the jurors in that condition that they can not feel an abiding conviction of the defendant's guilt, and are fully satisfied of the truth of the charge. It is such a doubt as would cause a reasonable, prudent and considerate man, in the graver and more important affairs of life, to pause and hesitate before acting upon the truth of the matter charged," is not prejudicial, when connected with an instruction that the jury must acquit if they entertain "any reasonable doubt upon any single fact or element necessary to constitute the crime."—State v. Gibbs, 10 Mont. 213; 25 Pac. 289.

210. An erroneous instruction, charging that the defense of an alibi must be proved beyond a reasonable doubt, is not cured by a subsequent charge correctly stating the law.—State v. McClellan, 23 Mont. 532; 59 Pac. 924.

211. In a prosecution for grand larceny, an instruction that "in this case there is no allegation in the information that the property was in excess of $50; therefore it must have been taken from the person of the said G. or else defendant must be found not guilty. —though not perspicuous, correctly stated the law, when considered with other instructions defining grand larceny. —State v. Whorton, 25 Mont. 11; 63 Pac. 627.

212. Where the court gave a proper definition of "reasonable doubt," an instruction that the defendant is to be presumed innocent until the contrary is proved, and in case of reasonable doubt, whether his guilt is satisfactorily shown, he is entitled to an acquittal, was not erroneous for failure to insert the phrase "beyond a reasonable doubt," following the word "proved."—State v. Martin, 29 Mont. 273; 74 Pac. 715.

H. REQUESTS FOR INSTRUCTIONS, 213-217.

213. The refusal to give an instruction is not error, where the substance of it has been given in the general charge.
State v. Bowser, 21 Mont. 133; 53 Pac. 179.
State v. Mahoney, 24 Mont. 281; 61 Pac. 647.
State v. Dotson, 26 Mont. 305; 67 Pac. 938.
State v. Martin, 29 Mont. 273; 74 Pac. 715.

214. Requested instructions which are already substantially given and covered by the general charge, or special instructions, are properly refused.—United States v. Upham, 2 Mont. 170.

215. Where the jury in a criminal case had been fully instructed, it was not error for the court to refuse to instruct that if, after the consideration of the whole case, any juror entertained a reasonable doubt as to defendant's guilt, it was his duty not to vote, nor be influenced by the majority to vote, for a conviction.—State v. Hurst, 23 Mont. 484; 59 Pac. 911.

216. Refusal to submit special instructions, correctly stating the law, is not erroneous, where the charge given clearly and correctly states the phase of the law embodied in the special request.—State v. Howell, 26 Mont. 3; 66 Pac. 291.

217. Where, in a prosecution for homicide, the court correctly defined the term "reasonable doubt," it was not error to refuse an instruction containing a definition of moral certainty, the two terms being equivalent.—State v. Martin, 29 Mont. 273; 74 Pac. 715.

I. EXCEPTIONS TO INSTRUCTIONS, 218-219.

218. Exceptions to instructions must be filed with the clerk before the case is submitted to the jury. (Changed by Laws Ex. Sess., 1887, p. 67.)—Territory v. O'Brien, 7 Mont. 38; 14 Pac. 631.

219. Exceptions to instructions must be reduced to writing and filed with the clerk. (Changed by Laws Ex. Sess., 1887, p. 67.)—Id.

J. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY, 220-229.

1. SEPARATION OF JURY, 220-222.
2. MISCONDUCT OF JURORS OR OTHERS, 223-224.
3. DELIBERATIONS, AND MANNER OF ARRIVING AT VERDICT, 225-226.
4. ASSISTING OR COERCING DETERMINATION, 227-229.

1. Separation of jury, 220-222.

220. The separation of a jury in a criminal case, after having agreed upon a verdict, is not such misconduct as will set aside a verdict. To have this effect the court must be satisfied that the misconduct was such that it had or might have had an unfavorable effect upon the verdict.—Territory v. Hexter, 3 Mont. 206.

221. Under Comp. Stat., p. 468, § 354, providing for a new trial in criminal cases when the jury has been separated without leave of court, it is not sufficient cause for new trial that, before retiring to consider their verdict, the jury were permitted to go in charge of an officer to a hotel for supper, and while there went into the wash room, and two of their number returned a short time before the others to the hotel office, a few feet distant, the entire jury being at all times in the charge of the officer, and no conversation being had with any others in regard to the case.—Territory v. Hart, 7 Mont. 489; 17 Pac. 718.

222. It is not sufficient cause for granting a new trial that one juror, who was suffering from diarrhea, was suddenly called to the privy, while the bailiff was absent, so that he could not notify him, the juror having returned as soon as possible to the jury room, and there being no pretense that he saw or spoke to anyone.—Territory v. Clayton, 8 Mont. 1; 19 Pac. 293.

2. Misconduct of jurors or others, 223-224.

223. The word "papers" in Comp. Stats., p. 468, § 354, providing that "a new trial shall be granted * * * when the jury has received any evidence, papers, or documents not authorized by the court," does not refer to newspapers. The intent of the statute is to prohibit documentary evidence going to the jury without the inspection and sanction of the court.—State v. Jackson, 9 Mont. 508; 24 Pac. 213.

224. Where the affidavit of a member of the jury convicting accused of murder stated that the bailiff remained in the same room with the jury an entire night, within hearing of their discussions, and conversed with some of the jurors; and the bailiff's counter-affidavit stated that he entered the jury room about 1 a. m. to take the jury lunch and bedding, and thereafter slept just inside the door, at which time all but four of the jury had retired, and that he did not speak to any of the jurors about accused, and the case was not discussed in his hearing; and affidavits of other jurors showed that the bailiff did not mix with the jury, and took no part in the discussion of the case,—such affidavits showed no prejudicial misconduct towards defendant.—State v. Pepo, 23 Mont. 473; 59 Pac. 721.

3. Deliberations, and manner of arriving at verdict, 225-226.

225. In criminal cases there is no statute to permit the jury to take with them an account book belonging to the accused, and, in the absence of any statute forbidding it, it is within the discretion of the trial judge.—Territory v. Doyle, 7 Mont. 245; 14 Pac. 671.

226. Where jurors in a capital case agreed upon a verdict of guilty on the third ballot, to which all agreed when polled, it will not be set aside because one of them stated in the jury room, before the informal ballot was taken, that he was "willing a majority should rule."—State v. Brooks, 23 Mont. 146; 57 Pac. 1038.

4. Assisting or coercing determination, 227-229.

227. Where defendant's affidavit for a continuance stated that certain witnesses, if present, would testify as to his good character, and the state admitted the fact that they would so testify, it was a reversible error, when the jury returned for further instructions as to their right to consider his past life, to instruct them to the effect that they could consider nothing outside of the testimony given on the witness stand, but that his failure to produce the depositions of his witnesses should not prejudice the jury against him, although the charge on the subject when the case was submitted was correct.—State v. Fisher, 23 Mont. 540; 59 Pac. 919.

228. On a trial for murder it is improper for the court to direct the attention of the jury to the expense incident to a new trial as the reason why they should reach a verdict.—Id.

229. On a trial for murder, where the jury informed the court that there was no prospect of an agreement, it was reversible error for the judge to remark: "Feeling as I do about the matter, I do not see any reason why a jury should disagree, * * * although I do not care to force any man, against his conscience, to agree to a verdict which he does not believe in. * * * Feeling as I do about the case * * * I do not feel that I should discharge you."—since the remark was calculated to impress the jury that the verdict should be one of guilty.—Id.

K. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS, 230-232.

230. On a murder trial defendant refused to answer a proper question on cross examination, and the court fined him, and threatened to continue to do so until he answered. The court also admonished him that he might prejudice himself before the jury, and advised him to consult his counsel. After consulting them he answered the question. The court then admonished the jury not to be prejudiced by what had occurred, and to determine defendant's guilt or innocence solely from the evidence. *Held*, that defendant was not prejudiced or injured by such course.—State v. Osnes, 14 Mont. 553; 37 Pac. 13.

231. Where, on a prosecution for murder, accused's counsel consents to the jury's taking certain blood-stained garments worn by deceased at the time of the killing, and admitted in evidence, into the jury room, such consent is a waiver of any objection thereto.—State v. Allen, 23 Mont. 118; 57 Pac. 725.

232. Since Pen. Code, § 2070, requires the court to charge the jury in writing, and forbids oral instructions unless by agreement of both the state and the accused, mere silence of the accused or his counsel is not equivalent to a consent to the giving of oral instructions.—State v. Fisher, 23 Mont. 540; 59 Pac. 919.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST, 233-282.

A. Nature of Remedy of New Trial, 233.
B. Grounds for New Trial, 234-253.
C. Application for New Trial, 254-275.
D. Hearing and Determination of Motion for New Trial, 276.
E. Nature of Remedy by, and Grounds for, Arrest of Judgment, 277-280.
F. Motions in Arrest, 281-282.

A. NATURE OF REMEDY OF NEW TRIAL, 233.

233. An application for new trial is addressed to the sound legal discretion of the trial court.—State v. Jones, 32 Mont. 442; 80 Pac. 1095.

B. GROUNDS FOR NEW TRIAL, 234-253.

1. Defects in Information, 234.
2. Errors and Irregularities in Conduct of Trial in General, 235.
3. Instructions, and Failure to Instruct, 236.
4. Summoning, Impanelling, and Oath of Jury, 237-239.
5. Disqualification of Jurors, 240-241.
6. Misconduct of or Affecting Jurors, 242-247.
7. Verdict Contrary to Evidence, 248.
8. Newly Discovered Evidence, 249-253.

1. Defects in information, 234.

234. Under Pen. Code, § 1910, providing that an information may be set aside when not properly subscribed by the county attorney, and § 1911, providing that, unless a motion to set aside be made before demurrer or plea, this ground of objection is waived, if the motion to set aside the information was made in the trial court, and improperly refused, the error can be reviewed only on appeal from the judgment, it not being one of the grounds for new trial enumerated under Pen. Code, § 2192.—State v. Schnepel, 23 Mont. 523; 59 Pac. 927.

2. Errors and irregularities in conduct of trial in general, 235.

235. A witness was asked if defendant had made to him any statement or confession. Objection was made, and during the pendency of the discussion witness answered that he had, but what the statement was, or what the confession was, if any, never went to the jury, and the answer given was entirely withdrawn from the consideration of the jury. *Held*, that the defendant could not have been prejudiced by such answer.—United States v. Upham, 2 Mont. 170.

3. Instructions, and failure to instruct, 236.

236. Where the trial court substantially covers all the instructions applicable to the facts asked for by defendants, a new trial will not be granted.—United States v. Upham, 2 Mont. 170.

4. Summoning, impanelling, and oath of jury, 237-239.

237. Where the challenge of the territory to a juror is improperly sustained, but it appears that "a jury of good and lawful men was sworn to try the case," there is no ground for new trial, as defendant's right to challenge is the right to reject, not to select, a jury.—Territory v. Roberts, 9 Mont. 12; 22 Pac. 132.

238. Under Pen. Code, §§ 2192, 2048, the disqualification of a juror in a criminal case on the ground that when sworn as a juror he was prejudiced against defendant; which fact he had concealed on his examination on his voir dire, was ground for new trial.—State v. Mott, 29 Mont. 292; 74 Pac. 728.

239. On a criminal prosecution a juror stated that he had heard of the case through the newspapers, and, on being asked if he had heard it discussed, answered, "only hearsay," and stated that he had no prejudice against defendant, and knew of no reason why he could not sit as a juror. Defendant's counsel made no attempt to impeach the competency of the juror at that time, but on a motion for new trial on the ground that he had been prejudiced against defendant and concealed such fact, affidavits were introduced in which affiants stated that the juror had said before trial that defendant ought to be hung. Each affidavit referred to a different conversation, and in none of the conversations was the juror speaking to affiant, and the names of the parties to whom the juror was speaking were not given. *Held*, that the motion was properly denied.—State v. Mott, 29 Mont. 292; 74 Pac. 728.

5. Disqualification of jurors, 240-241.

240. Where it appears that a juror had, before trial, evinced a bias and prejudice generally, in relation to a particular class of prosecutions, which included the case on which he served, it affords sufficient ground for new trial.—United States v. Upham, 2 Mont. 170.

241. A juror's expression of opinion after verdict and discharge of jury is not evidence of

his prejudice in the case.—State v. Anderson, 14 Mont. 541; 37 Pac. 1.

6. Misconduct of or affecting jurors, 242-247.

242. It is not sufficient misconduct to require a new trial that on two occasions, while the jury, in charge of the bailiff, were at a hotel to get their meals, some of them drank intoxicating liquor at their own expense, without being in the least intoxicated thereby.—Territory v. Hart, 7 Mont. 489; 17 Pac. 718.

243. The drinking of liquor by jurors, in a murder case, after having retired to consider their verdict, is not of itself ground for new trial, where it appears that the quantity drunk was small and that no intoxication or any mental or other unfitness resulted therefrom.—Territory v. Burgess, 8 Mont. 57; 19 Pac. 558.

244. A new trial for misconduct of the jury in discussing in the jury room another offense of which defendant was reported guilty was properly denied, where afterwards jurors showed that the other offense was not referred to in the jury room until after the verdict was rendered.—State v. Gay, 18 Mont. 51; 44 Pac. 411.

245. A new trial for misconduct of the jury in separating during recess and going among the spectators in the court room is properly denied where affidavits of the bailiffs show that no one conversed with the jurors during recess.—Id.

246. Allowing the jury on a trial for theft of a colt, under an order of inspection of a mare belonging to defendant, and claimed by him to be the dam of the colt, to inspect the two and a mare belonging to the prosecuting witness, and claimed by him to be the dam of the colt, and to observe the actions of the colt towards the two mares, is ground for new trial.—State v. Landry, 29 Mont. 218; 74 Pac. 418.

247. It is no ground for new trial that, on an inspection by the jury on a trial for theft of a colt, bystanders indicated, by their action and laugh, their belief that the colt did not belong to defendant, but to the prosecuting witness.—Id.

7. Verdict contrary to evidence, 248.

248. In a criminal case a new trial will be granted if the testimony preponderates against the verdict of conviction.—Territory v. Reuss, 5 Mont. 605; 5 Pac. 885.

8. Newly discovered evidence, 249-253.

249. New evidence which only tends to impeach defendant's own witness, is no ground for new trial.—State v. Anderson, 14 Mont. 541; 37 Pac. 1.

250. A new trial for newly discovered evidence was properly denied, where the uncontradicted affidavit of the prosecuting attorney showed that, with diligence, all the evidence could have been obtained before trial.—State v. Gay, 18 Mont. 51; 44 Pac. 411.

251. A new trial will not be granted for newly discovered evidence which is merely cumulative.—State v. Brooks, 29 Mont. 146; 57 Pac. 1088.

252. Where in a prosecution for murder, the insanity of defendant was placed in issue, in support of which defendant called witnesses who testified, and the facts to be proved by newly discovered evidence were merely cumulative on that issue, and were not such as to make it reasonably probable that a different result would have been reached on a new trial, nor was it clearly shown that they could not have been produced on the former trial by the exercise of reasonable diligence, a new trial was properly refused.—State v. Hamlet, 28 Mont. 18; 72 Pac. 39.

253. In a prosecution for rape, newly discovered evidence examined, and *held* insufficient to warrant a new trial.—State v. Jones, 32 Mont. 442; 80 Pac. 1095.

C. APPLICATION FOR NEW TRIAL, AND ITS EFFECT, 254-275.

1. Form and Requisites, 254-255.
2. Notice, 256-263.
3. Statement of Grounds, 264-265.
4. Statement of Case, 266.
5. Affidavits and Other Proofs in General, 267-271.
6. Affidavits of Jurors, 272.
7. Affidavits as to Newly Discovered Evidence, 273-274.
8. Effect of Application for New Trial, 275.

1. Form and requisites, 254-255.

254. Irregularities appearing on the face of a notice of motion for new trial are not waived by a motion to strike out for other reasons.—State v. Whaley, 16 Mont. 574; 41 Pac. 852.

255. Defects in a motion for new trial are not waived by a special appearance to move for a dismissal of the motion for such defects.—State v. Pilgrim, 17 Mont. 311; 42 Pac. 856.

2. Notice, 256-263.

256. Where it appears that the notice of motion for new trial was filed, and that counsel on both sides appeared and argued the motion, that is equivalent to waiver of service of the notice.—Territory v. Rehberg, 6 Mont. 467; 13 Pac. 132.

257. Under Comp. Stat., p. 468, § 356, providing that application for a new trial, if made for any cause mentioned in the first 4 subdivisions of § 354, shall be based on affidavits filed at the same time as the notice of motion, and that in all other cases the notice must state particularly the error relied on, a notice of motion entered on the motion book, and service of which is admitted by the county attorney, stating that as soon as a transcript of the evidence is made defendant will move for new trial on grounds to be set forth in the motion, is sufficient.—State v. Fry, 10 Mont. 407; 25 Pac. 1055.

258. Where the record does not contain a full copy of the notice of motion for new trial, a statement in the bill of exceptions that notice was given may be construed that it was given as provided by law; and a further statement therein that the notice was on the same grounds as set forth in the motion, which motion was in writing and is contained in full in the record, and sets forth the error relied on, may, since the bill of exceptions imports verity, be construed as that the notice particularly stated, as provided in Comp. Stat., p. 468, § 356, the error relied on, and that it was filed within the proper time.—State v. Ryan, 12 Mont. 297; 30 Pac. 78.

259. Comp. Stat., p. 468, §§ 355, 356, provide that the notice of motion for new trial, on account of a misdirection of the jury, must state particularly the error on which the movant relies. Laws 1887, p. 77, provides that the charge and instructions are deemed excepted to, and no exception need be taken thereto nor bill of exceptions filed. *Held*, that an order denying a motion for new trial for misdirection of the jury will not be reviewed, unless the misdirection claimed is stated in the notice of motion.—State v. Black, 15 Mont. 143; 38 Pac. 674.

260. Comp. Stat., p. 468, § 356, provides that a notice of motion for new trial must state

particularly the error on which the party making the application relies. *Held*, that a notice of intention to move for new trial, not specifying the alleged errors, was not cured by the contemporaneous service and filing of motion for new trial.—State v. Whaley, 16 Mont. 574; 41 Pac. 852.

261. A stipulation that the bill of exceptions and papers used on motion for new trial should be allowed as a bill of exceptions on appeal, will not have the effect of curing a defective notice of motion for new trial.—Id.

262. An amended notice of motion for new trial, which attempts to set up a new specification of error not relating to the specification contained in the original notice, is insufficient to supply deficiencies in such original notice.—State v. Mason, 18 Mont. 362; 45 Pac. 557.

263. Under Pen. Code, §§ 2192-2194, the notice of motion for new trial in a criminal case need not state whether the motion will be based on affidavit or on bill of exceptions, but it is enough for it to state the grounds of the motion; the stating therein of the grounds upon which the motion will be made is of itself notice of what will be the basis of the motion.—State v. Landry, 29 Mont. 218; 74 Pac. 418.

3. Statement of grounds, 264-265.

264. A motion for new trial, prior to the adoption of the Penal Code of 1895, which failed to specify the particular errors relied on, was properly dismissed.—State v. Pilgrim, 17 Mont. 311; 42 Pac. 856.

265. A specification of error, on motion for new trial, that the court misdirected the jury by giving certain instructions, designated by number, was insufficient, in that it set forth that all the instructions named were erroneous, and not that each one was erroneous.—State v. Mason, 18 Mont. 362; 45 Pac. 557.

4. Statement of case, 266.

266. A statement on motion for new trial may be settled and passed on by the successor of the judge who tried the case. Comp. Stat., p. 467, § 349, provides that exceptions "must be settled and signed by the judge and filed with the clerk," and Laws 1887, p. 77, provides that a motion for new trial shall be heard by the judge of the court where the same is pending.—Territory v. Bryson, 9 Mont. 32; 22 Pac. 147.

5. Affidavits and other proofs in general, 267-271.

267. An affidavit charging a juror, in a murder case, with having made a statement, before the trial, claimed to be an expression of opinion which disqualified him from serving, will be offset by a full and explicit denial by the juror under oath of having used the language charged, or of having formed or expressed any opinion about the case prior to the trial.—Territory v. Burgess, 8 Mont. 57; 19 Pac. 558.

268. The fact that, three days after the trial, a paper issued during the trial, and containing comments thereon, was found in the jury room, to which others had since had access, does not at all prove that a juryman ever saw it.—State v. Jackson, 9 Mont. 508; 24 Pac. 213.

269. Where a juror, who duly qualified on voir dire, is out of the state, and unattainable for the hearing for the new trial, the court is not shown to have abused its discretion in refusing a new trial on an affidavit which, without detailing circumstances, baldly states that the juror, before trial, made an "unqualified" assertion that defendant "ought to be hung."—State v. Anderson, 14 Mont. 541; 37 Pac. 1.

270. A new trial will not be granted on affidavit of a stranger that a juror told him that he had used improper language in the jury room, as against affidavits of the juror in question, and six other jurors, denying that he had used such language.—Id.

271. Objection to defendant's affidavits for new trial, because the notary's name is not attached to the jurat, is waived by counsel for the state filing counter-affidavits controverting some of the matters alleged in them.—State v. Landry, 29 Mont. 218; 74 Pac. 418.

6. Affidavits of jurors, 272.

272. Affidavits of jurors are competent to rebut affidavits of misconduct on their part urged in support of a new trial.—State v. Gay, 18 Mont. 51; 44 Pac. 411.

7. Affidavits as to newly discovered evidence, 273-274.

273. Defendant having been convicted of murder in the first degree, and sentenced to death, his accomplice, who had turned state's evidence, and had his plea of guilty in the second degree accepted, made an unsworn statement to the judge that he had lied on the trial, and had alone committed the murder. It did not appear how he would testify in another trial, and his statement was inconsistent with any theory based on the facts otherwise proved. *Held*, that there was no ground for new trial.—State v. Anderson, 14 Mont. 541; 37 Pac. 1.

274. A new trial for newly discovered evidence was properly denied, where the uncontradicted affidavit of the prosecuting attorney showed that, with diligence, all the evidence could have been procured before trial.—State v. Gay, 18 Mont. 51; 44 Pac. 411.

8. Effect of application for new trial, 275.

275. Though a bond conditioned for the prisoner's appearance and obedience to the orders of the court be given and approved pending a motion for a stay of execution and for a new trial, such approval does not, by implication, stay the execution, and the prisoner may be lawfully imprisoned pending the motion for new trial.—State v. Reynolds, 14 Mont. 383; 36 Pac. 449.

D. HEARING AND DETERMINATION OF MOTION FOR NEW TRIAL, 276.

276. On the hearing of a motion for new trial, a motion, of which no notice had been given, to strike out an affidavit, on the ground that it was taken by a notary public, out of the county for which he was appointed, is properly denied where the party so moving insists on an immediate hearing.—State v. Jackson, 9 Mont. 508; 24 Pac. 213.

E. NATURE OF REMEDY BY, AND GROUNDS FOR, ARREST OF JUDGMENT, 277-280.

277. Comp. Stat., p. 469, § 357, providing that "a motion in arrest of judgment * * * may be granted * * * for either of the following causes: 1st, that the grand jury * * * had no legal authority to inquire into the offense charged, * * * it not being within the jurisdiction of the court; 2nd, that the facts stated do not constitute a public offense." *Held*, that a motion in arrest of judgment could be granted only on these statutory grounds.—State v. Smith, 12 Mont. 378; 30 Pac. 679.

278. A motion in arrest of judgment will not lie where the facts stated in the indictment constitute a public offense of which the court has no jurisdiction.—Id.

279. Under Comp. Stat., p. 447, § 233, providing that, when change of venue is had in a criminal cause, "all questions concerning the

regularity of proceedings and the right of the court to which the change is made to try the cause and execute judgment, shall be considered as waived after trial and verdict," a motion in arrest of judgment on the ground that the information on which defendant was tried was not filed at the proper time, was properly refused. —Id.

280. Under Pen. Code, § 2200, a motion in arrest of judgment must be founded on some defect in the information mentioned in § 1922. —State v. Tully, 31 Mont. 365; 78 Pac. 760.

F. MOTIONS IN ARREST, 281-282.

281. Under Comp. Stat., p. 497, § 516, providing that on appeal from a justice's court the case shall be tried anew in the district court, it is error for the latter court to arrest the judgment in the cause tried before it on appeal from a justice, on the ground that the justice was without jurisdiction.—State v. Deslauries, 13 Mont. 398; 34 Pac. 490.

282. Extrinsic evidence can not be received at a hearing on a motion in arrest of judgment. —State v. Tully, 31 Mont. 365; 78 Pac. 760.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT, 283-285.

283. Where the record is found to contain no entry of the plea, the court may, after conviction, during the trial term, allow an amendment inserting the plea of not guilty, the fact of the plea being admitted; and the fact that a different judge is presiding at the trial term from the one at the term at which the indictment was found is immaterial.—Territory v. Clayton, 8 Mont. 1; 19 Pac. 293.

284. The amendment may state that the plea was made orally, though such fact does not appear from the affidavits submitted, as it may be assumed, nothing to the contrary appearing.—Id.

285. A judgment in a criminal case which provides for punishment by fine and imprisonment is not void in that it further provides that the fine shall be enforced as a civil judgment.—State v. Marion, 14 Mont. 458; 36 Pac. 1044.

XV. APPEAL AND ERROR, AND CERTORARI, 286-412.

A. FORM OF REMEDY, JURISDICTION, AND RIGHT OF REVIEW, 286-298.
B. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW, 299-316.
C. PROCEEDINGS FOR TRANSFER OF CAUSE, AND EFFECT THEREOF, 317-330.
D. RECORD, AND PROCEEDINGS NOT IN RECORD, 331-359.
E. ASSIGNMENTS OF ERROR, AND BRIEFS, 360-366.
F. DISMISSAL AND REHEARING, 367.
G. REVIEW, 368-403.
H. DETERMINATION AND DISPOSITION OF CAUSE, 404-411.
I. LIABILITIES ON BONDS, 412.

A. FORM OF REMEDY, JURISDICTION, AND RIGHT OF REVIEW, 286-298.

1. NATURE, SCOPE, AND FORM OF REMEDY, 286-287.
2. DECISIONS REVIEWABLE, 288-292.
3. RIGHT OF PROSECUTION TO REVIEW, 293-298.

1. Nature, scope, and form of remedy, 286-287.

286. Defendant is not confined to appeal to obtain relief from a penalty in excess of that allowed by statute, but may use certiorari as auxiliary to habeas corpus.—State v. District Court, 14 Mont. 452; 37 Pac. 9.

287. Under Pen. Code, § 1990, where one indicted for murder, after a judgment convicting him of manslaughter was reversed, pleaded an acquittal of murder in the first and second degrees, and former jeopardy as to such offenses, and the state's attorney asked the court to take judicial notice of the proceedings on the former trial, and pass on the pleas of former acquittal and jeopardy, an order by the court sustaining the validity of such pleas, and ordering defendant to be held for trial for manslaughter, was not within Pen. Code, § 2273, sub. 4, providing that the state may appeal from an order affecting the substantial rights of the state.—State v. O'Brien, 19 Mont. 6; 47 Pac. 103.

2. Decisions reviewable, 288-292.

288. No appeal lies in criminal cases from an order overruling a motion for a new trial, but only from the judgment.—United States v. Smith, 2 Mont. 487.

289. The territory has the right of appeal from an order sustaining the plea of a former conviction, where there is no dispute as to the facts which are offered in support of the plea. —Territory v. Stocker, 9 Mont. 6; 22 Pac. 496.

290. Comp. Stat., p. 476, § 394, provides that "an appeal to the supreme court may be taken by the defendant, as a matter of right, from any judgment against him, and, upon appeal, any decision of the court or intermediate order in the progress of the case may be reviewed. *Held*, that an order denying a motion in arrest of judgment is appealable.—State v. Kingsley, 10 Mont. 537; 26 Pac. 1066.

291. Pen. Code, § 2273, subd. 1, does not authorize an appeal by the state from judgment on a demurrer to a complaint, under Const., art. 3, § 8, providing that criminal offenses of which justices' courts have jurisdiction shall be prosecuted by complaint, and that those of which district courts have exclusive original jurisdiction shall be prosecuted by information or indictment.—State v. Morris, 22 Mont. 1; 55 Pac. 360.

292. Under Pen. Code, §§ 2272, 2278, no appeal lies from a refusal of a district judge to grant a certificate of probable cause.—State v. Broadbent, 27 Mont. 63; 69 Pac. 323.

3. Right of prosecution to review, 293-298.

293. Under Crim. Pr. Act, § 395, providing that the territory can appeal when judgment is rendered for defendant in quashing or setting aside an indictment, such an appeal will lie where a demurrer to the indictment is sustained on the ground of want of jurisdiction of the offense.—Territory v. Flowers, 2 Mont. 392.

294. Under Comp. Stat., p. 498, §§ 526, 527, when the prosecuting attorney takes exceptions to a ruling on a question of law, the territory may appeal to the district court, but the latter court, in the absence of a bill of exceptions, has no jurisdiction of an appeal from a judgment and the agreed statement of facts discharging defendant, and an appeal by the territory from the judgment of the district court on retrial will be dismissed.—Territory v. Jinks, 8 Mont. 135; 19 Pac. 386.

295. Under Comp. Stat., p. 476, § 396, authorizing an appeal by the territory in a criminal case "on a question of law reserved by the territory," an appeal does not lie from an instruction to acquit defendant of larceny on the ground that the evidence showed that defendant

had a partnership interest in the property taken.—Territory v. Laun, 8 Mont. 322; 20 Pac. 652.

296. Nor can such instruction be made the subject of a bill of exceptions under Comp. Stat., p. 466, § 340, authorizing exceptions by the territory to any decision in deciding any question of law not a matter of discretion, and in giving or refusing instructions when the cause is finally submitted to a jury.—Id.

297. Comp. Stat., p. 476, § 396, authorizing an appeal by the state on "a question of law reserved by the state," does not authorize an appeal from an order granting defendant a new trial.—State v. Northrup, 13 Mont. 522; 35 Pac. 228.

298. There is no authority in the statute for an appeal by the state from an order setting aside an information.—State v. O'Brien, 20 Mont. 191; 50 Pac. 412.

B. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW, 299-316.

1. OBJECTIONS, 299-309.
2. EXCEPTIONS, 310-313.
3. MOTIONS, AND PRESENTATION OF EXCEPTIONS BY MOTION, 314-316.

1. Objections, 299-309.

299. Alleged error in giving or refusing instructions will be considered by the appellate court only when evidence showing their applicability is properly embraced in the record.—Territory v. McAndrews, 3 Mont. 158.

300. The question as to whether the indictment supports the judgment can be raised for the first time in the appellate court.—Territory v. Young, 5 Mont. 242; 5 Pac. 248.

301. An indictment must at all times support the judgment, and the question whether it does or not may be raised in the supreme court for the first time.—Territory v. Duncan, 5 Mont. 478, 6 Pac. 353.

302. An objection that an indictment does not state facts sufficient to constitute a public offense can not be raised in the appellate court for the first time. It must be taken advantage of on the trial or on motion to arrest judgment.—Territory v. Carland, 6 Mont. 14; 9 Pac. 578.

303. Under Comp. Stat., p. 443, § 217, providing that defendant, by failure to demur to an indictment, waives all defects therein, except that the court has no jurisdiction of the offense, and that the indictment does not state facts constituting an offense, an objection to an indictment on the latter ground can not be raised for the first time on appeal.—State v. Malish, 15 Mont. 506; 39 Pac. 739.

304. On a trial for murder, a remark of the prosecuting attorney in argument to the jury, referring to a birth mark on defendant's neck, that "we, too, are superstitious; and it is an old saying and by some believed to be true, that a man to be hung is known by his neck," is not ground for reversal where no objection was made at the time by defendant's counsel, nor any request made for an instruction to the jury to disregard the language.—State v. Cadotte, 17 Mont. 315; 42 Pac. 857.

305. To enable the appellate court to review improper remarks of the prosecuting attorney in his argument to the jury, it is necessary to request and secure a ruling of the trial court thereon; the taking of an exception to the remarks alone is insufficient.—State v. Biggerstaff, 17 Mont. 510; 43 Pac. 709.

306. Remarks of the prosecuting attorney in course of argument will not be reviewed, where no objection was taken to them on argument, and the court was not requested to stop them, nor an instruction requiring the jury to disregard them requested.—State v. Gay, 18 Mont. 51; 44 Pac. 411.

307. An objection to remarks of the county attorney can not be considered where no exception thereto was reserved.—State v. Bloor, 20 Mont. 574; 52 Pac. 611.

308. An objection on appeal to the sufficiency of the indictment for want of signature is made too late, since Pen. Code, § 1911, requires that such objection must be made before defendant demurs or pleads, or the objection is waived.—State v. Peterson, 24 Mont. 81; 60 Pac. 809.

309. Where defendant's objection that an indictment is bad, as charging more than one offense, under Pen. Code, § 1922, subd. 3, making such duplicity ground for demurrer, is not taken in the trial court, it will not be considered for the first time on appeal.—State v. Mahoney, 24 Mont. 281; 61 Pac. 647.

2. Exceptions, 310-313.

310. Where accused incorporates in his bill of exceptions on motion for new trial an assignment of error predicated on the court's withdrawing certain evidence from the jury, and recites that to such ruling he excepted at the time, and the court settles and allows the bill as correct, the exception is sufficiently preserved.—State v. Shadwell, 22 Mont. 559; 57 Pac. 281.

311. Exclusion of evidence will not be reviewed, in the absence of an exception taken to the ruling.—State v. Pepo, 23 Mont. 473; 59 Pac. 721.

312. Errors not preserved in a bill of exceptions and not properly certified can not be considered on appeal.—State v. Hurst, 23 Mont. 484; 59 Pac. 911.

313. Where no exception was taken to the remarks of the court in ruling on an objection to an argument of counsel, the matter could not be considered on appeal.—State v. Tully, 31 Mont. 365; 78 Pac. 760.

3. Motions, and presentation of exceptions by motion, 314-316.

314. Comp. Stat., p. 476, § 394, provides that upon appeal any decision of the court made in the progress of the case may be reviewed. *Held*, that errors enumerated as grounds for new trial (§ 354) can not be considered unless they were first called to the attention of the trial court by proper motion for new trial.—State v. Whaley, 16 Mont. 574; 41 Pac. 852.

315. Under Comp. Stat., p. 468, § 354, subd. 6, providing for new trials when there has been an abuse of discretion, errors in refusing to order a change of venue, and overruling challenges to jurors, must be first considered on motion for new trial before they will be reviewed on appeal.—Id.

316. Under Pen. Code, § 2321, errors in the admission and exclusion of evidence may be reviewed though no motion for new trial was made.—State v. O'Brien, 18 Mont. 1; 44 Pac. 399.

C. PROCEEDINGS FOR TRANSFER OF CAUSE, AND EFFECT THEREOF, 317-330.

1. TIME OF TAKING PROCEEDINGS, 317-321.
2. BONDS, 322-323.
3. NOTICE, 324-326.
4. STAY OF PROCEEDINGS, 327-330.

1. Time of taking proceedings, 317-321.

317. Under Cod. Stat., p. 249, §§ 396, 397, authorizing the taking of appeals in criminal cases by filing a notice of intention to appeal

within six months after the rendition of judgment, this court is without jurisdiction of an appeal where the notice was not filed within such time.—Territory v. Fallis, 2 Mont. 236.

318. Crim. Pr. Act, § 396, providing that "the transcript must be filed within 30 days after the appeal is taken," is directory, and the delay of the territory in filing the transcript will not authorize this court to dismiss the appeal.—Territory v. Flowers, 2 Mont. 392.

319. If an appeal is taken by a substantial compliance with the statute, the matter as to the time when the transcript should be filed is directory and not mandatory.—Territory v. Hanna, 5 Mont. 246; 5 Pac. 250.

320. Under Rev. Stat. 339, § 393, providing that on an appeal by defendant, any decision or intermediate order may be reviewed, an order overruling a motion for new trial in a murder case may be reviewed on an appeal from the judgment; and the appeal being from the judgment it is not necessary that it should be taken within 60 days, as in civil cases.—Territory v. Rehberg, 6 Mont. 467; 13 Pac. 132.

321. The provision of Comp. Stat., p. 476, § 397, that the transcript must be filed within 30 days after appeal taken, is merely directory. —Territory v. Mackey, 8 Mont. 168; 19 Pac. 395.

2. Bonds, 322-323.

322. Though Comp. Stat., p. 497, § 510, requires an appeal bond in an appeal from the probate to the district court to contain the condition that appellant will appear in the district court at the trial, yet, as § 292 provides that, where an undertaking to pay fine and costs has been filed, trial for a misdemeanor may be had in the absence of defendant, a bond containing the latter, but lacking the former, conditions, is sufficient.—Territory v. Milroy, 7 Mont. 559; 19 Pac. 209.

323. Rev. Stat., p. 478, § 407, providing that an appeal in a criminal case shall not be dismissed for any informality or defect in the taking thereof, authorizes the amendment of a defective appeal bond by the substitution of one with the conditions prescribed by law.—Id.

3. Notice, 324-326.

324. Notice of appeal must be served upon the clerk of the district court, and a similar notice also served upon the prosecuting attorney. —Territory v. Hanna, 5 Mont. 246; 5 Pac. 250.

325. A notice of appeal served upon the prosecuting attorney, and filed with the clerk, is not sufficient notice to the clerk, and the appeal will not be entertained.—Id.

326. No appeal in a criminal case can be perfected where the notice served upon the prosecuting attorney recites that defendant appeals from the "verdict." An appeal from the verdict is unknown to the criminal law.—State v. Gibbs, 10 Mont. 210; 25 Pac. 288.

4. Stay of proceedings, 327-330.

327. Under Pen. Code, § 2278, petitions to a justice of this court for certificates of probable cause must be verified by the oath of the petitioner, or of some person in his behalf.—State v. Broadbent, 27 Mont. 63; 69 Pac. 323.

328. A petition to a justice of the supreme court for a certificate of probable cause stated that the certificate was refused by the district judge, as appeared by the record in the transcript. The petition was not verified by oath. Held that, under Pen. Code, § 2278, a contention that the petition failed to show refusal of the district judge was of no avail, since, while the recital as to refusal was no part of the record on appeal, it might be considered.—Id.

329. On the hearing of an application for a certificate of probable cause where the state contended that Pen. Code, § 2278, was unconstitutional, on the ground that the grant by Const., art. 8, § 3, of jurisdiction to a justice amounted to a withdrawal of other authority, the constitutionality can not be determined, but the statute must be presumed valid.—Id.

330. A stay of proceedings until the bill of exceptions in a criminal appeal could be prepared should have been granted where the business of the trial court prevented an immediate preparation of such bill, and the court had extended the time therefor.—State v. McDonald, 27 Mont. 66; 69 Pac. 323.

D. RECORD, AND PROCEEDINGS NOT IN RECORD, 331-359.

1. Matters to be Shown by Record, 331-332.
2. Scope and Contents of Record, 333-336.
3. Bill of Exceptions, 337-340.
4. Statement of Facts, 341-342.
5. Filing, 343-344.
6. Defects, Objections, Amendment, and Correction, 345-350.
7. Questions Presented for Review, 351-359.

1. Matters to be shown by record, 331-332.

331. Where the record does not show arraignment and plea, it will be presumed that defendant was arraigned and pleaded if no objection was made at the time.—Territory v. Shipley, 4 Mont. 468; 2 Pac. 313.

332. Under Pen. Code, § 2171, providing that a draft of a bill of exceptions in a criminal case shall be presented for settlement on at least two days notice to the county attorney, where the record on appeal does not show affirmatively that such notice was given, the bill of exceptions will not be considered.—State v. Stickney, 29 Mont. 523; 75 Pac. 201.

2. Scope and contents of record, 333-336.

333. On an appeal from a conviction for felony, this court will strike from the transcript evidence not contained in a bill of exceptions, nor in any way identified as the minutes of the court; it not appearing that the evidence in the transcript was before the court on motion for new trial.—State v. Chandonette, 10 Mont. 280; 25 Pac. 438.

334. The court can not review the evidence in the bill of exceptions, unless the record shows that appellant notified the county attorney that he would present the bill of exceptions for settlement, as required by Pen. Code, § 2171.—State v. Moffatt, 29 Mont. 371; 51 Pac. 823.

335. The appellate court is without jurisdiction to consider an appeal, where the record contains no copy of the notice of appeal, as prescribed by Pen. Code, § 2281.—Butte v. Call, 23 Mont. 94; 57 Pac. 726.

336. Under Pen. Code, § 2229, subd. 1, designating the information as a part of the judgment roll in a criminal case where a conviction had been had, and Laws 1903, p. 47, providing that motions to set aside informations, or demurrers to informations, shall be embodied in a bill of exceptions, and can not be reviewed in any other manner, the original and first amended informations, and demurrers to them which were properly sustained, and a motion to dismiss the prosecution, and order overruling it, were not a part of the appeal record, where they were not embodied in the bill of exceptions.—State v. Stickney, 29 Mont. 523; 75 Pac. 201.

3. Bill of exceptions, 337-340.

337. A bill of exceptions commenced as follows: "Now comes the defendant by his at-

torneys and tenders the following bill of exceptions, which were taken at the proper time and allowed." *Held*, that the words quoted formed a part of the bill of exceptions and showed that proper exceptions were taken at the time and allowed.—Territory v. McClin, 1 Mont. 394.

338. Under Rev. Stat., p. 333, § 348, stipulations between counsel extending the time for settling and signing a bill of exceptions will not be recognized.—Territory v. O'Brien, 7 Mont. 38; 14 Pac. 631.

339. A bill of exceptions will not be considered where the record does not show that two days' notice of its presentation to the judge for settlement was given to the county attorney, as required by Pen. Code, § 2171.—State v. Smith, 19 Mont. 48; 47 Pac. 207.

340. Under Pen. Code, § 2171, consent of the county attorney is not necessary for an extension of time for settlement of a bill of exceptions.—State v. Landry, 29 Mont. 218; 74 Pac. 418.

4. Statement of facts, 341-342.

341. Testimony can not be brought before the appellate court for review except by statement on motion for a new trial.—Territory v. Young, 5 Mont. 242; 5 Pac. 248.

342. It is not error for the court to refuse to incorporate into the statement of case the argument of the prosecuting attorney, in order to show that some newly discovered evidence would overthrow the theory on which his argument was based.—Territory v. Bryson, 9 Mont. 32; 22 Pac. 147.

5. Filing, 343-344.

343. Under Cod. Stat., p. 249, §§ 396, 397, providing that in appeals in criminal cases a transcript of the record must be filed in the appellate court within 30 days after filing the notice of appeal, this court is without jurisdiction, where the transcript was not filed within such time.—Territory v. Fallis, 2 Mont. 236.

344. Under Cr. Pr. Act, § 396, providing that the transcript must be filed within 30 days after the appeal is taken, delay by the territory in filing the transcript beyond the specified time is not ground for dismissal of the appeal, since the statutory provision is merely directory.—Territory v. Flowers, 2 Mont. 392.

6. Defects, objections, amendment, and correction, 345-350.

345. In case of misunderstanding between court and counsel as to what occurred at the trial, the reviewing court is bound by the bill of exceptions.—In re Thompson, 9 Mont. 381; 23 Pac. 933.

346. Where an appeal has been dismissed because the notice served upon the prosecuting attorney was of an appeal from the "verdict," and it is afterwards shown that the defect was due to a mistake in copying the transcript, such mistake can not be amended in this court, but the transcript may be withdrawn and corrected below.—State v. Gibbs, 10 Mont. 212; 25 Pac. 289.

347. It is the duty of the trial judge to examine the bill of exceptions presented to him on appeal, and make it conformable to the facts; and the appellate court will assume that the bill of exceptions as it comes from the court below is correct.—State v. O'Brien, 18 Mont. 1; 44 Pac. 399.

348. The court will not consider papers purporting to amend fatal defects in the record unless requests to file the same have first been made.—State v. Moffatt, 20 Mont. 371; 51 Pac. 371.

349. Where, in a criminal case, endorsements required by Code Civ. Proc., § 1080, subd. 7, as amended by Laws 1897, p. 241, providing that the court shall mark each instruction "given," "refused" or "modified," and all shall be filed as part of the record, were not made at the time of the trial, as the better practice requires, they may be identified subsequently by an entry ordered to be made in the minutes.—State v. Lucey, 24 Mont. 295; 61 Pac. 994.

350. Where counsel for appellant was allowed by the clerk to take the record from the clerk's office, and the record was rearranged in certain particulars, and there was incorporated in it a certificate of the trial judge settling the bill of exceptions and notice of appeal, and there was added an entirely new certificate of the clerk, bearing date a month later than the supreme court file marks, though counsel for appellant filed a suggestion for diminution of the record, and asked for an order of the district court to correct the defects and supply the omissions, the appeal would be dismissed.—State v. Franceschi, 32 Mont. 495; 81 Pac. 12.

7. Questions presented for review, 351-359.

351. An exception was taken to the overruling of a question propounded to two jurors on a voir dire whether they knew of the feuds existing between two families, in which defendant had engaged, and whether they had taken sides therein. The record did not show that either of the jurors was sworn or served as juror, or that defendant had exhausted his peremptory challenges before the jury was empanelled. *Held*, that no error prejudicial to defendant was shown.—Territory v. Campbell, 9 Mont. 16; 22 Pac. 121.

352. The action of the court in discharging the jury because of their disagreement, as authorized by Comp. Stat., p. 465, § 331, can not be reviewed, when it does not appear how long the jury had the case under consideration.—State v. McCaffery, 16 Mont. 33; 40 Pac. 63.

353. Errors assigned on the giving and refusing of particular instructions can not be considered where the evidence is not contained in the record.—State v. Gill, 21 Mont. 151; 53 Pac. 184.

354. On appeal for insufficiency of the evidence to convict, the entire evidence which is material, or its substance, should be before the court, either in the bill of exceptions or the certificate of the trial judge.—State v. Shepphard, 23 Mont. 323; 58 Pac. 868.

355. An appellant, relying on the insufficiency of the evidence, must show by the record affirmatively all material facts, or the substance thereof, so as to overcome the presumption in favor of the court below.—Id.

356. The certificate of the stenographer, who transcribed his notes for an appeal, that the transcript contains all the evidence, can not supply the certificate of the judge to that effect, or an omission of the bill of exceptions to show that it does.—Id.

357. The court in a criminal prosecution charged the jury that they were the exclusive judges of the evidence and its weight, and the credibility of the witnesses, and that they, on considering the evidence, might reject all or any testimony not supported or corroborated by other worthy and credible evidence. *Held*, that on appeal from the judgment, on the judgment roll, such instruction could be reviewed, though the record contained no evidence, since it was erroneous under any and every conceivable state of facts.—State v. Mason, 24 Mont. 340; 61 Pac. 861.

358. In a criminal case a witness for defendant on cross examination testified that his evidence before the examining magistrate was given while he was drunk. Part of the testimony was read to the witness, and used for

impeachment purposes, but the writing was not introduced. Defendant's counsel then offered the testimony for the purpose of showing that in its entirety it was not contradictory of the witness' testimony on the trial. *Held*, on appeal, that its exclusion was not apparent error, inasmuch as defendant had the opportunity, of which he availed himself, of interrogating the witness further, and the bill of exceptions contained no copy of the paper, or substance of its contents, so that it could be determined whether the remainder of the testimony on the examination was or was not inconsistent with the testimony on the trial.—State v. Tighe, 27 Mont. 327; 71 Pac. 3.

359. Under Pen. Code, § 2051, where a jury was obtained from a special venire after the regular panel had been exhausted, and the appeal record does not contain the examination of the jurors, nor any evidence as to whether any of the jurors selected had read or discussed, or heard read or discussed, any of the newspaper articles in question, the refusal of a change of venue, for prejudice of the people of the county, based on certain newspaper articles prejudicial to defendant published in a newspaper circulated in the county, was not reversible error.—State v. Martin, 29 Mont. 273; 74 Pac. 715.

E. ASSIGNMENTS OF ERROR, AND BRIEFS, 360-366.

1. ASSIGNMENTS OF ERROR, 360-364.
2. BRIEFS, 365-366.

1. Assignments of error, 360-364.

360. The Criminal Practice Act, containing no provisions requiring a defendant excepting to the sufficiency of the evidence to sustain the verdict to specify wherein it is deficient, as required in civil cases, an exception taken in the language of the statute, without such specification, is sufficient.—Territory v. Rehberg, 6 Mont. 467; 13 Pac. 132.

361. Under the Criminal Practice Act no independent specification of errors, on appeal, or on an order overruling a motion for new trial, is required.—Id.

362. Under Pen. Code, § 2194, an assignment that the verdict is contrary to law and evidence is insufficient to bring before the appellate court error in the instructions.—State v. Smith, 19 Mont. 48; 47 Pac. 207.

363. Where appellant complains of the charge, but points out nothing to his prejudice, it is not incumbent on the court to search for possible errors.—State v. Allen, 23 Mont. 118; 57 Pac. 725.

364. A failure to comply with rule 5, subd. 3, providing that, when the error alleged is to the charge, the specification shall set out totidem verbis the part referred to, is sufficient warrant for refusing an examination of the charge on appeal.—Id.

2. Briefs, 365-366.

365. Failure to comply with rule 5, regulating the form of appellant's brief, will warrant a refusal to consider specifications of error.—State v. Shepphard, 23 Mont. 323; 58 Pac. 868.

366. Rule 10, § 5, providing that where an appellant is in default in filing his brief the case may be dismissed on motion, will not be relaxed where counsel was not prevented from observing it by press of other professional duties, or interruptions caused by illness or the like.—State v. Franceschi, 32 Mont. 495; 81 Pac. 12.

F. DISMISSAL AND REHEARING, 367.

367. Where one convicted of murder appealed, and thereafter escaped and fled beyond the jurisdiction of the court, the appeal should be dismissed on condition that, if he surrendered himself within the stated time, the appeal would be reinstated.—State v. Dempsey, 26 Mont. 504; 68 Pac. 1114.

G. REVIEW, 368-403.

1. SCOPE AND EXTENT IN GENERAL, 368.
2. PARTIES ENTITLED TO ALLEGE ERROR, 369-370.
3. PRESUMPTIONS, 371-377.
4. DISCRETION OF LOWER COURT, 378-381.
5. QUESTIONS OF FACT, VERDICTS, AND FINDINGS, 381a-384.
6. HARMLESS ERROR, 385-403.

1. Scope and extent in general, 368.

368. Under Rev. Stat., p. 339, § 393, an order overruling a motion for new trial in a murder case may be reviewed on appeal from the judgment.—Territory v. Rehberg, 6 Mont. 467; 13 Pac. 132.

2. Parties entitled to allege error, 369-370.

369. Defendant can not predicate error on the giving of an instruction which he requested.—State v. McClellan, 23 Mont. 532; 59 Pac. 924.

370. A party can not complain of an instruction which he himself requested.—State v. Lucey, 24 Mont. 295; 61 Pac. 994.

3. Presumptions, 371-377.

371. Where a demurrer and motion to quash an information are based upon the fact that the information does not show on its face that the prisoner had a preliminary examination, and is not verified, where there was no affidavit nor any evidence showing that there had been no preliminary examination or leave to file the information, it will be presumed that such examination was had and leave granted, and that the examination was had on a complaint supported by oath.—State v. Mansfield, 19 Mont. 483; 48 Pac. 898.

372. In the absence of a showing to the contrary, it is presumed that a writing, proved by a certain witness, and admitted in evidence in a criminal case, was read to the jury, as required by Code Civ. Proc., § 3382.—State v. Patch, 21 Mont. 534; 55 Pac. 108.

373. Under Pen. Code, § 2082, authorizing the court to require all persons who are shown to have been present at a homicide to be called as witnesses by the state, a refusal to order such witnesses placed on the stand, where such refusal is an abuse of the court's discretion, is reversible error.—State v. Rolla, 21 Mont. 582; 55 Pac. 523.

374. On an application for a change of venue in a prosecution for homicide, accused deposed that people of all parts of the county were greatly excited; that 200 armed men had gathered at a ranch near the Indian agency on which accused, an Indian, was, their object being to force the Indian agent to surrender the murderer, who, they claimed, was a member of the tribe; if not surrendered, it was their intention to exterminate the tribe, and, to this end, they had gathered ammunition and rifles from distant cities, and were only persuaded from attacking the Indians by the civil authorities of the county; that the sheriff was compelled to leave deputies in charge of them; that, at the time of the burial of deceased, a large number of men took an oath that they would be present at the trial of his murderers, and, if they were acquitted, they would not be allowed to leave the court room; that the military authorities sent soldiers to the reservation to prevent an outbreak; that the papers of the county of gen-

eral circulation denounced the Indians, including defendant, and about 40 families moved away from the agency to a distant town, to get protection from threatened danger, and remained away several weeks. This showing was contradicted by an affidavit on information and belief, and by the sheriff, who denied that he put deputies in charge of the armed men, but admitted that he had placed deputies from different parts of the county near the agency, to warn the people of any coming danger. Another witness deposed to excitements in all parts of the county, and that there was strong prejudice in the minds of the people, who were ready to commence an open movement against the Indians if further trouble occurred. *Held*, an abuse of discretion to refuse the application.—State v. Spotted Hawk, 22 Mont. 33; 55 Pac. 1026.

375. The fact that the jury, answering all statutory requirements, was obtained after examining only 65 veniremen, is not conclusive on the question of the existence of such a prejudice in that county as to render a fair and impartial trial impossible.—Id.

376. The trial court is presumed to have acted legally, and to have based on a proper foundation its decision that the evidence was sufficient.—State v. Shepphard, 23 Mont. 323; 58 Pac. 868.

377. An error is presumptively prejudicial to the defeated party, and the presumption is rebutted only when it appears that it was not or could not have been injurious.—State v. Shadwell, 26 Mont. 52; 66 Pac. 508.

4. Discretion of lower court, 378-381.

378. The action of the court upon an application for continuance can not be reversed on error, unless it clearly appears from all the facts and circumstances that there has been an abuse of discretion operating to the prejudice of the party.—Territory v. Perkins, 2 Mont. 467.

379. The rule that the trial court's action in granting a new trial can not be disturbed, even if it committed errors during the course of the trial, because such action was discretionary, applies only when the motion is made upon grounds which appeal to the discretionary power of the court; and hence does not apply where the motion was made upon assignments of errors in law only.—State v. Schnepel, 23 Mont. 523; 59 Pac. 927.

380. Where an order granting a new trial is silent as to the grounds on which it is based, it will be affirmed, if it can be justified on any ground on which the motion was predicated.—State v. Foster, 26 Mont. 71; 66 Pac. 565.

381. The action of the trial court in refusing or allowing a continuance will not be interfered with on appeal unless there has been an abuse of discretion.—State v. Howard, 30 Mont. 518; 77 Pac. 50.

5. Questions of fact, verdicts, and findings, 381a-384.

381a. It is the duty of an appellate court, if, looking upon the testimony preserved in the record, it sees substantial proof to sustain the verdict, to do so.—United States v. Upham, 2 Mont. 170.

382. Refusal to grant a new trial of a criminal case for insufficiency of evidence will not be disturbed on appeal where the evidence was conflicting, and tended to support the verdict.—State v. Hurst, 23 Mont. 484; 59 Pac. 911.

383. A verdict in a criminal prosecution, based on conflicting evidence, will not be disturbed on appeal.—State v. Ford, 26 Mont. 1; 66 Pac. 293.

384. Disputed questions of fact and the credibility of witnesses will not be considered on appeal.—State v. Howell, 26 Mont. 3; 66 Pac. 291.

6. HARMLESS ERROR, 385-403.

(a) Prejudice to Rights of Party as Ground of Review, 385-386.

(b) Presumptions as to Effect of Error, 387.

(c) Proceedings Preliminary to Trial, 388-389.

(d) Rulings as to Evidence, 390-397.

(e) Instructions, 398-403.

(a) Prejudice to rights of party as ground of review, 385,386.

385. The name of defendant's wife was endorsed on the information among the names of the witnesses for the state, over his objection that she was incompetent; but on the trial she was excluded from testifying, on a renewal of the objection. *Held*, that he was not prejudiced by being compelled to object to her competency before the jury.—State v. Sloan, 22 Mont. 293; 56 Pac. 364.

386. A person can not complain that he has been committed for a shorter time than the maximum authorized by law in default of the payment of the fine and costs assessed against him on conviction of a crime.—State v. Towner, 26 Mont. 339; 67 Pac. 1004.

(b) Presumptions as to effect of error, 387.

387. On the second or third day of a six days' murder trial, and before defendant had opened his case, a juror read newspaper comments adverse to defendant. The court, being informed of this, immediately gave instructions, in the presence of the jury, that newspaper comments should be kept from them. *Held*, that there was no absolute presumption of prejudice or injury from the receipt of the articles, and that the circumstances showed none.—State v. Jackson, 9 Mont. 508; 24 Pac. 213.

(c) Proceedings preliminary to trial, 388-389.

388. Defendant in a prosecution for grand larceny raised the objection that the copy of the information furnished was materially different from the information on which he was about to be tried, which objection the court sustained, and required defendant to be furnished with a true copy, whereupon defendant requested the statutory time in which to plead. *Held*, that a refusal of the request constitutes reversible error, under Pen. Code, § 1893, the record showing that no plea was entered at the trial.—State v. De Wolfe, 29 Mont. 415; 74 Pac. 1084.

389. Under Pen. Code, § 2170, an exception does not lie to the action of the court in sustaining a challenge to an individual juror for implied bias.—State v. Jones, 32 Mont. 442; 80 Pac. 1095.

(d) Rulings as to evidence, 390-397.

390. Error in the admission of evidence is cured by withdrawing such evidence, and directing the jury to disregard it.—United States v. Upham, 2 Mont. 170.

391. The admission of irrelevant and immaterial evidence is not ground for the reversal of a conviction, unless it is shown that defendant was injured thereby.—Territory v. Clayton, 8 Mont. 1; 19 Pac. 293.

392. The exclusion of evidence is not ground for reversal, if the evidence is subsequently admitted.—State v. Biggerstaff, 17 Mont. 510; 43 Pac. 709.

393. Where, after the refusal of the court to require the state to place on the stand certain witnesses of the homicide, the witnesses in question were introduced and fully examined on defendant's behalf, and it is not claimed that the county attorney acted unfairly in the matter, such refusal by the court worked no prejudice on defendant.—State v. Rolla, 21 Mont. 582; 55 Pac. 523.

394. It is reversible error to exclude evidence for defendant as to a material point, though other evidence of defendant as to such point was not stricken out.—State v. Shafer, 22 Mont. 17; 55 Pac. 526.

395. The exclusion of material testimony is harmless error, where it is afterwards admitted on cross examination of the witness.—State v. Geddes, 22 Mont. 92; 55 Pac. 927.

396. Permitting the prosecution to ask a witness as to a conversation between him and deceased, over defendant's objection that he was not present, was not error, where the witness later testified to defendant's presence.—State v. Pepo, 23 Mont. 473; 59 Pac. 721.

397. Where a letter improperly admitted was immaterial, and the only defense made in the case was insanity, the admission of the letter was harmless error.—State v. Howard, 30 Mont. 518; 77 Pac. 50.

(e) Instructions, 398-403.

398. An exception to a charge for inconsistency, in effect, that a distribution is not necessary to a prize distribution business, is not ground for reversal, where it appears from defendant's evidence that he sold or gave away prize tickets, under the promise of a drawing or distribution of prizes.—Territory v. Harris, 8 Mont. 140; 19 Pac. 286.

399. A person convicted of grand larceny can not complain of the ambiguity of instructions as to the crime of petit larceny, where the instructions as to grand larceny were perfectly plain.—State v. Moffatt, 20 Mont. 371; 51 Pac. 823.

400. Where conflicting propositions of law are given to the jury on a material point, one correct and the other incorrect, the error is fatal.—State v. Rolla, 21 Mont. 582; 55 Pac. 523.

401. On a prosecution for larceny of five horses pursuant to a prearranged plan to collect and brand the horses and sell them, an instruction referring to possession of the stolen property generally, and not to that alleged in the information, is not prejudicial, though erroneous, where the evidence tended to show that the whole band, including the five horses described in the information, went into the actual possession of accused.—State v. Stevenson, 26 Mont. 332; 67 Pac. 1001.

402. Code Civ. Proc., § 2070, subd. 4, as amended by Laws 1901, p. 173, provides that special instructions requested shall be written and signed by the party or his attorney and delivered to the court, and that the court shall give each instruction as requested, or refuse to do so, or give the instruction with a modification, and shall mark or pass on each instruction so that it shall distinctly appear what instructions were given in whole or in part, and whether refused or modified, and requires all instructions given by the court to be filed, together with those refused, as a part of the record. *Held*, that requested instructions must be signed merely for the purpose of identification, and used by the court in making up a charge, and the fact that the court permitted the name and official title of the county attorney to be placed on an instruction requested by him and given to the jury, was not reversible error.—State v. Martin, 29 Mont. 273; 74 Pac. 715.

403. Where, in a criminal prosecution, an instruction correctly stating the law is in conflict with an erroneous one in defendant's favor, he can not complain of the erroneous instruction, or of the conflict between the two.—State v. Jones, 32 Mont. 442; 80 Pac. 1095.

H. DETERMINATION AND DISPOSITION OF CAUSE, 404-411.

1. AFFIRMANCE, 404-407.
2. REVERSAL, 408-410.
3. MANDATE AND PROCEEDINGS AFTER REMAND, 411.

1. Affirmance, 404-407.

404. On appeal in a criminal case, where no errors are assigned, and there is no brief or argument, and no error appears from the record, the judgment will be affirmed.—Territory v. Mooney, 8 Mont. 151; 19 Pac. 595.

405. Where the record on appeal shows no error on the part of the trial court, and no briefs were filed and no arguments made in the supreme court, the judgment of the lower court will be affirmed without any special reasons being assigned.—Territory v. Stanton, 8 Mont. 157; 19 Pac. 593.

406. On appeal by the state from the overruling of its demurrer, the judgment will be affirmed, where no brief has been filed and no oral argument made by either party.—State v. Dakin, 15 Mont. 556; 39 Pac. 848.

407. A conviction for murder in the first degree will not be disturbed on appeal, when the instructions were correct and the evidence justified the verdict.—State v. Pugh, 16 Mont. 343; 40 Pac. 861.

2. Reversal, 408-410.

408. On reversal by this court of a judgment of acquittal, under Comp. Stat., p. 477, § 404, the case will be remanded for new trial to the court below, where the defendant, if he so desires, may plead the former acquittal in bar of a new trial, and denies the power of the court to grant it.—State v. Herron, 12 Mont. 300; 30 Pac. 140.

409. A conviction in the face of the charge of the court must be set aside, however erróneous the instructions may be.—State v. Dickinson, 21 Mont. 595; 55 Pac. 539.

410. Where the record shows many technical objections of the prosecuting attorney to competent evidence offered by defendant, and many technical rulings excluding such testimony, as well as admitting testimony of like character on the part of the state, and many instructions that approach closely the border line of prejudicial error, if they do not cross it, and the charge contains a vast and voluminous mass of not wholly harmonious declarations of law, a new trial will be awarded, on the ground that defendant has not had a fair trial.—State v. Shafer, 22 Mont. 17; 55 Pac. 526.

3. Mandate and proceedings after mandate, 411.

411. A court has jurisdiction of cases before it on appeal until the remittitur is issued.—State v. Faulds, 17 Mont. 140; 42 Pac. 285.

I. LIABILITIES ON BONDS, 412.

412. The dismissal of an appeal taken from a judgment for fine and costs in a justice's court, the district court having declared the recognizance forfeited, and that fact having been duly entered upon the records, constitutes an affirmance of the judgment, and, the recognizance being conditioned that the defendant would appear in the district court on the trial there-

in, and pay all judgments for fine and costs that might be rendered against him, the defendant's sureties are liable thereon for the judgment in the justice's court.—State v. Biesman, 12 Mont. 11; 29 Pac. 534.

XVI. PUNISHMENT AND PREVENTION OF CRIME, 413.

413. Under Pen. Code, §§ 1232, 2146, 2151, a judgment that defendant "be imprisoned in the state prison for the term of 10 years, five years upon the conviction for assault in the second degree, and five years for the prior conviction of a felony as by the statute made and provided," is not void as to the five years for former conviction, since the division of the term into equal parts, and the assignment of each part to its supposed function as a measure of punishment is merely redundant, and not ground for reversal under Pen. Code, §§ 2320, 2600.—State v. Connors, 27 Mont. 227; 70 Pac. 715.

CURTESY.

1. Comp. Stat., p. 1044, § 1432, providing that the property of a married woman, listed in the register of deeds of the county in which she resides, shall be exempt from all debts and liabilities of her husband, does not deprive a husband of curtesy in the property listed.—Allen v. Roush, 15 Mont. 446; 39 Pac. 459.

CUSTOMS AND USAGES.

1. A usage prevailing among physicians of a particular locality is not binding upon one who has no knowledge thereof.—Fitzgerald v. Hanson, 16 Mont. 474; 41 Pac. 230.

2. Evidence of a usage prevailing among physicians of a particular locality, that where one employs another to assist him in a case, the assistant is to look to the patient for his pay in the absence of a special agreement to the contrary, is inadmissible in an action by one physician to recover of another for such services, where it did not appear that such usage was known to the plaintiff or that it was so well established as to warrant the legal presumption that the parties contracted with reference thereto.—Id.

3. U. S. R. S., § 2324, provides that the miners in each mining district may make regulations, not in conflict with the laws of the United States, governing the amount of work necessary to hold possession of a mining claim, provided that no less than $100 worth of labor shall be performed or improvements made on each claim during each year. *Held*, that a custom among miners in a certain district that 20 days labor shall constitute $100 worth of work is in conflict with this section, and therefore void, for the test is, not the number of days work performed, but the reasonable value thereof.—Penn v. Oldhauber, 24 Mont. 287; 61 Pac. 649

4. Where, by uniform practice, existing through years, it is mutually understood that the debtor is to have until a certain day of the succeeding month in which to pay for goods purchased during the current month, he is entitled to such time, though no express agreement has ever been made.—Hayes v. Union Merc. Co., 27 Mont. 264; 70 Pac. 975.

5. A custom can nor vary the terms of, or operate to abrogate or repeal, a general statute.—Ettien v. Dunn, 32 Mont. 311; 80 Pac. 369.

DAMAGES.

I. Nominal Damages, 1-2.
II. Grounds and Subjects of Compensatory Damages, 3-12.
A. Direct or remote, contingent or prospective, consequences or losses, 3-4.
B. Aggravation, mitigation, and reduction of loss, 5-8.
C. Interest, costs, and expenses of litigation, 9-12.
III. Liquidated Damages and Penalties, 13-19.
IV. Exemplary Damages, 20-21.
V. Measure of Damages, 22-24.
VI. Inadequate and Excessive Damages, 25-29.
VII. Pleading, Evidence, and Assessment, 30-50.
A. Pleading, 30-33.
B. Evidence, 34-38.
C. Proceedings for assessment, 39-50.

I. NOMINAL DAMAGES, 1-2.

1. A case will not be reversed and remanded to the lower court to direct a judgment for nominal damages in favor of appellant.—McCauley v. McKeig, 8 Mont. 389; 21 Pac. 22.

2. Where a sheriff levies on personalty in defendant's warehouse, and remains in possession of the premises, defendant is entitled to nominal damages, even though no special damage is shown.—Yoder v. Reynolds, 28 Mont. 183; 72 Pac. 417.

II. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES, 3-12.

A. Direct or Remote, Contingent or Prospective, Consequences or Losses, 3-4.
B. Aggravation, Mitigation, and Reduction of Loss, 5-8.
C. Interest, Costs, and Expenses of Litigation, 9-12.

A. DIRECT OR REMOTE, CONTINGENT OR PROSPECTIVE, CONSEQUENCES OR LOSSES, 3-4.

3. In an action for breach of contract to supply goods, profits which might have arisen from their resale, are too remote to sustain the action.—Loeb v. Kamak, 1 Mont. 152.

4. In an action for injuries resulting from a defective street, a charge that the jury may take into consideration as an item of damages the probable consequences, so far as proved, of the personal injuries received by plaintiff, if any are proved, is proper.—Snook v. Anaconda, 26 Mont. 128; 66 Pac. 756.

B. AGGRAVATION, MITIGATION, AND REDUCTION OF LOSS, 5-8.

5. In an action upon an injunction bond, the obligors may prove the facts that entitled them to the injunction in mitigation of damages, if the injunction has been dissolved before the merits of the case have been adjudicated.—Stewart v. Miller, 1 Mont. 301.

6. Where an action is brought against a telephone company for continuing damages caused by an alleged wrongful removal of a telephone from a customer, the company may plead in mitigation of damages that it afterwards offered to replace the telephone on the payment of certain expenses by the customer, since the customer is required to do every act in his power to decrease the damages resulting from the wrongful act, and the acceptance of the phone on such conditions will not prevent an action for the accrued damages.—Ashley v. Telephone Co., 25 Mont. 286; 64 Pac. 765.

7. In an action for injuries caused by diversion of a stream, evidence that plaintiff, by a small expense in riprapping the bank of the new channel, could have avoided or diminished the damages to his property, was admissible, it being his duty to use reasonable care to save it from injury.—Sweeney v. Montana Central, 25 Mont. 543; 65 Pac. 912.

8. Where defendants broke a contract to purchase all of plaintiff's milk at wholesale for a specified price per gallon for five years, plaintiff was not thereafter required to change the character of his business, and sell his milk at retail, in order to reduce the damages.—Brazell v. Cohn, 32 Mont. 556; 81 Pac. 339.

C. INTEREST, COSTS, AND EXPENSES OF LITIGATION, 9-12.

9. A reasonable attorney's fee will not be awarded to a party under the general prayer for a certain sum as damages and expenses in protecting "rights, remedies and equities."—Wilson v. Davis, 1 Mont. 183.

10. The statutes of this territory will not allow interest on unliquidated damages before judgment. (See 111 U. S. 775.) Randall v. Greenhood, 3 Mont. 506.

11. In an action by a wife for the value of her property, which was sold under mortgage for the husband's debts, plaintiff can only recover the value of the property, without interest.—Palmer v. Murray, 8 Mont. 174; 19 Pac. 553.

12. Where an unreasonable and vexatious delay in withholding payment of plaintiff's claim was neither pleaded nor proved, and it appeared that defendant defended the suit in good faith, believing he had a meritorious defense, it was error to charge that plaintiff, in event of recovering, was entitled to 10% interest on the claim from the time of its inception.—Nixon v. Cutting, 17 Mont. 90; 42 Pac. 108.

III. LIQUIDATED DAMAGES AND PENALTIES, 13-19.

13. A promissory note in which the maker agrees to pay "interest after maturity at the rate of 4% per month until paid," is an agreement between the parties to liquidate the damages for a breach of contract. This interest is not fixed as a penalty for the breach of the contract, and the agreement will be enforced by the courts.—Davis v. Hendrie, 1 Mont. 499.

14. Where a contract specifies a certain sum to be paid as damages on failure of either party to perform "all and everyone of the covenants and agreements resting upon him," and does not provide for part performance, plaintiff's waiver of complete, and his acceptance of part, performance, changes the agreement for liquidated damages into one for penalty, and entitles him to recover only for damages actually sustained by a partial breach of the contract.—Wibaux v. Grinnell, 9 Mont. 154; 22 Pac. 492.

15. A bond is prima facie a penal obligation, and the burden of proving that the sum therein was intended as liquidated damages rests on the party alleging such intention.—O'Keefe v. Dyer, 20 Mont. 477; 52 Pac. 196.

16. The owner of a mining claim had never visited or inspected it, nor caused it to be examined, nor was there any evidence of its condition as to development or its character otherwise. He testified "that it is impossible to tell what the value is. It is a quartz claim, and there is no rule by which you can ascertain its value. * * * I do not know anything about the value of the ground." *Held*, that the evidence did not show that the value of the mine was difficult to estimate, and thereby evidence an intention of the parties to make the sum named in the bond for conveyance of the claim liquidated damages, and not a penalty.—Id.

17. Defendant was about to apply for a patent to a mining claim, and, in order to avoid litigation as to the claim, executed a bond to plaintiff for $1,000, not designated as stipulated damages, to secure his promise to quitclaim the ground of plaintiff to him after the patent was issued. *Held*, that the $1,000 must be considered as a penalty, and not as liquidated damages, under the rule that a promise to pay a certain sum if the promissor fails to perform his agreement to convey land is prima facie a penalty.—Id.

18. A contract bound defendant, an irrigation company, to furnish to plaintiff a certain amount of water during a certain season, and provided that, if the company should for any reason fail to deliver the water, it would return to plaintiff the money paid by him, and plaintiff agreed to accept the same, and to release the company from any damage arising from such failure. *Held*, to fall clearly within Code Civ. Proc., § 2243, and to be void on its face to the extent of the liquidated damages agreed on in case of a breach.—Denninck v. Irrigation Co., 28 Mont. 255; 72 Pac. 618.

19. If a contract is one wherein "it would be impracticable or extremely difficult to fix the actual damage," it is for defendant to plead and prove the fact.—Id.

IV. EXEMPLARY DAMAGES, 20-21.

20. Exemplary damages are only given where the act complained of is wilful, or there is either wanton recklessness or a deliberate intention to injure.—Bohm v. Dunphy, 1 Mont. 333.

21. In a suit where exemplary damages are claimed, the defendant may prove, as a mitigating fact, that he acted in good faith, under the advice of counsel.—Id.

V. MEASURE OF DAMAGES, 22-24.

22. In an action brought to recover damages for the wrongful taking and conversion of United States treasury and national bank notes, *held*, that plaintiff could only recover such damages as directly and necessarily resulted from the act complained of, which would be the amount wrongfully taken, with legal interest, and such exemplary damages as the jury might give under proper instruction of the court, and within reason, under all the circumstances proven.—Bohm v. Dunphy, 1 Mont. 333.

23. The value of the crops, and the expense of maturing, reaping, threshing and moving them to market, are competent facts to be considered in arriving at the measure of damages to crops by the overflowing of a stream, caused by negligence in driving logs.—Hopkins v. Commercial Co., 16 Mont. 356; 40 Pac. 865.

24. In order to permit a recovery for injury for crops and for permanent injury to the land on which the crops were raised, it should be distinctly alleged and proven when the permanent injury to the land took place, how much of the land was permanently injured, and the annual injury to crops prior to that date.—Watson v. Smelting Co., 31 Mont. 513; 79 Pac. 14.

VI. INADEQUATE AND EXCESSIVE DAMAGES, 25-29.

25. When the injury is the result of unavoidable accident, not of wilful negligence or gross carelessness, damages will be regarded as excessive where awarded to the full extent allowed by law where death ensues, where the evidence shows that the accident resulted in the loss of a foot and would not necessarily shorten the life of plaintiff or incapacitate him in his business. (See 131 U. S. 22.)—Kennon v. Gilmer, 5 Mont. 257; 5 Pac. 847.

26. Plaintiff, injured while a passenger on defendant's coach, testified that he was 54 at the time; that his ankle was dislocated; that his medical attendance for two months cost him $800; that his foot was amputated and his leg did not heal for over a year; that he had an artificial foot which caused him much pain; that he had been unable at all times to walk without crutches; that he was deprived almost entirely of attending to his business—hardware, and that it would be more profitable if he could; that he was at times obliged to employ others; that his general health was as good as before, but that he was not as strong; and that he could not, on account of his injury, take exercise. His physician testified that the amputation was necessary; that it was 101 days before he could get the ligature away, and that small pieces of bones were taken out several months after the amputation. There was no evidence as to the value of plaintiff's business, but his partner testified that he considered him of no account since the accident; but before that he was able bodied and did considerable work about the store. *Held*, that a verdict of $20,750 was excessive, and would be reversed unless plaintiff remitted all except $10,750, with interest.—Kennon v. Gilmer, 9 Mont. 108; 22 Pac. 448.

27. In action for conversion of household goods aagainst a constable who sold them, under execution, the verdict assessed plaintiff's damages at $196. Plaintiff testified that the furniture cost $226.90, had been in use four years, and was now worth $196. The purchaser stated that the goods "looked to be used up pretty well." The articles were sold separately at one bid for $72.25. *Held*, that it was not an abuse of discretion to require plaintiff to accept $135.60 and remit the excess, under the alternative of a new trial.—Cunningham v. Quirk, 10 Mont. 462; 26 Pac. 184.

28. Where it appears that plaintiff's left arm was broken, and would never become a perfect arm, and that consequently plaintiff's working capacity was permanently reduced by three-fourths, a verdict for $4,500 will not be set aside as excessive.—Sweeney v. Butte, 15 Mont. 274; 39 Pac. 286.

29. In an action for injuries to a passenger, there was evidence that she was injured in her back and side, and suffered from nervous prostration, but that such injuries were curable; that she suffered a slight displacement of the womb, but that such injury was much less painful than at first, and was also curable; and that other internal injuries would be relieved after it was cured. *Held*, that a verdict of $20,000 was excessive.—Hamilton v. Railroad Co., 17 Mont. 334; 42 Pac. 860; 43 Pac. 713.

VII. PLEADING, EVIDENCE, AND ASSESSMENT, 30-50.

A. PLEADING, 30-33.
B. EVIDENCE, 34-38.
C. PROCEEDINGS FOR ASSESSMENT, 39-50.

A. PLEADING, 30-33.

30. The amount of damages claimed in the complaint is not a material averment under the Civil Practice Act. The plaintiff can recover the damages he proves.—Loeb v. Kamak, 1 Mont. 152.

31. An allegation in a cross-bill, "besides the sum of $6,500 damages, and expenses incurred in attending to and protecting the rights, remedies and equities of said D in and about the premises which said F stipulated and agreed to pay and refund to said D, before said D was required to make a deed to said property," *held*, not specific enough to warrant the court in awarding any damages or remuneration for expenses.—Wilson v. Davis, 1 Mont. 183.

32. Where the complaint alleged that defendants entered plaintiff's land, threw down fences, and exposed his crop, but did not allege the amount of damage, and prayed for $500 damages for the trespass, it was error to admit evidence of damage to a crop of wheat from stock.—Carron v. Clark, 14 Mont. 301; 36 Pac. 178.

33. In an action by a wife for personal injuries, she need not specially plead damages caused by impairment of her capacity to earn money, where the petition shows that she is injured to such an extent as to cause her great pain.—Hamilton v. Railroad Co., 17 Mont. 334; 42 Pac. 860; 43 Pac. 713.

B. EVIDENCE, 34-38.

34. In an action for injuries to a stock of goods, where plaintiff's witnesses, who have had experience with such goods, took a general survey of the stock after the injury, estimated the damages at from $15,000 to $22,500, and defendant's expert witness estimated them at from $1,500 to $3,000, and the only estimate below $1,500 was that of defendant himself, who placed them at $25, but who saw the goods a few minutes only, it is no abuse of discretion of the trial court to set aside a verdict for $100 for plaintiffs, and grant them a new trial.—Landsman v. Thompson, 9 Mont. 182; 22 Pac. 1148.

35. It was error to exclude evidence to show that, at a small expense for riprap, the injury could have been avoided or materially diminished.—Sweeny v. Montana Central, 19 Mont. 163; 47 Pac. 791.

36. In an action against a railroad company for injuries to an abutting owner by the operation of a railroad in the street, evidence as to the noise of the trains, the shaking of the windows of his house, the ringing of bells and sounding of whistles, and the difficulty with which teams could turn in the space in front of his house, and the diversion of travel from the street, is inadmissible if no special damages are alleged.—Root v. Railway Co., 20 Mont. 354; 51 Pac. 155.

37. A recovery for an item of alleged damage, but as to which no evidence is introduced, is waived.—Watson v. Smelting Co., 31 Mont. 513; 79 Pac. 14.

38. Where three of plaintiff's animals were killed and three were injured, testimony merely as to the value of the animals killed and injured is too indefinite on which to base judgment.—Carman v. Montana Central, 32 Mont. 137; 79 Pac. 690.

C. PROCEEDINGS FOR ASSESSMENT, 39-50.

39. A charge in an action for injury to a passenger which, after stating that the jury should, in awarding damages, consider "all testimony as to the nature of the injuries," stated that the jury should consider all plaintiff's complaints due to the accident, such as headaches, loss of flesh, etc., and should award such sum as would fairly compenaste her for "all of these

items of damage," is not objectionable, as authorizing damages for all the items enumerated.—Hamilton v. Railroad Co., 17 Mont. 334; 42 Pac. 860; 43 Pac. 713.

40. Where plaintiff, in an action for injuries received as a passenger, claimed damages for a displacement of her womb, it was not error to refuse to charge that she could not recover therefor unless it was occasioned by the shock, and was uncurable, where the court had charged that plaintiff could only recover for such injuries as were occasioned by the accident.—Id.

41. Where there was evidence supporting allegations that, by reason of the accident plaintiff received injuries in her side and back, that internal organs were displaced and injured, and that she suffered from nervous prostration, it was proper to charge that plaintiff could recover for all pain which she has suffered, or "in any reasonable probability will hereafter sustain," because of the injury.—Id.

42. In an action by a wife for personal injuries, all the testimony as to future disability consisted of opinions of medical experts. *Held*, not error to charge that damages could be awarded for such consequences as are "reasonably likely" to ensue in the future, and that plaintiff may recover for all pain and suffering which she has sustained, or, "in reasonable probability, will hereafter sustain," etc.—Id.

43. An instruction which lays down a rule by which the jury are to estimate damages is not objectionable if it be predicated on the hypothesis of the evidence showing certain facts before any damages can be awarded.—Cannon v. Lewis, 18 Mont. 402; 45 Pac. 572.

44. Where plaintiff claimed damages for the cutting of a new channel for a stream through his premises, and the jury were instructed that, in determining the market value of the land after the injury, they might take into consideration the alteration of the channel, in causing overflows during the two years following the trespass, it was error to refuse to charge, further, that plaintiff could not recover damages for the injuries caused by such overflows.—Sweeny v. Montana Central, 19 Mont. 163; 47 Pac. 791.

45. Where, in an action for personal injuries, it appeared that plaintiff was engaged in overseeing his farm, and the labor thereon, and the exact value of his time lost by his injuries was not clearly shown, it was proper to leave the amount of compensation therefor to the "sound discretion of the jury, under the evidence."—Rogan v. Montana Central, 20 Mont. 503; 52 Pac. 206.

46. An instruction in an action for levying on personalty in a cafe and lodging house, and taking possession of the premises, that if plaintiff sustained any damages, and defendants were liable therefor, she would be liable to the damages she sustained for the time the business was closed, but would be entitled to all damages from their unlawful acts, is objectionable as allowing the jury to include remote and fanciful damages.—Ramsey v. Burns, 27 Mont. 154; 69 Pac. 711.

47. Under Civ. Code, § 4330, an instruction, in an action by an employee, that, if she was injured by defendant's negligence, she was entitled to recover what would compensate for all damage "proximately caused by the negligence of defendant, whether such damage could be anticipated or not," was not objectionable for failing to specify by whom the damage need not be anticipated.—Coleman v. Perry, 28 Mont. 1; 72 Pac. 42.

48. In an action for personal injuries the court properly instructed that plaintiff might recover any reasonable sum she had expended for medical treatment, where there was uncontradicted evidence that plaintiff had spent $75 for that purpose.—Ball v. Gussenhoven, 29 Mont. 321; 74 Pac. 871.

49. Where a party claims damages according to one standard in his complaint and by his evidence, instructions authorizing the assessment of damages by another standard are erroneous.—Thornton v. Bretherton, 32 Mont. 80; 80 Pac. 10.

50. In an action for breach of contract, a requested instruction that the jury, in fixing damages for non-performance in the future, should make allowance for the uncertainties which affect all conclusions depending on future events, and that only such evidence as was reasonably certain to extend to future events should be considered in fixing damages for non-performance of the contract, was vague and indefinite, and not authorized by Code Civ. Proc., § 4201, providing that no damages can be recovered for breach of contract which are not clearly ascertainable in both their nature and origin.—Brazell v. Cohn, 32 Mont. 556; 81 Pac. 339.

DEATH.

1. To determine the measure of damages in an action for the death of one upon whose support plaintiffs were dependent, evidence as to the age of deceased at his death is admissible.—Soyer v. Water Co., 15 Mont. 1; 37 Pac. 808.

2. In an action by decedent's wife and child for his death, the measure of damages is the amount which he would probably have earned during his life for their benefit.—Id.

3. Under Code Civ. Proc., § 3266, uncontradicted evidence that the supposed intestate left her home in Montana 14 years before, to go to her relatives in Missouri, and that said relatives had not heard of her since, though diligent inquiry was made, entitled the public administrator to letters of administration on his petition therefor.—In re Liter's Estate, 19 Mont. 474; 48 Pac. 753.

DEDICATION.

I. Nature and Requisites, 1-3.

II. Operation and Effect, 4-5.

I. NATURE AND REQUISITES, 1-3.

1. Where one has made valuable improvements upon ground afterwards dedicated as a street and alley, but accepted deeds describing lots bounded by the street and alley, he cannot assert any title to such street or alley after the expiration of the time mentioned in Cod. Stat., p. 548, §§ 4-12, providing that the streets and alleys, after the filing of the plat in the proper office, "shall remain dedicated to the public use forever."—Territory v. Deegan, 3 Mont. 82.

2. Where there has been a continued occupancy of the premises in opposition to the claim of the public, and no user by the public from which the assent of the owners could be implied, a dedication for a street will not be presumed, as there must be some act of the owner, either direct or by implication, to create an indebtedness.—Helena v. Albertose, 8 Mont. 499; 20 Pac. 817.

3. Under Pol. Code, § 2600, providing that roads laid out or erected by others than the public, dedicated or abandoned to the public, are public highways, such dedication or abandonment is not shown by mere user until the period of limitations of actions to recover real property has lapsed.—M. O. P. Co. v. Mining Co., 25 Mont. 427; 65 Pac. 420.

II. OPERATION AND EFFECT, 4-5.

4. U. S. R. S., § 2387, provides that the county judge may enter a townsite on the public domain "in trust for" the occupants. Laws 1867, p. 601, §§ 3-5, provide that the judge entering such townsite "shall within three months" thereafter plat and survey the same, so as to conform to the rights of the occupants, the townsite to be "surveyed into lots, blocks, streets and alleys," and the plat thereof filed, "and thereafter the streets and alleys designated in such plat shall remain dedicated to the public use forever." and that after the entry of the townsite a notice thereof shall be published, requiring the occupants to make proper claim within two months, upon due proof of which deeds will be issued to such occupants by the trustee. *Held*, that where a townsite is so entered by a county judge, and the streets and alleys are dedicated to the public use by the filing of the survey and plat before any conveyance is made to the original occupants or persons entitled thereto, the fee in the streets and alleys does not pass to the lot owners in the deeds from the trustee.—Hershfield v. Telephone Co., 12 Mont. 102; 29 Pac. 883.

5. Pol. Code, § 4724, provides that whenever territory adjoining a city or town is surveyed and laid off into streets and blocks as an addition thereto, it may become a part of such city or town on filing the plat thereof. Sec. 5000 provides that an accurate plat and survey of the land must be recorded. Sec. 5001 provides that the plat must show all streets, alleys, etc., and the width thereof, all grounds reserved for public uses, and give the dimensions of each lot and block. Secs. 5004, 5005, provide that the surveyor and the owner must attach their certificates to such plat. An owner surveyed certain land, and recorded his plat, showing lots and streets designated in colors, and a portion, not colored, marked "reserved," which addition was accepted by the city. His certificate stated that he had surveyed the lots and streets shown in colors, and dedicated to the public the streets and alleys thereof. The surveyor's certificate stated that the colored shadings represented the lots, blocks, streets and alleys. *Held*, that it was the intention of the owner in giving and of the city in accepting the addition that the pieces of land not colored on the plat were to be excepted, and such pieces therefore did not become a part of the corporate territory.—Farlin v. Hill, 27 Mont. 27; 69 Pac. 237.

DEEDS.

I. Requisites and Validity, 1-2.
II. Recording, 3.
III. Construction and Operation, 4-11.
A. General rules of construction, 4-6.
B. Property conveyed, 7-8.
C. Estates and interests created, 9-11.
IV. Pleading and Evidence, 12-13.

I. REQUISITES AND VALIDITY, 1-2.

1. The acknowledgment is no part of a deed, and as between the parties to the instrument a deed is good without acknowledgment, the acknowledgment and record being required for the protection and benefit of third persons.—Taylor v. Holter, 1 Mont. 688.

2. Plaintiff and defendant lived together as man and wife, their relations were intimate and confidential, and defendant had great influence over plaintiff; plaintiff made to defendant a quitclaim deed of her property, held by him for her, and received therefor much less than the property was worth. The money he paid her was in reality her own money, held by him in trust for her, and plaintiff made the deed in fear of maltreatment by him, and apprehending that he might leave her if she failed to comply with his wishes. Defendant was of more than ordinary intelligence and education, while plaintiff was uneducated, and had little knowledge of English. When plaintiff made the deed, she was suffering from the effects of continuous indulgence in intoxicating liquors for the past month, and had only a general idea of the nature of the transaction. *Held*, that the deed was procured by duress and fraud, and should be concelled.—Muller v. Buyck, 12 Mont. 354; 30 Pac. 386.

II. RECORDING, 3.

3. Under Cod. Stat., p. 396, §§ 10-18, a deed properly acknowledged requires no subscribing witnesses to entitle it to record. (See 14 Otto 279.)—Belk v. Meagher, 3 Mont. 65.

III. CONSTRUCTION AND OPERATION, 4-11.

A. General Rules of Construction, 4-6.
B. Property Conveyed, 7-8.
C. Estates and Interests Created, 9-11.

A. GENERAL RULES OF CONSTRUCTION, 4-6.

4. A deed may be construed by the light of surrounding circumstances, and, so far as possible, the court may put itself in the place of the parties, and may interpret the language from this standpoint, but nothing can be added to or taken from the written words.—Taylor v. Holter, 1 Mont. 688.

5. The intent of the parties to a deed must be gathered from what is written rather than from parol evidence, but the language of the instrument may be construed by the light of surrounding circumstances.—Id.

6. In an action to compel the reconveyance of land, procured by fraud, and for an inadequate consideration, and for an accounting by defendant for profits realized from sales of portions of the premises, evidence of the consideration received by defendant for the portions so sold, as recited in deeds by him, is admissible, such recitals being prima facie evidence as to the consideration.—Leggatt v. Leggatt, 13 Mont. 190; 33 Pac. 5.

B. PROPERTY CONVEYED, 7-8.

7. Where the appropriators of a water right, without proceeding in eminent domain, make an agreement whereby a landowner gives them permission to construct the ditch over his premises, in consideration of sufficient water to irrigate that part of his land lying below the ditch, the water being essential to its proper cultivation, the landowner's interest in the ditch becomes appurtenant to the land lying below the ditch, and passes with a conveyance of it.—Sloan v. Glancy, 19 Mont. 70; 47 Pac. 334.

8. A deed of mineral land described the tract as a lot situated in a certain town, county and state, "fronting 25 feet on" a certain road, "extending back east 125 feet, more or less, to the gulch, and lying about 25 or 30 feet south from the south sideline of a certain claim. *Held*, in a suit involving its construction, that the description was not so ambiguous as to authorize the submission of the case to the jury.—McGuigan v. Hennessy, 24 Mont. 202; 61 Pac. 1.

C. ESTATES AND INTERESTS CREATED, 9-11.

9. The words "remise, release and quitclaim," when supported by an additional consideration and warranty of title, thereby showing the intention of the parties to have been to convey the property itself, and not the grantor's interest therein, are words of bargain and sale, and operate to convey the property described. —Taylor v. Holter, 1 Mont. 688.

10. A quitclaim deed by a husband to land, after its sale on execution, conveys only his right of redemption, and not the wife's inchoate dower, though she is then a non-resident of the state.—Lynde v. Wakefield, 19 Mont. 23; 47 Pac. 5.

11. A purchaser under a quitclaim deed takes only such title as the grantor has, and subject to any prior deed by the grantor to the same person.—Wetzstein v. Largey, 27 Mont. 212; 70 Pac. 717.

IV. PLEADING AND EVIDENCE, 12-13.

12. Where the owner of real estate executes a deed to her daughters, from whom she takes back a life lease of the premises and some months later the owner, with one of her daughters, delivers to a third party a package containing the deed and lease, and inscribed with directions to deliver the same to the owner, and in case of her death to one of her daughters, and afterwards speaks of the deed as "the girls' deed," and occupies the premises under the lease till her death, the facts show a present delivery of the deed to the daughters.—Martin v. Flaherty, 13 Mont. 96; 32 Pac. 287.

13. Plaintiffs had, in order to defend a suit against them and others, for land, by persons claiming under a quartz location, located the land for themselves and the other defendants in such suit, and agreed that if plaintiffs therein were unsuccessful they would convey to each defendant who contributed his pro rata share of the expenses of the suit so much of the land as he was entitled to. Plaintiffs and the other defendants in such suit were successful, but, through the default of several owners of lots involved therein in payment of their share of expenses, plaintiffs were compelled to pay a deficiency of $500. One of these defaulting owners, whose pro rata share of expenses was $41, conveyed to defendant, who, after learning what title and interest plaintiffs claimed in the lot, had a notary make a deed to himself, without stating the consideration, and take it to plaintiffs, who named $200 as the consideration, and told the notary to ask defendant if that was satisfatcory. The notary, after consulting defendant, told plaintiffs that defendant wanted he deed, and did not care what consideration was inserted, and plaintiffs executed the deed with $200 named as the consideration. *Held*, that plaintiffs could recover that amount, it having been evidently named by them in order to secure a reimbursement for their expenditures.—Thomas v. Frank, 16 Mont. 297; 40 Pac. 762.

DEPOSITIONS.

I. Proceedings in Which Depositions May be Taken, 1.
II. Persons Authorized to Take Depositions, 2.
III. Execution of Commission, 3-4.
IV. Making and Requisites of Return, 5-8.
V. Objections, 9.

I. PROCEEDINGS IN WHICH DEPOSITIONS MAY BE TAKEN, 1.

1. Under Code Civ. Proc., § 3341, which provides that the testimony of a witness out of the state may be taken in a special proceeding at any time after a question of fact has arisen, a deposition may be taken in disbarment proceedings.—In re Wellcome, 23 Mont. 259; 58 Pac. 711.

II. PERSONS AUTHORIZED TO TAKE DEPOSITIONS, 2.

2. Under the Civil Code of 1867, §§ 404, 405, 408, as amended by Acts 1869, p. 66, § 17, depositions taken before a notary public in another state can not be read in evidence in the courts of Montana, notaries public not being enumerated among the officers authorized to take depositions out of the territory.—McCormick v. Largey, 1 Mont. 158.

III. EXECUTION OF COMMISSION, 3-4.

3. The certificate of a deposition, which does not state that the witness was sworn before giving his evidence, or that it was read to, or corrected by, the witness, is insufficient.—McCormick v. Largey, 1 Mont. 158.

4. Under Code Civ. Proc., §§ 3330, 3340, 3341, 205, in an application for letters of administration by the public administrator, where there is no contest, sworn declarations taken before a notary public in a foreign state are admissible to prove death and intestacy, though no commission to take depositions issued from the court, and no notice was given nor interrogatories prepared, as required by Code Civ. Proc., § 3350, subd. 1, relating to depositions of foreign witnesses.—In re Liter's Estate, 19 Mont. 474; 48 Pac. 753.

IV. MAKING AND REQUISITES OF RETURN, 5-8.

5. Under Civ. Code, §§ 404, 405, the certificate of the commissioner must show that the deposition was read to the witness and corrected by him.—McCormick v. Largey, 1 Mont. 158.

6. Under such statute, the certificate of the commissioner must show that the witness was sworn before giving his evidence.—Id.

7. Depositions taken out of this territory, before an officer other than a court or clerk of a court having a seal, must be authenticated by the certificate of a court or clerk having a seal that the person taking the deposition was, at the time, authorized to administer oaths. Civ. Code, 1867, §§ 404, 405, 408, as amended by Act Jan. 15, 1869, p. 66, § 17.—Id.

8. The authority of a deputy recorder in Arizona to give a certificate of the official character of a justice of the peace before whom a deposition was taken in that territory must be determined by the laws of such territory. (See 14 Otto 618.)—Fredericks v. Davis, 3 Mont. 251.

V. OBJECTIONS, 9.

9. Objections to a deposition, going only to the formalities of its execution, must be noted when the deposition is taken, or be raised by a motion to suppress before trial is begun.—Murray v. Larabie, 8 Mont. 208; 19 Pac. 574.

DESCENT AND DISTRIBUTION.

1. A wife's right to dower or election under Civ. Code, §§ 228, 236, is separate from her rights as an heir of her husband under § 1852.

and hence the fact that she participated in the distribution of the estate as an heir of her husband did not constitute a waiver of the right to dower or the statutory substitute for dower. —Dahlman v. Dahlman, 28 Mont. 373; 72 Pac. 748.

DISCOVERY.

I. In Equity, 1.

II. Under Statutory Provisions, 2-24.

- A. Physical examination, 2.
- B. Production and inspection of writings and other matters, 3-4.
- C. Grounds and purposes of inspection, 5.
- D. Nature of subject matter, 6-13.
- E. Application, 14-18.
- F. Order, 19-23.
- G. Mode of inspection, 24.

I. IN EQUITY, 1.

1. Equity has no jurisdiction, independent of statute, and in the absence of a statute, to order inspection of property.—State v. District Court, 26 Mont. 396; 68 Pac. 570; 69 Pac. 103.

II. UNDER STATUTORY PROVISIONS, 2-24.

A. Physical Examination, 2.
B. Production and Inspection of Writings and Other Matters, 3-4.
C. Grounds and Purposes of Inspection, 5.
D. Nature of Subject Matter, 6-13.
E. Application, 14-18.
F. Order, 19-23.
G. Mode of Inspection, 24.

A. PHYSICAL EXAMINATION, 2.

2. In an action for personal injuries, the district court, in the absence of legislation, may not compel plaintiff to submit to a phyiscal examination by physicians appointed by the court. —May v. Northern Pacific, 32 Mon. 522; 81 Pac. 328.

B. PRODUCTION AND INSPECTION OF WRITINGS AND OTHER MATTERS, 3-4.

3. Under Code Civ. Proc., § 1317, to entitle one to an inspection of a claim for the purpose of ascertaining or enforcing his right or interest in another claim, he must have an interest in the first claim, and the right of one owning a claim to follow a lode having its apex therein into another claim is not such an interest in the latter claim as to authorize his inspection and survey of it.—State v. District Court, 26 Mont. 396; 68 Pac. 570; 69 Pac. 103.

4. Under Const., art. 3, § 7, a court in which an action at law is pending has authority to make an order under Code Civ. Proc., § 1810, the statute conferring on law courts authority inherent in courts of equity, and defining the circumstances under which an inspection of papers will not be deemed an unreasonable search.—State v. District Court, 27 Mont. 441; 71 Pac. 602.

C. GROUNDS AND PURPOSES OF INSPECTION, 5.

5. Where, on an application for inspection of books and papers, it appeared that the evidence sought was desired for use in a pending action, and that it was in defendant's possession, and related to the merits of the action stated by plaintiff, it was not a prerequisite to the granting of such application that plaintiff should also show that the evidence could not be obtained from other sources.—State v. District Court, 30 Mont. 206; 76 Pac. 206.

D. NATURE OF SUBJECT MATTER, 6-13.

6. Plaintiff claimed that defendant had, by fraud and collusion, induced him to sell for a small consideration his interest in an option to purchase a mining claim, and had subsequently purchased the claim; and plaintiff sued to recover an interest therein. He obtained an order authorizing him to inspect all letter-press copy books of defendant containing any letters written by any of its officers to any other officer, for the purpose of ascertaining what letters there were relating to the claim and the acquisition. *Held*, that the order should have confined plaintiff to the inspection of such books as related to the purchase.—State v. District Court, 27 Mont. 441; 71 Pac. 602.

7. A provision in the order entitling plaintiff to copies of maps of all workings made by defendant in a certain year was too broad.—Id.

8. A provision in the order permitted inspection of all books of account showing transactions with the claim in controversy, and particularly such books as showed the amount and value of the ore extracted from it, and the expenditures made on account of it. *Held*, that the inspection should have been limited to particular accounts and items in the books which showed the facts mentioned, and should not subject defendant to have its books open in their entirety.—Id.

9. A provision in the order permitting an inspection of the stope sheets and stope books showing ore extracted from claims other than that in controversy was erroneous, plaintiff being entitled to an inspection of such books only to the extent that they showed ore extracted through the workings of such claims from the claim in controversy.—Id.

10. A provision in the order authorizing an inspection of all books and records of the company which had owned the claim before defendant was erroneous, as the inspection should be limited to an examination of only those portions of the books which related to the option of plaintiff or the sale of the claim to defendant. —Id.

11. For a like reason a provision in the order authorizing inspection of all books showing the cash account and investment account of defendant for a certain year was erroneous. —Id.

12. A provision in the order permitting an inspection of all letters written to defendant concerning the claim was too broad, as defendant could not be bound by statements in letters written to it by persons not connected with the transaction involved.—Id.

13. Where, in an action to have defendant declared a constructive trustee of a certain estate in a mining claim, plaintiff claimed that he had been deprived of the same by reason of a fraudulent conspiracy by defendant and certain others, by means of which defendant acquired title to the claim, an order for inspection of defendant's books and papers with reference to such claim should have been limited to such of the correspondence between defendant's executive officers and its agents through whom the purchase of the claim was made as related to the acquisition of the title to such claim. —State v. District Court, 30 Mont. 206; 76 Pac. 206.

E. APPLICATION, 14-18.

14. Inspection should not be granted of a mine not described in the petition, under the authority of Code Civ. Proc., § 1317, for inspection and survey of a mine, on petition.—State v. District Court, 26 Mont. 396; 68 Pac. 570; 69 Pac. 103.

15. Where the affidavits in support of an application for the examination of defendant's books and papers contained no statement that an action was pending in the court, and failed to apprise the court of the nature of the action and relief sought, the application should not be granted.—State v. District Court, 27 Mont. 441; 71 Pac. 602.

16. Under Code Civ. Proc., § 1810, providing that a court in which an action is pending may order either party to give the other an inspection or copy of book entries or of documents or papers containing evidence as to the merits of the action or defense, the court, before making the order, must determine from the moving papers that an action is pending, and that the writings subject to be inspected contain competent evidence, material to the issues, or necessary to enable the moving party to prepare for trial; and hence the moving papers must affirmatively show that such action is in fact pending.—State v. District Court, 29 Mont. 363; 74 Pac. 1078.

17. The court must determine from the facts set forth in the moving papers whether any necessity exists for the order; and affidavits which do not set forth any facts, but merely affiant's conclusion that such inspection is necessary, are insufficient.—Id.

18. Where, in an action to have defendant declared a constructive trustee of an interest in a mining claim, plaintiff applied for an inspection of certain books and papers, together with defendant's workings of the mine, and defendant appeared at the hearing and filed a counter affidavit which controverted none of the statements contained in plaintiff's affidavit as to the existence of the letters and other documents, defendant's possession thereof, or that they related to the merits of the action, but only denied that defendant was in possession of such records, etc., "within the state of Montana," it was no objection that the affidavits on which plaintiff's application was based were on information and belief.—State v. District Court, 30 Mont. 206; 76 Pac. 206.

F. ORDER, 19-23.

19. The order authorized by Code Civ. Proc., § 1317, for inspection and survey of a mine for protection of petitioner's interest therein or in another mine, should be limited to the necessities of the case, and explicitly state how far it may go.—State v. District Court, 26 Mont. 396; 68 Pac. 570; 69 Pac. 103.

20. An order for the examination of defendant's books and papers, containing no limitation on the time within which inspection shall be made, is void.—State v. District Court, 27 Mont. 441; 71 Pac. 602.

21. Under Code Civ. Proc., § 1810, an order granting an inspection is defective, where it fails to fix the time at which the inspection shall begin and when it shall be completed.—State v. District Court, 30 Mont. 206; 76 Pac. 206.

22. Where defendant appeared and resisted a motion for an inspection on its merits, without objecting that the required formalities of demand and notice had not been fully complied with, and it appeared that the action in which the evidence sought was to be used was then pending, and that such evidence was not in plaintiff's possession, but was under defendant's control, and related to the merits of the action, defendant could not object that the order for such inspection was prematurely made.—Id.

23. Where an order directed defendant to permit plaintiff to inspect original letters in defendant's possession, a further provision that plaintiff should also be permitted to examine "letterpress copies of such letters" was erroneous.—Id.

G. MODE OF INSPECTION, 24.

24. Under the authority in Code Civ. Proc., § 1317, to order inspection of a mine to ascertain and protect the interest of petitioner, all the appliances for use for ingress and egress may be made available for the persons making the inspection.—State v. District Court, 26 Mont. 396; 68 Pac. 570; 69 Pac. 103.

DISMISSAL AND NONSUIT.

I. Voluntary, 1-6.

II. Involuntary, 7-11.

I. VOLUNTARY, 1-6.

1. The plaintiff in an action can move to set aside a nonsuit, when he has consented to it, upon its becoming apparent, from the rulings of the court, that he could not recover, basing his motion upon alleged error in the rulings of the court, which induced him to consent to the nonsuit. (See 18 Wall. 657.)—Conner v. McPhee, 1 Mont. 73.

2. Under Code Civ. Proc., § 1004, subd. 1, where a receiver had been appointed plaintiff could not dismiss his action until payment of such receiver's compensation, since such expense is a taxable cost on the losing party.—State v. Lindsay, 24 Mont. 352; 61 Pac. 883.

3. Plaintiff in a partition suit could not dismiss his action after answer filed setting up defendant's interest in lands in question, since such answer sought affirmative relief.—Id.

4. Code Civ. Proc., § 1004, provides that an action may be dismissed or a nonsuit entered by the plaintiff at any time before trial, on payment of costs, and that the dismissal is made by entry in the clerk's register; and § 1008 provides that, on the dismissal of an action, it is the duty of the court to render such judgment for costs. *Held*, that under the statutes, and in view of the legislative intent as evidenced by Laws 1871-1872, p. 63, and Laws 1874-1875, p. 18, Code Civ. Proc., § 244, when a plaintiff at any time before trial files a præcipe with the clerk for the dismissal of the action, and the dismissal has been entered on the register of actions, the case is dismissed, and has passed beyond the jurisdiction of the court, save for the sole purpose of entering a judgment for costs in favor of defendant, under Code Civ. Proc., § 1008.—Miller v. Northern Pacific, 30 Mont. 289; 76 Pac. 691.

5. The argument and submission to the court of a motion for judgment on the pleadings on the ground that defendant's answer containing allegations of new matter which were admitted by plaintiff's failure to reply, is a "trial" within Code Civ. Proc., § 1004, subd. 1.—State v. District Court, 32 Mont. 37; 79 Pac. 546.

6. Under Code Civ. Proc., § 722, as amended by Laws 1899, p. 142, where a motion for judgment on the pleadings on plaintiff's failure to reply to an answer alleging new matter has been argued and submitted, it is too late for plaintiff to dismiss the action.—Id.

II. INVOLUNTARY, 7-11.

7. The dismissal of an action is, in effect, a final judgment against the plaintiff, although he has a right to bring a new action for the same subject matter.—Dahler v. Steele, 1 Mont. 206.

8. Judgment of nonsuit should not be entered when the answer admits one cause of action in the complaint.—Gans v. Woolfolk, 2 Mont. 458.

9. Where proof shows that too many persons have been joined as defendants, such misjoinder will be deemed waived unless taken advantage of by answer or demurrer.—Conklin v. Fox, 3 Mont. 208.

10. Where, in an action on a note, defendants alleged that the note is secured by a mortgage which has been foreclosed, the fact that at the commencement of the action plaintiff made an affidavit for attachment, in which he stated that without his fault such security had become worthless, could not affect the action of the court on a motion for non-suit, where such affidavit was not offered in evidence.—Brophy v. Downey, 26 Mont. 252; 67 Pac. 312.

11. Where a complaint joins two causes of action, the first to recover damages for trespasses upon mining property, and the second a statutory action, under Code Civ. Proc. § 1310, to quiet title to the premises in controversy and for an injunction to restrain defendant from trespassing thereon, or asserting any right or title thereto, the latter action was not ancillary to the former, but a wholly independent cause of action; and hence the dismissal by the plaintiff of the first cause of action did not operate as an abatement of the second cause of action.—M. O. P. Co. v. Mining Co., 27 Mont. 288; 70 Pac. 1114.

DISORDERLY HOUSE.

1. An information charging defendant with having, keeping and maintaining at a certain time and place a house of ill fame, commonly called a "bawdy house," open to the public night and day for common bawdry, and resorted to for the purpose of prostitution and lewdness, and that defendant, for her own lucre and gain, and men and women of evil name and fame, and of dishonest conversation, did there frequent and come together, and did at said times specified remain whoring, to the common nuisance of all good citizens, is sufficiently specific in its facts, and the court did not err in overruling the defendant's motion requiring the state to furnish a bill of particulars, or more specific statement of facts or evidence whereby to prove the charge.—State v. Hendricks, 15 Mont. 194; 39 Pac. 93.

2. Upon the trial of a person charged with keeping a bawdy house, evidence of the general reputation of defendant is competent and admissible to prove the intent of the keeper.—Id.

3. On a prosecution for keeping a bawdy house it is competent to prove by reputation the character of the house, where there are other facts or circumstances in connection therewith which satisfy the jury beyond a reasonable doubt that the house is not only one of ill fame, but is actually used for the purposes of prostitution and lewdness.—Id.

4. On a prosecution for keeping a bawdy house evidence of the general reputation of the women who frequent the house is admissible.—Id.

5. On a prosecution for keeping a bawdy house, where the jury are properly instructed that the actual keeping and use of the house for purposes of prostitution and lewdness must be shown beyond a reasonable doubt, to justify a conviction, an instruction not pertinent to the testimony, that the character of the house could be proved by reputation, is not prejudicial error, where the actual use of the house for bawdy purposes was proved and where no testimony at all as to the reputation of the house was introduced.—Id.

DIVORCE.

I. Nature and Form of Remedy, 1.
II. Grounds, 2.
III. Defenses, 3-5.
IV. Jurisdiction, Proceedings, and Relief, 6-19.
A. Jurisdiction and venue, 6.
B. Pleading, 7.
C. Evidence, 8-9.
D. Trial, 10-13.
E. Judgment or decree, 14-15.
F. Appeal, 16-17.
G. Fees and costs, 18-19.
V. Alimony, Allowance, and Disposition of Property, 19a-32.
A. Temporary alimony, 19a-21.
B. Allowance for counsel fees and expenses, 22-27.
C. Enforcement of order, judgment, or decree, 28-32.
VI. Custody and Support of Children, 33-34.
VII. Operation and Effect of Divorce, 35.

I. NATURE AND FORM OF REMEDY, 1.

1. Proceedings for divorce constitute a chancery case, differing only in that the law requires a trial by jury of the issues on the grounds for divorce, if the allegations of the complaint are denied.—Black v. Black, 5 Mont. 15; 2 Pac. 317.

II. GROUNDS, 2.

2. One beating or whipping of a wife by her husband is sufficient to constitute extreme cruelty.—Albert v. Albert, 5 Mont. 577; 6 Pac. 23.

III. DEFENSES, 3-5.

3. No words can justify an assault by a husband upon his wife, so as to afford a defense to a charge of extreme cruelty.—Albert v. Albert, 5 Mont. 577; 6 Pac. 23.

4. For several years a husband had been guilty of acts of violence to his wife, and of continued drunkenness. A final separation occurred in January, 1889. The wife began suit for divorce in April, 1889, and, just before she did so, the husband, armed, intoxicated, and threatening to kill her, broke into her house, and drove her therefrom. *Held*, that the husband's offenses were not condoned by the cohabitation of the wife with him until October, 1888.—Morrison v. Morrison, 14 Mont. 8; 35 Pac. 1.

5. In an action for divorce on the ground of a wife's adultery, where plaintiff's witnesses informed him of such adultery within two or three days after its occurrence, on Dec. 23, 1897, and, notwithstanding such knowledge, he continued to live with defendant as his wife until Jan. 26, 1898, occupying the same room with her, in which there was but one bed, etc., he thereby condoned her offense, and was not entitled to a divorce by reason thereof, under Civ. Code, §§ 160, 163, 164.—Bordeaux v. Bordeaux, 30 Mont. 36; 75 Pac. 524.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF, 6-19.

A. JURISDICTION, 6.
B. PLEADING, 7.
C. EVIDENCE, 8-9.
D. TRIAL, 10-13.
E. JUDGMENT OR DECREE, 14-15.
F. APPEAL, 16-17.
G. FEES AND COSTS, 18-19.

A. JURISDICTION, 6.

6. Where a married woman, living with her husband in Arizona, goes to Montana to spend the summer, but, on hearing that her husband has commenced an action for divorce, returns to Arizona, and is there served with summons, and thereafter, before decree rendered, returns to Montana, there is no evidence that she is a non-resident.—State v. Giroux, 19 Mont. 149; 47 Pac. 798.

B. PLEADINGS, 7.

7. While, generally speaking, condonation in divorce is a defense not available unless pleaded, when, though not pleaded, the issue has been contested in the evidence without objection, and it clearly appears that the offense alleged in the complaint has been condoned, the divorce will be denied.—Bordeaux v. Bordeaux, 32 Mont. 159; 80 Pac. 6.

C. EVIDENCE, 8-9.

8. In a divorce suit against a husband for continued drunkeness and acts of violence, evidence of his failure or neglect to support his wife is admissible to show the general tenor of his conduct towards her, but not as a ground of divorce.—Morrison v. Morrison, 14 Mont. 8; 35 Pac. 1.

9. In divorce, evidence considered and *held* sufficient to show that the offense charged in the complaint, if committed, had been condoned.—Bordeaux v. Bordeaux, 32 Mont. 159; 80 Pac. 6.

D. TRIAL, 10-13.

10. Under Rev. Stat., p. 513, § 508, divorce cases are of chancery jurisdiction, and in such cases the decree must proceed from the chancellor, and verdicts of special findings in such cases being merely advisory, may be approved or disregarded as the conscience of the chancellor may demand.—Beck v. Beck, 6 Mont. 318; 12 Pac. 694.

11. Comp. Stat., p. 128, § 275, which provides for the submission of special findings to be returned by the jury, applies to divorce suits. —Morrison v. Morrison, 14 Mont. 8; 35 Pac. 1.

12. Where, in a suit, for divorce on the ground of adultery, plaintiff's wife, by way of recrimination, alleged cruelty and desertion as grounds for divorce against plaintiff, which he denied by replication, and the jury specially found against defendant on both grounds, but the court set aside such findings, and denied defendant's application to make findings on the issues in the case other than those presented by the complaint, and granted plaintiff a divorce, without making any findings on the issues made by defendant's crossbill, plaintiff's judgment could not be sustained, under Civ. Code, §§ 132, 160, 170.—Bordeaux v. Bordeaux, 30 Mont. 36; 75 Pac. 524.

13. Where, in a suit for divorce, defendant, by crossbill, alleged extreme cruelty and desertion in recrimination, which plaintiff denied, and the court set aside findings by the jury against defendant on such issues, and granted plaintiff a divorce, findings against defendant on the issues raised by the crossbill could not be implied.—Id.

E. JUDGMENT OR DECREE, 14-15.

14. On a motion to set aside a judgment by default in a divorce suit it appeared that defendant had a meritorious defense; that she was a non-resident, and, upon receiving the summons, engaged counsel in the town where she lived, who wrote to an attorney where the suit was brought, requesting him to take the case; that the latter attorney, after agreeing to appear, and after a verified answer had been sent to him, upon refusal of defendant to accept a compromise, shortly before the judgment was rendered, wrote that he would withdraw from the case unless such compromise was accepted, and, after receipt of a telegram refusing the same, returned unopened the letters explaining such refusal. *Held*, that the judgment should be set aside.—Simpkins v. Simpkins, 14 Mont. 386; 36 Pac. 759.

15. The fact that plaintiff had remarried immediately after the judgment was no ground for refusal to set it aside.—Id.

F. APPEAL, 16-17.

16. The supreme court has no power under Const., art. 8, §§ 2, 3, 11, or under the statutes, nor any inherent power, to allow temporary alimony or suit money after the appeal in a divorce case, the suit being still pending in the district court, as an appeal in equity does not operate to bring the entire case before the court, but only authorizes a trial of questions of law, and an affirmance, modification or reversal of the judgment, or remand for further proceedings, as authorized by Code Civ. Proc. § 21.—Bordeaux v. Bordeaux, 26 Mont. 533; 69 Pac. 103.

17. Where, in divorce, defendant moved for suit money and counsel fees before trial, a denial of attorneys' fees and refusal to allow more than $200 suit money, was not prejudicial to defendant, it appearing that she was represented by eminent counsel, and nothing appearing to show that she did not have all the witnesses she desired, though her application showed that she had spent over $1,000 in preparing the case, and that she owed about $900 of such sum.—Bordeaux v. Bordeaux, 32 Mont. 159; 80 Pac. 6.

G. FEES AND COSTS, 18-19.

18. Costs in a divorce suit are in the discretion of the court.—Black v. Black, 5 Mont. 15; 2 Pac. 317.

19. If a third party voluntarily intrudes himself into a divorce suit for his own ends, he may be taxed to pay the costs.—Id.

V. ALIMONY, ALLOWANCE, AND DISPOSITION OF PROPERTY, 19a-32.

A. TEMPORARY ALIMONY, 19a-21.
B. ALLOWANCE FOR COUNSEL FEES AND EXPENSES, 22-27.
C. ENFORCEMENT OF ORDER, JUDGMENT, OR DECREE, 28-32

A. TEMPORARY ALIMONY, 19a-21.

19a. In a divorce case, wherein plaintiff alleged that she was defendant's lawful wife by a marriage in Russia, defendant denied the validity of the marriage, but admitted long continued cohabitation and the birth of four children. Defendant also charged plaintiff with

adultery, and alleged that he had obtained a Mosaic divorce from her. *Held*, that there was sufficient prima facie proof of marriage to entitle plaintiff to alimony pendente lite.—Finkelstein v. Finkelstein, 14 Mont. 1; 34 Pac. 1090.

20. Where it appears that defendant is conducting a large tailoring business, though in another's name, an allowance of $30 per month as temporary alimony and $50 as counsel fee is not unreasonable.—Id.

21. Under Civ. Code, § 191, and Code Civ. Proc., §§ 1730, 1895, the district court has jurisdiction, notwithstanding a judgment in favor of the husband for divorce, at any time prior to the determination of the appeal from the judgment or prior to the expiration of the time for appeal to require the husband to pay any money necessary to enable the wife to support herself, or to further prosecute or defend the action.—Bordeaux v. Bordeaux, 29 Mont. 478; 75 Pac. 359.

B. ALLOWANCE FOR COUNSEL FEES AND EXPENSES, 22-27.

22. While the district court may allow a wife, against whom judgment of divorce has been rendered, costs and expenses incident to the preparation and presentation of an appeal, such allowance can not be made while a motion for new trial is pending, and before the appeal has been taken.—Bordeaux v. Bordeaux, 29 Mont. 478; 75 Pac. 359.

23. Under Civ. Code, § 191, the court has no power, after trial and judgment, to compel the husband to pay for past services of attorneys, or for expenses incurred in the trial, except when such payment is necessary to enable the wife to continue her prosecution or defense.—Id.

24. In order to empower the court to allow a wife money to pay for past services of attorneys, it must be shown that such allowance is necessary to enable her to continue her prosecution or defense; and the fact that the court refused to allow such money during the trial, and reserved the right to allow it until after the trial, does not show a necessity for the allowance.—Id.

25. Although judgment for divorce is passed against a wife, the court may allow her, on a proper showing, reasonable costs, expenses and attorney's fees for services to be rendered in the preparation and presentation of a motion for new trial, notice of which has been given.—Id.

26. While the district court may allow a wife, against whom a judgment for divorce has been entered, money necessary to enable her to prepare her statement or bill of exceptions on motion for new trial, a necessity for such allowance must be shown.—Id.

27. Where, in an action for divorce, plaintiff alleged that his wife had been guilty of desertion and adultery, which she denied, and, on her application for suit money and attorney's fees, it appeared that plaintiff had property of the value of $60,000, and it was uncontradicted that a much larger sum than $200 was necessary to enable defendant to properly prepare her defense, together with her cause of action for a divorce on the ground of desertion and extreme cruelty, alleged in a crossbill, an order denying defendant's application for attorney's fees, and allowing only $200 for suit money, was an abuse of discretion.—Bordeaux v. Bordeaux, 30 Mont. 36; 75 Pac. 524.

C. ENFORCEMENT OF ORDER, JUDGMENT, OR DECREE, 28-32.

28. In divorce proceedings, where the district court has punished the disobedience to an order for alimony pendente lite of the defendant, residing out of the territory, by striking out his answer, and, on application of defendant's counsel, has overruled the order striking out the answer, and has modified the order for alimony, the court is justified, on such modified order being disobeyed, in again ordering the answer to be stricken out, and referring the case as on a default, and defendant can not be heard to complain that he had no notice of the modified order.—Zimmerman v. Zimmerman, 7 Mont. 114; 14 Pac. 665.

29. The action of divorce being a chancery proceeding under Rev. Stat., p. 513, § 508, the district court has power to punish contempt in refusing to pay alimony awarded by it, by striking the defendant's answer from the record, in a case in which, defendant being absent from the territory, punishment for contempt can not be otherwise inflicted.—Id.

30. It is error to refuse to hear a petition by one committed for contempt for non-payment of alimony, which sets up inability to pay same, and prays a modification of the order for alimony.—Nixon v. Nixon, 15 Mont. 6; 37 Pac. 839.

31. One ordered to pay alimony, to protect himself from contempt proceedings for noncompliance therewith, because of stress of circumstances, should apply for revocation or modification of the order.—State v. District Court, 31 Mont. 511; 79 Pac. 13.

32. A divorce bill is still in the district court, notwithstanding pendency of an appeal, so as to authorize the lower court, by contempt proceedings, to compel obedience to its order for payment of alimony.—Id.

VI. CUSTODY AND SUPPORT OF CHILDREN, 33-34.

33. Where a father is fitted in character and ability to retain the custody of his son, seven years of age, and such custody is awarded him by the decree of divorce rendered against his wife, in a foreign state, for misconduct, the son will be given over to the father, in accordance with the decree.—State v. Giroux, 19 Mont. 149; 47 Pac. 798.

34. Under Civ. Code, § 192, the court should, on its own motion, where the parents make no petition, inquire into the facts and make the necessary order for the custody of the children, and must do so when moved by either party, irrespective of whether such party was in default or not, in the suit, or whether he or she was the guilty party; and, if a mistake is made in the first instance, the court should remedy the same, on a proper showing, as soon thereafter as possible.—Pearce v. Pearce, 30 Mont. 269; 76 Pac. 289.

VII. OPERATION AND EFFECT OF DIVORCE, 35.

35. Where the judgment roll in an action for divorce in a foreign state shows nothing on its face indicating that the decree was void, and there is evidence from the clerk who issued the summons, and the sheriff who served it, that there was no fraud in the service of such summons upon defendant, there is no evidence upon which to base a finding that the divorce was void.—State v. Giroux, 19 Mont. 149; 47 Pac. 798.

DOWER.

1. Comp. Stat., p. 68, c. 3, providing for the limitation of actions other than for the recovery of real property, which provides (§ 47) that "an action for relief not here-

inbefore provided for must be commenced within three years after the cause of action shall have accrued," does not apply to actions for the assignment of dower.—Burt v. Sheep Co., 10 Mont. 571; 27 Pac. 399.

2. Comp. Stat., p. 65, § 29, which provides that "no action for the recovery of real property * * * can be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within five years before the commencement of the action," does not apply to actions for the assignment of dower.—Id.

3. A purchaser at a sheriff's sale of land of the husband, on judgment against him, takes subject to the wife's right of dower.—Lynde v. Wakefield, 19 Mont. 23; 47 Pac. 5.

4. Comp. Stat., p. 68, c. 3, relating to the limitation of actions other than for the recovery of real property, which provides (§ 47) that "an action for relief not herein provided for must be commenced within three years after the cause of action shall have accrued," does not apply to actions for the assignment of dower.—Id.

5. When a court is exercising its probate jurisdiction it has no power with reference to dower, and can make no orders affecting a widow's dower right.—In re Dahlman, 28 Mont. 379; 72 Pac. 750.

EASEMENTS.

1. A water right legally acquired, is in the nature of an easement in gross, which, according to circumstances, may or may not be an easement annexed or attached to certain land as an appurtenant thereto.—Smith v. Denniff, 24 Mont. 20; 60 Pac. 398.

2. An easement can become legally attached to a parcel of land as appurtenant thereto only by unity in the same person to both the dominant estate and the easement claimed.—Id.

3. Where one holds land by defective or inchoate title, and servitude upon or easement in it by a valid title, the servitude or easement is not extinguished by unity of possession.—Id.

4. An easement in land can not be created by parol.—Great Falls W. W. Co. v. Great Northern, 21 Mont. 487; 54 Pac. 963.

5. Under a deed of a right to lay a water main from a pumping station, and "after crossing (a certain railroad branch), along the southerly line of the right of way of said branch to Tenth avenue," the main should intersect the branch at the closest point therein from the pumping station.—Id.

6. Plaintiff for several years had hauled the ore from its mine across defendant's land to a public highway. The public had traveled across the land where they chose since 1886, but the particular road since traveled by palintiff was constructed by persons hauling its ores under contract in 1893. *Held*, that plaintiff had not acquired a prescriptive right to such road under Comp. Stat., p. 65, § 29, fixing a limitation of five years for actions to recover real property, when the Code of Civil Procedure took effect, Jul. 1, 1895, which, in § 483, prescribes a limitation of 10 years, since such road over uninclosed land can not be acquired until the travel has been confined to a particular way for the length of time prescribed by such statute.—M. O. P. Co. v. Mining Co., 25 Mont. 427; 65 Pac. 420.

7. An easement claimed on lands in possession of defendants can not be adjudged in a suit in which the owner is not a party.—Campbell v. Flannery, 32 Mont. 119; 79 Pac. 702; 80 Pac. 240.

EJECTMENT.

I. Right of Action and Defenses, 1-7.
- A. Property which may be subject to action, 1.
- B. Title to support action, 2.
- C. Defenses, 3-7.

II. Pleading and Evidence, 8-24.
- A. Pleading, 8-18.
- B. Issues, proof, and variance, 19-21.
- C. Presumptions and burden of proof, 22-23.
- D. Evidence, 24.

III. Trial, Judgment, Enforcement of Judgment, and Review, 25-31.
- A. Course and conduct of trial, 25.
- B. Nonsuit, 26.
- C. Verdict, 27.
- D. Judgment, 28-30.
- E. Appeal, 31.

IV. Rents and Profits, and Improvements, 32.

I. RIGHT OF ACTION AND DEFENSES, 1-7.

A. Property Which May be Subject to Action, 1.
B. Title to Support Action, 2.
C. Defenses, 3-7.

A. PROPERTY WHICH MAY BE SUBJECT TO ACTION, 1.

1. Ejectment will lie at the suit of a riparian owner on a navigable stream to recover possession of land between high and low water mark from one who is in possession thereof, not claiming rights as a navigator or fisherman.—Gibson v. Kelley, 15 Mont. 417; 39 Pac. 517.

B. TITLE TO SUPPORT ACTION, 2.

2. Plaintiff in ejectment must prove that, when the suit was brought, the title or right to immediate possession was in himself, and that defendant unlawfully withheld possession.—Herbert v. King, 1 Mont. 475.

C. DEFENSES, 3-7.

3. An equitable defense is not available in an action of ejectment.—Reece v. Roush, 2 Mont. 586.

4. An answer averring a contract of purchase from a railroad company by virtue of the provisions of a circular issued by the company, containing a proposal to bona fide settlers to give them a preference in the sale of the company's agricultural lands, and waiving notice of application to purchase, but which fails to aver mutual obligation by acceptance of the contract by them in writing, is demurrable.—Billings v. Sanderson, 8 Mont. 201; 19 Pac. 307.

5. Defendants in ejectment pleaded that, prior to the issuance of patent to plaintiffs, the residents in the gulch where were situated the premises in controversy, consisting of a part of the surface of a mining claim then located, held a meeting at which it was resolved to lay out the surface of the gulch for a townsite, and to keep a record of the transfers of the lots, two of which could be taken up by each person; that, in pursuance thereof, defendants' grantor took up the premises in controversy, and made valuable improvements; and that the owners of the claims from whom plaintiffs took title were aware of the proceedings,—one of them partici-

pating in the meeting, and one took up town lots. *Held*, that the facts did not constitute an equitable defense. (See 164 U. S. 325.)—Mayer v. Carothers, 14 Mont. 274; 36 Pac. 182.

6. Equitable defenses, as well as defenses at law, may be interposed in actions in ejectment, but, in such cases, the answer must contain all the allegations necessary to constitute the defense or warrant the relief sought.—Power v. Sla, 24 Mont. 243; 61 Pac. 468.

7. In ejectment for building on plaintiff's premises, the fact that defendant was ignorant of the boundary line, and the intrusion was the result of his mistake or inadvertence, is no defense.—Hamilton v. Murray, 29 Mont. 80; 74 Pac. 75.

II. PLEADING AND EVIDENCE, 8-24.

A. Pleading, 8-18.
B. Issues, Proof, and Variance, 19-21.
C. Presumptions and Burden of Proof, 22-23.
D. Evidence, 24.

A. PLEADING, 8-18.

8. A complaint alleged that plaintiff was seized in fee and entitled to immediate possession, that defendants are in possession and withholding the same, and that plaintiff has been damaged in a certain sum. *Held*, to be sufficient.—McCauley v. Gilmer, 2 Mont. 202.

9. A demurrer to an answer by defendant in ejectment admits only so much of the new matter as goes to make a proper defense, and the rest may be regarded as immaterial and surplusage.—Meyendorf v. Frohner, 3 Mont. 282.

10 In an action involving the legal title alone a complaint is sufficient which alleges that the plaintiff is seized in fee or for life or years, that the defendant was in possession at the time of the commencement of the action, and that he withholds possession of the same, and such complaint must also be sufficient in an action where equitable relief is sought, depending entirely upon the legal title.—Mauldin v. Ball, 5 Mont. 96; 1 Pac. 409.

11. A complaint in ejectment is good if it aver the seisin of the plaintiff, the possession of defendant at the time of the commencement of the action, and the withholding of possession. —Northern Pacific v. Lilly, 6 Mont. 65; 9 Pac. 116.

12. In ejectment by the purchaser at a sale under a power of sale in a mortgage, the insufficiency of the description of the personalty in the notice of sale, where the realty is particularly described, is not material, especially where it is pleaded as in the mortgage. (See 156 U. S. 470.)—First Nat'l Bank v. Mining Co., 8 Mont. 32; 19 Pac. 403.

13. A complaint which avers seizin and possession, and that, while so seized and possessed, defendants entered and ousted plaintiff, together with appropriate averments as to description, time, place and damage, states facts sufficient to constitute a cause of action.—Billings v. Sanderson, 8 Mont. 201; 19 Pac. 307.

14. A complaint averring that plaintiff "is seized in fee, and possessed of and entitled to the possession and occupation, of a certain tract or parcel of land," is sufficient, without stating how he became seized.—Id.

15. A complaint in ejectment alleging that on a certain day plaintiff was the owner, seized in fee, and entitled to the posession of the premises demanded, and that afterwards, while plaintiff was so seized, defendant, on the — day of March, 1889, without right or title, entered into possession and ousted plaintiff, is not demurrable or subject to a motion to make more definite.—First Nat'l Bank v. Roberts, 9 Mont. 323; 23 Pac. 718.

16. In ejectment, where the general description in the complaint is different from that by courses and distances, the latter control.—Haggin v. Lorenz, 15 Mont. 309; 39 Pac. 285.

17. Where a complaint in ejectment does not describe any land in possession of defendant, it can not, after judgment thereon by default, be so amended as to describe such land.—Id.

18. In order to support a judgment in ejectment the complaint should describe the land with such certainty and definiteness as to enable an officer to identify the land from the description itself without reference to other sources of information.—Tracy v. Harmon, 17 Mont. 465; 43 Pac. 500.

B. ISSUES, PROOF, AND VARIANCE, 19-21.

19. In ejectment defendant, under a general denial, may show title in himself, but the allegation of such title in the answer does not constitute new matter and therefore does not present a new issue, but is mere surplusage.—Meyendorf v. Frohner, 3 Mont. 282.

20. A party who desires to avail himself of an equitable title, must plead it specially, or he will not be permitted to give evidence thereon.—Lamme v. Dodson, 4 Mont. 560; 2 Pac. 298.

21. Under an answer admitting possession of the premises demanded, described by lots and block, and alleging title in defendants, it can not be shown that the lots demanded are not coincident with those held by defendants, by reason of variance between different plats of the townsite.—Ming v. Foote, 9 Mont. 201; 23 Pac. 515.

C. PRESUMPTIONS AND BURDEN OF PROOF, 22-23.

22. He who holds the legal title to real property is presumed to have the right to possession until a better right is shown.—Lamme v. Dodson, 4 Mont. 560; 2 Pac. 298.

23. In an action in ejectment, the burden is upon defendant to establish his claim of adverse possession.—Jennings v. Gorman, 19 Mont. 545; 48 Pac. 1111.

D. EVIDENCE, 24.

24. Where, in ejectment, defendant introduces evidence to show exclusive possession for a length of time sufficient to give him title, the plaintiff should be allowed, in rebuttal, to introduce evidence to the contrary.—Jennings v. Gorman, 19 Mont. 545; 48 Pac. 1111.

III. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW, 25-31.

A. Course and Conduct of Trial, 25.
B. Nonsuit, 26.
C. Verdict, 27.
D. Judgment, 28-30.
E. Appeal, 31.

A. COURSE AND CONDUCT OF TRIAL, 25.

25. In ejectment, the court may separately try the issues raised by legal and equitable defenses.—Chambers v. Jones, 17 Mont. 156; 42 Pac. 758.

B. NONSUIT, 26.

26. In ejectment where there is no proof to support a necessary and fatal averment of the complaint, a nonsuit may be properly granted.—Herbert v. King, 1 Mont. 475.

C. VERDICT, 27.

27. Plaintiff in ejectment alleged ownership and possession, and ouster by defendant. Defendant's answer denied all of plaintiff's allegations. On the trial the controverted issue was as to the location of a boundary line. The jury returned a verdict "in favor of the plaintiff and against the defendant for the possession of the premises in controversy," etc. *Held*, that the verdict was bad, as not responding to all the material issues.—Hamilton v. Murray, 29 Mont. 80; 74 Pac. 75.

D. JUDGMENT, 28-30.

28. A complaint describing a house and lot "⅛ of a mile westerly" from a certain point will not support a judgment for a house and lot "⅛ of a mile easterly" from the same point, though the person alleged to reside at the former point resides at the latter.—Foster v. Wilson, 5 Mont. 53; 2 Pac. 310.

29. Where a complaint in ejectment does not describe any land in possession of defendant, it can not, after judgment thereon by default, be so amended as to describe such land.—Haggin v. Lorenz, 15 Mont. 309; 39 Pac. 285.

30. In ejectment to recover an undivided interest in a mining claim, a judgment in favor of plaintiff should be for the possession of such interest, and not for that of the whole mining claim.—Keefe v. Doreland, 16 Mont. 16; 39 Pac. 916.

E. APPEAL, 31.

31. Where defendant in ejectment was adjudged to be in wrongful possession, and no writ had been issued to put plaintiff in possession, and defendant appealed, and is ready to furnish security for stay of execution, the amount of security should be fixed, whether defendant was in possession or not.—State v. District Court, 24 Mont. 330; 61 Pac. 882.

IV. RENTS AND PROFITS, AND IMPROVEMENTS, 32.

32. In ejectment, where the evidence of defendant shows the erection of improvements on the lot in controversy, estimated by various witnesses at a value of from $400 to $1,000, and the replication admits improvements of the value of $400, the sum of $400 should be offset against the judgment for rents and profits.—Parrott v. Hungelburger, 9 Mont. 526; 24 Pac. 14.

ELECTIONS.

I. Right of Suffrage and Regulation Thereof, 1.
II. Election Officers, 2-3.
III. Qualifications of Voters, 4.
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X. Violations of Election Laws, 96.

I. RIGHT OF SUFFRAGE AND REGULATION THEREOF, 1.

1. Laws 1897, p. 136, amending Pol. Code, §§ 1770-1782, relating to the election of school trustees, does not violate Const., art. 3, § 5, providing for free suffrage, because when the polls closed at the first election under said act a number of persons who had stood in line for some time, awaiting their turn to vote, had not cast their ballots, and were unable to do so.—State v. Long, 21 Mont. 26; 52 Pac. 645.

II. ELECTION OFFICERS, 2-3.

2. Where a statute authorizes a special election for a change of county seat, and provides no method of holding it, the election is good if conducted according to the general law on the subject, and if there is a fair vote and

an honest count the qualified voters must not be disfranchised by having the election declared void, because the officers conducting the same were not duly sworn or chosen, or were not qualified for the office, or for any technical irregularity.—Wells v. Taylor, 5 Mont. 202; 3 Pac. 255.

3. The failure of the judges of election to take the oath prescribed by law is not sufficient to invalidate the votes cast.—Heyfron v. Mahoney, 9 Mont. 497; 24 Pac. 93.

III. QUALIFICATIONS OF VOTERS, 4.

4. The registration oath prescribed by Laws 1897, p. 136, amending Pol. Code, §§ 1770-1782, relating to school elections, recites, in case of non-citizenship, "I am entitled to become a citizen of the United States, and it is my honest intention to become such before the school election day of this year." Sec. 1779 preserves the right of challenge, and by the oath put upon a challenge the voter must swear that he is a citizen of the United States. *Held*, that an alien can not vote at a school election thereunder.—State v. Long, 21 Mont. 26; 52 Pac. 645.

IV. REGISTRATION OF VOTERS, 5-9.

5. Pol. Code, § 5181, adopted Mar. 13, 1895, provides that Laws 1893 and 1895 shall remain in full force and effect, in like manner as if enacted after the adoption of the Codes, notwithstanding any provision therein to the contrary; and such laws are by Id., § 5184, to be considered amendments to the provisions of the Codes conflicting with them. Id., § 5186, declares that certain acts—among them Act Mar. 8, 1893, amending Act Mar. 8, 1889, regulating the registration of electors—shall be in full force and effect. In 1895 several new laws were enacted after the adoption of the Codes, regulating the registration of electors. *Held*, that Laws 1893 and 1895, including those regulating registration, are in force, and Code provisions are invalid so far as they are inconsistent with them.—Steele v. Gilpatrick, 18 Mont. 453; 45 Pac. 1089.

6. Pol. Code, § 1233, gives an elector the right to vote at general elections, provided he has registered, and requires, as a condition for registration, residence in the county for 30 days preceding the election. *Held*, that a registry agent will be enjoined from registering electors prior to 30 days before a general election.—Id.

7. Pol. Code, §§ 1206, 1210, requiring biennial registration of electors, as amended by Laws 1897, p. 113, provides that, "except in registration districts included in an incorporated town or city containing, at the last preceding state election, over 1,000 registered voters, such general registration * * * shall only be required every eighth year, from and after the year 1898, and any person who has been registered in any district, except as above noted, at any time within said eight-year period, * * * shall be entitled to vote, if otherwise qualified, without further registration." Laws 1899, p. 54, amends the act of 1897, but the proviso quoted is substantially the same in both acts. Sec. 1210, subd. 5, which was not amended by the act of 1899, provides that, "whenever the person is registered under the provisions of this chapter, such registration is good for eight years, except as otherwise provided in § 1206." *Held*, that the eight-year exemption from the necessity of registering of the persons provided for in the acts of 1897-99 began with and included the registration of 1898, and hence an elector of an election district included in an incorporated town of less than 1,000 registered voters, who was properly registered in 1898, was not required to register in 1900, as a prerequisite to his right to vote at the general election in November, 1900, and he could not compel the registry clerk to register him.—State v. Wine, 24 Mont. 376; 62 Pac. 414.

8. Under Laws 1899, p. 54, requiring a biennial registration of voters in registration districts included in an incorporated town or city containing at the last preceding state election over 1,000 voters, a voter residing in an incorporated town not containing at the preceding state election 1,000 voters, for which election he was registered, is not required to register for the general election of 1900, though the registration district, which was not confined to the town, may contain more than 1,000 voters.—State v. Davidson, 24 Mont. 411; 65 Pac. 1003.

9. Pol. Code, § 1209, as amended by Laws 1897, p. 118, requires electors applying for registration to take an oath as to their qualifications. Sec. 1234, as amended by Id., p. 123, makes the fact that an elector's name appears in the check lists and copy of the official register in the possession of the judges of election prima facie evidence of his right to vote. Secs. 1213, 1214, as amended by Id., p. 121, et seq., require the registry agent to prepare lists and post them in public places and furnish a copy to the county clerk, and that in such lists the agents shall give notice that they will receive objections to the right of registered persons to vote until a certain date; and also provides that if, on election day, a person objected to applies to vote, the judges of election shall test his qualifications under oath. Certain persons applied for registration, giving the agent all information requested, and their names were entered in the official register, check lists, etc. The oath required by § 1209 was not administered, the agent testifying that he did not think it was necessary. *Held*, that the failure to take the oath did not disqualify the elector.—Lane v. Bailey, 29 Mont. 548; 75 Pac. 191.

V. NOMINATIONS AND PRIMARY ELECTIONS, 10-49.

A. Nominations, 10-36.
B. Certificates of Nomination and Election Papers, 37-44.
C. Objections and Contests, 45-49.

A. NOMINATIONS, 10-36.

1. Party Divisions and Conflicting Nominations, 10-11.
2. Nomination by Convention or Other Representatives of Party, 12-26.
3. Nomination by Electors, 27-30.
4. Nominations to Fill Vacancies, 31-35.
5. Irregularities and Defects, 36.

1. Party divisions and conflicting nominations, 10-11.

10. A regular convention of the republican party of a county was called by the proper party authorities. A rival convention was called without authority. Each claimed to represent the party, but, after the delegates elected by the latter had been refused recognition by the state convention of the party, no longer assuming to represent the regular organization, they adopted the name "Eight Hour Republican Party," and nominated a ticket. *Held*, that a demurrer to a petition for an injunction restraining the county clerk from placing their ticket on the official ballot was properly overruled, since the convention adopting such ticket was not composed of delegates selected under the regular republican party call, and its delegates could act for no other party, having been elected as delegates

to a republican convention.—State v. Moran, 24 Mont. 433; 63 Pac. 390.

11. A minority faction of a political party of a county left the convention and formed an organization, and issued a call for a subsequent convention, which apparently excluded those precincts which were represented by the ousted delegates; but primaries were held in every precinct of the county, except six, which were only entitled to seven delegates, and five of such precincts were represented in the convention by delegates elected to the former convention. *Held*, that the convention had in pursuance of such call was a representative body, entitled to have its nominations placed on the official ballot.—State v. Arms, 24 Mont. 447; 63 Pac. 401.

2. Nomination by convention or other representatives of party, 12-26.

12. A political convention delegated to a committee power "to fill all vacancies that now exist, or that may hereafter occur." The convention failed to make a certain nomination, and the committee, after the convention, made such nomination. *Held*, that the ballot law does not forbid a nomination to be so made, and that it was properly made.—State v. Benton, 13 Mont. 306; 34 Pac. 301.

13. The secretary of the committee to which was delegated the power to make a nomination by a political convention, who certified such nomination to the proper officer, testified that he was present at a committee meeting where the nomination was made; that meetings were held at several places, and that several committeemen were present; that such nomination was decided on at several meetings, but he could not name the particular meeting at which the nomination was made, no minutes having been kept. *Held*, that such testimony did not overthrow the prima facie case made by the certificate of nomination.—Id.

14. A party convention of a single county, which is one of two or more counties composing a judicial district, has no authority to place in nomination a candidate for the office of district judge, that office being a state office, a legal nomination to which can only be made by a convention representing all the voters of the party in the several counties in the district.—State v. Rotwitt, 18 Mont. 502; 46 Pac. 370.

15. It appeared that alleged "silver republican" candidates were nominated at a meeting participated in by less than 50 members of the "Silver Republican Club," which had some 400 members; that most of the persons nominated at this meeting were not silver republicans, but men who had already been nominated by various other parties; that no primaries were held, no delegates chosen, no call for a convention made, nor any notice thereof given, other than information of the club's proceedings, published in a daily paper as news items, and a statement on a banner that the club met every Wednesday night; that the chairman who presided at the meeting and signed the certificate of nomination did not know till after it was filed that the meeting was a convention, but supposed it was merely a meeting of the club. *Held*, that such meeting was not a party convention, within Pol. Code, § 1310.—State v. Tooker, 18 Mont. 540; 46 Pac. 530.

16. Electors assembled by personal invitation, and representing but one-fourth of the precincts in one county, organized as a political party by the election of a chairman and secretary, and appointment of committees. The assembly then proceeded as a county convention and nominated a county ticket. The county convention adjourned sine die, and the same electors immediately proceeded to hold a state convention. No call for a state convention was ever given; no delegates to the state convention were ever elected by any county convention; no credentials as such were ever given; no notice was attemptd to be published of a state gathering of the new party; and no delegates other than those who first assembled, and who sat as a county convention, participated. *Held*, that there was neither a county nor state convention with authority to nominate candidates.—State v. Johnson, 18 Mont. 548; 46 Pac. 533.

17. In a contest involving the validity of a nomination made by a judicial convention it was shown that it had been a party custom in the state for delegates to a state convention from counties composing judicial districts to meet in separate judicial conventions, and there nominate candidates for district judges; but it did not appear that such nominations had ever been made without express authority in the delegates to do so, except in one case. *Held*, insufficient to establish that it was the custom of such delegates to nominate candidates for judges, whether authorized by the electors of their respective counties or not.—State v. Hogan, 24 Mont. 383; 62 Pac. 583.

18. A mass meeting in one of two counties composing a judicial district, called without notice except to those present at the final adjournment of a regular county convention, for the announced purpose of formulating a protest to the action of the convention, has no authority to name delegates to represent the county in a state and judicial convention in place of those named by the regular county convention; and delegates named by such meeting, though recognized and seated by the state convention, have no authority to represent the county in the judicial convention, and a nomination made by it is invalid, because the electors of both counties are not represented.—Id.

19. A county convention of a political party, called by the county central committee to select delegates to a state convention, and for no other purpose, can not depose the chairman of such committee, and supersede him by a chairman of its own choice, where the custom of such party was to select such chairman at a convention called to nominate county officers. Hence a convention for nominating candidates for office, called by such central committee through its duly elected chairman, though he had been deposed at such convention, was the authorized convention of such party.—State v. Smart, 24 Mont. 413; 62 Pac. 591.

20. Where, in a political convention, the presiding officer directs that the temporary chairman be selected by ballot, and in his temporary absence from the platform a delegate addresses the convention, and requests all in favor of a certain candidate for the temporary chairmanship to rise, and a majority of the convention does so, such candidate is the duly elected chairman of the convention: and its proceedings will be the acts of the convention, though the minority in the same shall proceed with the election by ballot, select a temporary chairman, and proceed independently of the majority.—Id.

21. Where, by reason of dissensions in the central committee of the democratic party of a county, the committee divided, and each faction elected delegates to attend the state convention, and the contest so occasioned was presented to the state convention on the application of the delegates of both factions for seats, and the state convention decided such contest before any candidates for county offices were nominated, the decision so made was conclusive and the candidates subsequently nominated by the successful faction were entitled to have their names printed on the official ballot under the party name.—State v. Weston, 27 Mont. 185; 70 Pac. 519.

22. Where a contest between the delegates of two factions in a state convention was submitted for decision, and the vote on the issue disclosed a clear majority of all the delegates present in favor of one of the contesting delegations, without the votes of such contending delegates, the fact that such delegates voted on the question was immaterial.—Id.

23. Under Pol. Code, § 1310, a mass convention of electors could make nominations only where it was called for that purpose.—State v. Hays, 31 Mont. 233; 78 Pac. 486.

24. A call for a mass convention of electors stated that the object was to organize central committees opposed to corporate rule, and to give the voters of the state an opportunity to vote for men free from such control, and did not state that the convention was to assemble to nominate candidates for any office whatever. *Held*, not a call of the electors of the state to assemble and select candidates for public offices.—Id.

25. If a mass convention of electors could not make nominations for public office because the call of the convention did not set forth such purpose, a committee appointed by such convention could not make such nominations.—Id.

26. Under the provisions of Pol. Code, § 1314, when the same committee appointed by a mass convention nominated two tickets for the several offices, both tickets were void, and neither could appear on the official ballot.—Id.

3. Nomination by electors, 27-30.

27. Pol. Code, §§ 1310-1312, having recognized the right of political parties, through conventions or primary meetings, to nominate candidates for office, they have an equal right to refrain from making nominations, and no person not so nominated has the right to have his name placed on the official ballot as the candidate of a party, and a candidate placed in nomination by petition, as authorized by § 1313, is the nominee of the petitioners only, and can not be designated on the ballot as the candidate of a regularly organized party.—State v. Rotwitt, 18 Mont. 502; 46 Pac. 370.

28. A petition filed with the county clerk and recorder, nominating certain persons for offices as candidates of a certain political party, does not entitle such persons to be placed on the official ballot.—State v. Tooker, 18 Mont. 540; 46 Pac. 530.

29. A candidate for district judge was nominated by a certificate signed and filed by the electors of the silver republican party in the counties composing the district. The certificate of election was filed under the direction of the state and county central committees of the district, and it was sought to place the nominee's name on the official ballot under the head of the silver republicans. *Held*, that the direction of the central committees did not make the nomination a party action, so as to take it out of the rule that a nomination of a regular existing party can not be made by a certificate of electors.—State v. Reek, 18 Mont. 557; 46 Pac. 438.

30. The nominations of an organized existing political party can not be made by the petitions of the individual electors.—State v. Fransham, 19 Mont. 273; 48 Pac. 1.

4. Nominations to fill vacancies, 31-35.

31. Laws 1889, p. 135, provides for the printing by the state of ballots containing the names of those whose nominations are certified as required. The certificate is to be filed 20 days before election, and must state the name of the candidate, his business, and the office; and, if by convention, it must designate the party represented, and be signed by the chairman and secretary. In case a convention has given power to fill vacancies to a committee, it must file a certificate stating the cause of the vacancy, the office, the name of the nominee, and the one whose place he takes, and such facts as are required in the original certificate. A certificate purporting to fill a vacancy in a nomination filed less than 20 days before an election stated neither the office, the cause of vacancy, nor the authority to fill it. It did not give the full name of the nominee, nor the name of the one whose place he took. It was signed by no one, nor did it designate the party represented. *Held*, that there was a failure to comply with mandatory provisions, and the name of the nominee could not be printed on the ballots.—Price v. Lush, 10 Mont. 61; 24 Pac. 749.

32. A person nominated by a political convention as a candidate for county treasurer, declined to the central committee, and no certificate of his nomination was ever filed with the county clerk. The committee, being empowered to fill vacancies on the ticket, nominated another candidate. The certificate of the second nomination failed to show the name of the person for whom such candidate was substituted, the cause of the vacancy, or that he was nominated to fill a vacancy. *Held*, that as such defects were not objected to until after the election, in which no fraud was charged, and no rights appeared to have been prejudiced thereby, the nomination would not be declared void for failure to comply strictly with the provisions of Laws 1889, p. 138, §§ 11, 12, which require that a candidate declining the nomination shall so notify the officer with whom his certificate is filed, in writing, and that the certificate of the nomination made to fill the vacancy shall state "the cause of the vacancy, * * * the name of the person for whom the new nominee is to be substituted, and the fact that the committee was authorized to fill vacancies."—Stackpole v. Hallahan, 16 Mont. 40; 40 Pac. 80.

33. The provisions of the Australian ballot law (Laws 1889) prescribing the facts to be stated in the certificate of nomination, and the manner in which the nomination may be declined and the resulting vacancy filled, should not be considered mandatory, when the question of a failure to comply with them strictly is raised after an election, the fairness of which is not questioned.—Id.

34. Pol. Code, § 1316, requiring certificates of nomination to be filed not less than 30 days before the day of election, refers only to certificates of original nomination made by conventions, primaries, or the requisite number of electors, and not to committee nominations to fill vacancies permitted by § 1320, when the vacancy is caused by death or declination of the candidate, or by the insufficiency of the original certificate of nomination.—State v. Hogan, 24 Mont. 397; 62 Pac. 683.

35. Where a convention of a political party has made a nomination, and authorized its committee to fill vacancies, and there is an error in the certificate of nomination filed, consisting of a misnomer of the party which the convention represented, such error renders the certificate void, thereby creating a vacancy to be filled by the committee, as provided by Pol. Code, § 1320.—Id.

5. Irregularities and defects, 36.

36. Though Laws 1889, p. 139, § 15, allows a voter to write or paste on his ballot the name of anyone he wishes to vote for, the official publication of the candidacy of one whose nomination is not duly made and certified, and the printing of his name on the ballots, gives him an undue advantage, which will avoid his election.—Price v. Lush, 10 Mont. 61; 24 Pac. 749.

B. CERTIFICATES OF NOMINATION AND ELECTION PAPERS, 37-44.

37. The provisions of an election law which adopts the leading features of the Australian ballot system, relating to the nomination of candidates for office, are mandatory, and the name of a person who is not nominated in the manner fixed by the statute can not lawfully be published or printed on the official ballot with those of the lawful candidates.—Price v. Lush, 10 Mont. 61; 24 Pac. 749.

38. A certificate of nomination, required to be filed by Laws 1889, p. 126, § 4, which is regular upon its face, and filed with the proper officer, is prima facie evidence of the nomination of the person so certified.—State v. Benton, 13 Mont. 306; 34 Pac. 301.

39. A certificate of nomination, giving the name, address and business of the nominee, substantially complies with the provisions of the election law of 1889, requiring that such certificate shall give his name, address and "business address."—Stackpole v. Hallahan, 16 Mont. 40; 40 Pac. 80.

40. The fact that a certificate of nomination, made by the central committee, under proper authority to fill vacancies caused by the declination of the former nominee, did not state, as required by Laws 1889, p. 138, § 12, that the committee had power to fill such vacancies, was not sufficient to render the nomination void; objection being made to the certificate, for the first time, after the election. —Id.

41. Under Pol. Code, § 1312, the certificate of nomination of a candidate for district judge of a district containing only one county is, like that of a county officer, to be filed with the clerk of the county.—State v. Hays, 27 Mont. 174; 70 Pac. 321.

42. Under Pol. Code, § 1311, all convention nominees of one party must be contained in a single certificate, and a separate certificate for each nominee can not be filed.—State v. Hays, 31 Mont. 227; 78 Pac. 301.

43. Under Pol. Code, § 1311, an inadvertent failure to include the name of a convention nominee for a certain office in the certificate of nominations renders that certificate insufficient, within the meaning of § 1320, and entitles the proper committee to fill the vacancy.—Id.

44. Pol. Code, § 1316, requiring certificates of nomination to be filed with the secretary of state not more than 60 days nor less than 30 days before election, is mandatory, and a certificate can not be filed less than 30 days before election.—Id.

C. OBJECTIONS AND CONTESTS, 45-49.

45. A court will not attempt to determine which of two rival county conventions, held by opposing factions of the same politcal party, and each composed of delegates regularly elected to a convention called by the constituted authorities of the party, is entitled to represent the party, by enjoining the county clerk from placing the names of the nominees of either convention on the official ballot.—State v. Johnson, 18 Mont. 556; 46 Pac. 440.

46. Where a relator has been guilty of such laches in bringing before the court an application for an injunction against an officer charged with the duty of preparing the official ballots for an election, that the court has not sufficient time for the proper consideration of the question involved before the officer is compelled by law to act, the application will be dismissed. -State v. Reek, 18 Mont. 561; 46 Pac. 442.

47. In a contest involving the validity of a nomination made by a judicial convention, proof that the delegates claiming to represent one of the counties composing the judicial district had been recognized and seated by a state convention of the party, and that it was the custom for delegates to the state convention from counties composing judicial districts to form judicial conventions during the sitting of the state conventions, and to nominate candidates for judges in their districts, whether authorized by the electors of their respective counties or not, was immaterial, where the delegates so recognized had been chosen by a mass meeting which was illegal because called without notice.—State v. Hogan, 24 Mont. 383; 62 Pac. 583.

48. Where candidates for county offices have been duly nominated by a regularly called and organized county convention of a political party, and the proper certificates of nomination filed, the right to have their names printed on the official ballot, in the proper column, under the appropriate party designation, to the exclusion of any others under that designation, becomes fixed, and is not affected by the subsequent misconduct of the properly authorized delegates constituting such convention, in betraying their party and departing from its principles, nor by a resolution adopted by a state convention authorizing loyal members of the party to take charge of its affairs in the county and to nominate another county ticket; such resolution being ineffectual, except to change the administrative agencies of the party.—State v. Martin, 24 Mont. 403; 62 Pac. 588.

49. Where there were contending factions of the democratic party in a certain county, and the state convention admitted the delegates of both factions into the convention, and gave to each delegation the right to cast one-half the vote of such county, but no nominations had been made at the time the state convention was held by either of such county factions, the state convention, while it had power to admit both delegations, could not lawfully decide in advance that the nominees at subsequent conventions of either faction should be considered the regular nominees of the democratic party of such county, and entitled to have their names on the official ballot as "democratic."—State v. Weston, 31 Mont. 218; 78 Pac. 487.

VI. BALLOTS, 50-63.

A. FORM AND CONTENTS, 50-53.
B. INDICATION OF CHOICE BY VOTER, 54-58.
C. IRREGULARITIES, DEFECTS, AND OBJECTIONS, 59-63.

A. FORM AND CONTENTS, 50-53.

50. A candidate for a county office, who was improperly nominated by the electors of a regular, existing party, can not be placed on the ballot as an indepenednt candidate.—State v. Reek, 18 Mont. 557; 46 Pac. 438.

51. Where minority delegates elected to a county democratic convention seceded on the ground that the majority faction is dominated by corporate influences, and cause a separate convention to be called, at which a ticket designated as the "Bryan democratic ticket" is nominated, such ticket is entitled to a place on the official ballot under such designation, since there is a sufficient distinctive principle in such designation, in connection with the facts, to warrant the conclusion that the differences are actual and substantial.—State v. Arms, 24 Mont. 447; 63 Pac. 401.

52. Laws 1901, amending the election law to the extent of removing the circle from the head of each ticket, thereby preventing a voter from voting a straight ticket by marking in the

circle, in no wise amends the rule that only one ticket shall appear on a ballot under a party designation.—State v. Weston, 31 Mont. 218; 78 Pac. 487.

53. The county committee of a political party duly called a convention at a certain time and place. The convention regularly organized and placed in nomination candidates. A contesting delegation claimed that they were excluded from participating in the convention, and thereupon nominated certain other nominees, which they claimed were entitled to the party designation on the ballot. The county convention was regularly called to order, and opportunity given to contestants to present their credentials. The contesting delegates made no attempt to be admitted by presenting their credentials, but proceeded to organize another convention. *Held*, that the nominees of the independent convention were not entitled to have their names placed on the ballot instead of the nominees of the regular convention.—Id.

E. INDICATION OF CHOICE BY VOTER, 54-58.

54. Under Comp. Stat., p 934, § 1044, which provides that "technicalities or error in spelling the name of any candidate" shall not be regarded, a ballot for "Dan Heyfron" for a county office is sufficiently definite to be counted for Daniel J. Heyfron, he being the only person having such surname in the county.—Heyfron v. Mahoney, 9 Mont. 497; 24 Pac. 93.

55. A county canvassing board excluded the returns from a precinct which should have been canvassed, and issued a certificate of election to a person who was not entitled to receive such certificate if the excluded precinct had been canvassed. *Held*, that mandamus lies to compel such board to hold another session and canvass such returns, after it has adjourned sine die, and to issue a certificate to the person entitled to receive the same.—State v. Choteau, 13 Mont. 23; 31 Pac. 879.

56. Under Pol. Code, §§ 1361, 1403, a ballot with a cross at the head of the list representing a political party, and a cross opposite the name of a candidate in another list for an office for which there is no candidate in the first list, will be counted for such candidate and all candidates in the first list; as, while the provision for use of a cross to indicate choice is mandatory, that for putting a cross opposite the name of every candidate where a voter wishes to vote for candidates in more than one list is merely directory.—Dickerman v. Gelsthorpe, 19 Mont. 249; 47 Pac. 999.

57. Where a cross is put at the head of one party's list of candidates and opposite the name of a candidate in another list for an office for which there is no candidate in the first list, the ballot will not be counted for either candidate for that office, but will be counted for all other candidates in the first list.—Id.

58. At a general election the official ballots set out the lists of candidates in columns headed by their respective party names. There was a circle at the top of each column, and a cross marked in it meant a straight party vote. A mixed ticket was voted by marking a cross at the left of each candidate voted for. The party nominations were all complete. Ballots were cast voting a cross in the circle at the head of one column; indicating a straight party vote, but bearing also a cross at the left of another party's candidate for sheriff. *Held*, that the electors having voted for two candidates for sheriff, their intention could not be determined, and as to sheriff the ballots could not be counted.—State v. Fransham, 19 Mont. 273; 48 Pac. 1.

C. IRREGULARITIES, DEFECTS, AND OBJECTIONS, 59-63.

59. The mere fact that the local district judge was a candidate for re-election, and thus disqualified from sitting in proceedings to correct erros in the official ballot, does not justify proceedings after the election, based on errors in the official ballot which could have been corrected by an application to another judge.—State v. Fransham, 19 Mont. 273; 48 Pac. 1.

60. An elector who, after notice by publication of the nominations to office, as required under Pol. Code, § 1318, neglects to avail himself of the remedy provided by § 1322, to correct an error of the clerk in the preparation of the ballot, can not complain of it after the election.—Id.

61. Where electors vote the official ballots supplied to them by the judges of election, their legally expressed will can not be overthrown, where they are not at fault, by the fact that the public officer who prepared the ballots in some way neglected his duty.—Id.

62. Where a county clerk was about to print an unauthorized ticket on an official ballot, such action would affect both the public and the candidates, and hence it was proper for a candidate to sue in the name of the state to restrain the clerk from exceeding his duty, since there would thus be someone answerable for the propriety of the suit and for its costs.—State v. Moran, 24 Mont. 433; 63 Pac. 390.

63. Where a county clerk was about to print an unauthorized ticket on an official ballot, the interests of the whole people of the state in a proper enforcement of the election laws, and in the proper selection of legislators for the state, would thereby be affected, and hence the state was a proper party to institute proceedings to prevent such action.—Id.

VII. CONDUCT OF ELECTION, 64-66.

64. Under Comp Stat., p. 925, § 1013, which provides that the clerk shall post, at least 30 days before any general election, notice of the house at which the election will be held, the vote of the precinct will be invalidated by the removal of the voting place by the judges from the house designated to one more than three miles off.—Heyfron v. Mahoney, 9 Mont. 497; 24 Pac. 93.

65. Where it appears that a certain number of votes are fraudulent, and there is nothing to show for which candidate they were cast, the vote of the whole precinct may be thrown out, or the number may be apportioned among the candidates in proportion to the number of votes received by each.—Id.

66. An election was conducted in a certain precinct by three judges instead of five, as required by Comp. Stat., p. 924, § 1011. The clerks who signed the return did not act, the clerical work being done by the judges. The canvass of the votes was not made in public, as required by § 1027, and the return was signed by the clerks two or three days after the election. The return was certified by the judges and attested by the clerks, instead of the obverse, as required by § 1030. The return showed that all the electors voted in alphabetical order, and that each elector voted for a candidate for every office, both of which statements were shown to be untrue as regarded some of the voters. Some of the votes were returned for different candidates than those for which they were cast. One elector who did not vote was returned as having voted, and the judges unlawfully placed the official stamp upon some of the ballots after they had been delivered to them to be put in the box. *Held*, that the entire return from such precinct should be rejected as evidence.—Lloyd v. Sullivan, 9 Mont. 577; 24 Pac. 218.

VIII. RETURNS AND CANVASS OF VOTES, 67-75.

A. RETURNS, 67-68.
B. CANVASS OF RETURNS, 69-73.
C. CERTIFICATE OF ELECTION, 74-75.

A. RETURNS, 67-68.

67. Comp. Stat., p. 929, § 1030, provides for the following return and certificate: "At an election held at ..... house on ....., in the precinct of ....., in the county of ....., and state of Montana, on the ..... day of ....., 18...., the following persons received the number of votes annexed to their respective names, * * * to-wit, * * *: Certified to by us: A and B, clerks of election. Attest: C, D, and E, judges of election." Such blank in the poll book from B precinct was not filed, but the document sent by mail to the proper county clerk, and which document was before the canvassing board, was entitled "Poll book of an election held in B precinct * * * at which time C, D and E were judges, and A and B were clerks." Such poll book contained the names and numbers of electors, and the tally sheets were recorded therein. At the end was, "Certified by us this 8 day of Nov., 1892. Attest: A and B, clerks of election. C, D and E, judges of election." *Held*, that as the names of the candidates for representatives, and the number of votes each received at this precinct, could be readily ascertained by the canvassers by an inspection of this poll book, such votes should have been canvassed, under Laws 1891, p. 301, § 5, which provides that "a failure to fill out all the certificates in the poll book, or a failure to do or perform any other act in or about the making up of the returns that is not essential to determine for whom the votes were cast, shall not be such an irregularity as to entitle the board to reject the same."—State v. Choteau, 13 Mont. 23; 31 Pac. 879.

68. A check list of a precinct, at which it was claimed persons had voted who were not registered, showed that there were 46 voters named thereon; that 5 of this number failed to vote; that 5 electors voted on county registered certificates; and that the voting list contained the names of 46 voters; that the names of 16 of these voters were misspelled by the clerks in the poll book, but that these names given in the poll book can be identified with names on the check list. *Held*, that the returns from such precinct do not show that there was any illegal vote cast therein.—Id.

B. CANVASS OF RETURNS, 69-73.

69. Under the laws, the governor, secretary of state and marshal must act together in canvassing the votes on the act of Feb. 11, 1874, to change the seat of government of the territory. (See 2 Otto 358.)—Chumasero v. Potts, 2 Mont. 242.

70. As Enab. Act, § 24, authorizes the constitutional convention to make provision "by ordinance" for the election of state officers, and as Const., § 17, "Schedule," refers to the state officers to be duly elected and qualified as provided by ordinance, the ordinance appointing a canvassing board has the force and effect of a constitutional provision.—State v. Kenney, 9 Mont. 223; 23 Pac. 733.

71. Laws 1891, p. 301, §§ 4, 6, defining the duties of the board of county canvassers, provides that "the canvass must be public, by opening the returns and determining therefrom the vote of such county for each person voted for, and declaring the result thereof," and that "the board must declare elected the person having the highest number of votes given for each office." *Held*, that the board in canvassing the votes cast at an election is not authorized to inquire into the validity of the certificate of the nomination of candidates, and can not on account of informality in such certificate be restrained from canvassing the votes cast.—Pigott v. Cascade, 12 Mont. 537; 31 Pac. 536.

72. Boards of canvassers have no authority to pass upon the regularity of an election or the qualifications of persons voting thereat.—State v. Choteau, 13 Mont. 23; 31 Pac. 879.

73. At the trial of an issue as to whether persons had voted who were not registered, it was proven that no check list of the voters of such precinct, or surrendered certificates of registration, were sent to the county clerk by the judges, and that the board of canvassers acted upon the poll book alone. *Held*, under Laws 1887, p. 129, § 9, that it was the duty of such board to procure a check list and surrendered certificates before the returns were rejected.—Id.

C. CERTIFICATE OF ELECTION, 74-75.

74. The certificate of the territorial canvassing board, upon the vote for the approval of the capital law, is prima facie evidence of the legal vote cast at the general election; and the members of the board have no right to go behind the abstracts of the votes returned to it. (See 2 Otto 358.)—Chumasero v. Potts, 2 Mont. 242.

75. The power to determine as to the election of its members being, by Const, art. 5, § 9, given to the legislature, the courts, in the absence of such determination, will regard as a member the person having a certificate of election from the legally constituted canvassing board.—State v. Kenney, 9 Mont. 223; 23 Pac. 733.

IX. CONTESTS, 76-95.

A. LIMITATIONS AND LACHES, 76-77.
B. PLEADING, 78-85.
C. EVIDENCE, 86-90.
D. REVIEW, 91-95.

A. LIMITATIONS AND LACHES, 76-77.

76. The court having failed to acquire jurisdiction of an election contest because the statement failed to show that contestant was an elector, as required by Comp. Stat., p. 934, § 1043, the defect could not be cured by an amendment made after the expiration of the 10 days in which, by law, the statement was required to be filed.—Gillespie v. Dion, 18 Mont. 183; 44 Pac. 954.

77. A statement so defective as to confer no jurisdiction on the court is incapable of amendment after the 10 days has expired in which it was required to be filed.—Id.

B. PLEADING, 78-85.

78. The court may allow the statement of contest to be amended during the trial by the correction of mistakes in spelling names in the list of alleged illegal voters, and by additions thereto.—Heyfron v. Mahoney, 9 Mont. 497; 24 Pac. 93.

79. Where a statement of contest alleges that the county clerk illegally issued a certificate of election to the contestee on the ground that said contestee had received a large number of votes from a precinct, the return from which was not included in the abstract of votes, and that no legal return was made from said precinct, and the contestee, without demurring, answers the statement, and denies its allegations, the question of the legality of the return from

such precinct is put in issue.—Lloyd v. Sullivan, 9 Mont. 577; 24 Pac. 218.

80. As Comp. Stat., p. 934, § 1043, provides that, when an "elector" shall wish to contest an election, he shall file a statement in writing, etc., the record must affirmatively show that the contestant is an elector.—Gillespie v. Dion, 18 Mont. 183; 44 Pac. 954.

81. An election contest, under Comp. Stat., p. 934, § 1043, et seq., is a special proceeding, and therefore the jurisdictional facts must appear on the face of the pleadings.—Id.

82. A statement filed, under Comp. Stat., p. 934, § 1043, to contest an election to a certain office, on the ground that marked ballots were voted and counted at said election, and that mistakes were made in counting the votes, which failed to state that contestant was a candidate for said office, or that the ballots were unlawfully marked or counted, or the nature of the alleged mistakes, or whether such mistakes affected the result, or that any electors were prevented from casting their ballots, was insufficient.—Id.

83. Code Civ. Proc., § 731, provides that a party must verify pleadings by an affidavit to the effect that the pleading is true, to deponent's knowledge, except as to matters therein stated on information and belief, and that as to those he believes it to be true. Sec. 2014 prescribes that in election contests a statement of the grounds of contest must be verified by contestant's affidavit that the matters and things therein contained are true. *Held*, that a verification of such a statement, in conformity with § 731, was sufficient.—Lane v. Bailey, 29 Mont. 548; 75 Pac. 191.

84. Under Code Civ. Proc., § 2014, an affidavit was sufficient, though the grounds on which the contest was based were alleged on information and belief.—Murphy v. Levengood, 31 Mont. 34; 77 Pac. 311.

85. Code Civ. Proc., §§ 2021, 2016, merely require that the contestant shall definitely apprise the contestee of the charges relied on, so that he may prepare to meet them with appropriate proof.—Id.

C. EVIDENCE, 86-90.

86. To explain the absence of certain witnesses in an election contest, a subpœna, with the return of the officer that he was unable to find them, is admissible.—Heyfron v. Mahoney, 9 Mont. 497; 24 Pac. 93.

87. Where, in an election contest, the entire return from a precinct is rejected on account of fraud and irregularity, the burden of proving that any legal votes were cast in such precinct rests on the party claiming them.—Lloyd v. Sullivan, 9 Mont. 577; 24 Pac. 218.

88. In an election contest subpœnas for persons who appear to have voted at the election, with their returns, showing that such persons could not be found, are admissible in evidence to show diligence in endeavoring to procure their attendance.—Id.

89. The privilege of refusing to testify as to how he voted may be waived by an elector.—Lane v. Bailey, 29 Mont. 548; 75 Pac. 191.

90. In an election contest in which conspiracy to colonize voters was alleged, contestant introduced testimony tending to show that men employed as ranch hands were hired mainly for political purposes, witneses testifying that there was no demand for ranch hands in the neighborhood, that the employer had no special use for men hired, and that most of them simply "killed time." *Held*, that the exclusion of the testimony of such a voter, offered by contestee, as to whether he was able to state whether the men were kept busy during the time they were at the ranch, and whether he knew and could state when a man was doing a days work and was kept busy, was error.—Id.

D. REVIEW, 91-95.

91. Const., art. 8, § 3, declares that "the appellate jurisdiction of the supreme court shall extend to all cases at law and in equity." Comp. Stat., p. 934, § 1044, provides that the decision of a district judge in election contests over a county office shall determine the right to hold such office "until such decision shall be reversed on appeal." Comp. Stat., p. 180, § 444, allows an appeal from the district to the supreme court "from a final judgment * * * in an action or special proceeding," and "from an order granting or refusing a new trial." *Held*, that the supreme court had jurisdiction of an appeal from an order refusing a new trial in an election contest.—Lloyd v. Sullivan, 9 Mont. 577; 24 Pac. 218.

92. Under Comp. Stat., p. 207, § 568, which provides that in mandamus proceedings the alternative writ shall state generally the allegations against the party to whom it is directed, and command such party to do the acts required to be performed, or to show cause, it is sufficient if the writ states "generally" the acts which the parties have omitted to do, and which they are required to perform.—State v. Choteau, 13 Mont. 23; 31 Pac. 879.

93. Laws 1891, p. 299, § 2, provides that the board of commissioners is the board of canvassers for the county, and must meet as such board at the usual meeting place of the commissioners. And if at such time one or more of the commissioners should not attend, the place of absentees must be supplied by the county officers whose duty it is to act, in the order named; and the clerk of the board of commissioners is the clerk of the board of canvassers. *Held*, where two of the commissioners and the treasurer constituted the board of canvassers, that an alternative writ of mandate directed to them, naming each one, as "constituting the board of county canvassers of election returns * * * and R, clerk of the board of county commissioners, and ex officio clerk of said board of canvassers," was diretced to the proper persons.—Id.

94. Under Civ. Code Proc., §§ 1151, 1152, a specification of error, in an election contest, of "insufficiency of the evidence to justify the findings of fact made by the court herein," was insufficient to permit a review thereof.—Lane v. Bailey, 29 Mont. 548; 75 Pac. 191.

95. Where, in an election contest, testimony erroneously excluded does not affect sufficient votes to overthrow the decision of the lower court, such exclusion is not ground for reversal.—Id.

X. VIOLATIONS OF ELECTION LAWS, 96.

96. Where a county canvassing board gave as its sole reason for excluding the returns from a precinct that illegal votes were cast therein, and mandamus proceedings are commenced to compel it to canvass such returns, such board will not be precluded, in its answer to the alternative writ, from assigning other reasons.—State v. Choteau, 13 Mont. 23; 31 Pac. 879.

EMBEZZLEMENT.

1. An Indian agent can not be indicted for embezzlement in the absence of a statute providing therefor.—United States v. Upham, 2 Mont. 170.

2. An indictment charging that defendant, being a postmaster and an officer of the United States charged with the safe keeping and dis-

bursement of public moneys, voluntarily converted to his own use and embezzled a portion of said moneys entrusted to him for safe keeping and disbursement, is insufficient because it does not appear, save by implication, in what capacity defendant received the money.—United States v. McElroy, 2 Mont. 494.

3. Under Comp. Stat., p. 522, § 92, as amended by Laws 1891, p. 253, providing that if any agent, servant or other person, "who shall have received or been entrusted with any money * * * from or by his master," shall embezzle such money, he shall be punished as if he had feloniously stolen the same, it is sufficient to allege that the agent of B, as such, did "receive and take into his possession a large sum of money of the said B * * * for and in the name of and on the account of said B," and embezzle the same; it not being necessary that the money should have been intrusted to him directly by B.—State v. Fournier, 12 Mont. 235; 29 Pac. 824.

EMINENT DOMAIN.

I. Nature, Extent, and Delegation of Power, 1-16.
- A. Nature and source of power in general, 1-4.
- B. Delegation of power, 5.
- C. Public use, 6.
- D. Particular uses or purposes, 7.
- E. Property subject to appropriation, 8-14.
- F. Exercise of delegated power, 15.
- G. Determination of question as to validity of exercise of power, 16.

II. Compensation, 17-24.
- A. Necessity of payment before taking, 17-18.
- B. Taking or injuring property as ground for compensation, 19-21.
- C. Measure and amount, 22-24.

III. Proceedings to Take Property and Assess Compensation, 25-46.
- A. Right to institute proceedings, 25-26.
- B. Jurisdiction and venue, 27-28.
- C. Pleading, 29-34.
- D. Determination as to right to take, 35.
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IV. Remedies of Owners of Property, 47-48.

V. Title or Rights Acquired, 49.

I. NATURE, EXTENT, AND DELEGATION OF POWER, 1-16.

A. Nature and Source of Power in General, 1-4.
B. Delegation of Power, 5.
C. Public Use, 6.
D. Particular Uses or Purposes, 7.
E. Property Subject to Appropriation, 8-14.
F. Exercise of Delegated Power, 15.
G. Determination of Question as to Validity of Exercise of Power, 16.

A. NATURE AND SOURCE OF POWER IN GENERAL, 1-4.

1. The mere taking of land for a use authorized by law is not conclusive that the taking is necessary.—Helena v. Harvey, 6 Mont. 114; 9 Pac. 903.

2. Code Civ. Proc., § 1314, authorizing an inspection of mining claims in an action to determine adverse claims thereto, is not violative of Const., art. 3, § 14, prohibiting the taking or damaging of property without just compensation.—State v. District Court, 28 Mont. 528; 73 Pac. 230.

3. Under Code Civ. Proc., § 1317, an order requiring defendant to use its appliances to lower and raise plaintiff's agents in making an inspection of a mining claim, and providing the amount to be paid therefor, was not objectionable as taking or damaging defendant's property without just compensation.—State v. District Court, 30 Mont. 206; 76 Pac. 206.

4. In the absence of proof that the burden imposed on a property owner by a municipal assessment is altogether out of proportion to the benefit actually accruing to the property, he can not assert that his property is thereby taken without compensation.—McMillan v. Butte, 30 Mont. 220; 76 Pac. 203.

B. DELEGATION OF POWER, 5.

5. Pol. Code, § 4800, as amended by Laws 1897, p. 203, conferring upon the city council power, for the purpose of providing the city with a water supply, to "procure and appropriate water rights * * * and the necessary real and personal property, * * * by purchase, * * * condemnation, or otherwise," gives a city the right to acquire by condemnation proceedings water rights for the purpose of establishing a water system.—Helena v. Rogan, 27 Mont. 135; 69 Pac. 709.

C. PUBLIC USE, 6.

6. Under Const., art. 3, § 15, providing that the use of all waters that are now appropriated, or may hereafter be appropriated, for any beneficial use, and the right of way over the lands of others for all ditches, etc., used in connection therewith, shall be held to be a public use, the use of water to irrigate a particular tract of land, or working a particular mine, though such land or mine is owned by a single individual, is a public use.—Ellinghouse v. Taylor, 19 Mont. 462; 48 Pac. 757.

D. PARTICULAR USES OR PURPOSES, 7.

7. Under Const., art. 15, § 5, declaring that all railroads shall be public highways, the mere fact that a railroad is built by a private corporation, and that its branches run to private mines, does not deprive it of the right of eminent domain.—B. A. & P. Ry. Co. v. Montana Union, 16 Mont. 504; 41 Pac. 232.

E. PROPERTY SUBJECT TO APPROPRIATION, 8-14.

8. As Const., art. 15, § 5, expressly gives a railroad company the right to cross the tracks of another, the mere fact that the latter may be inconvenienced by the crossing in the operation of its trains will not deprive the other of the right to cross.—B. A. & P. Ry. Co. v. Montana Union, 16 Mont. 504; 41 Pac. 232.

9. Comp. Stat., p. 216, § 600, providing that all rights of way shall be subject to be connected with, crossed or intersected by any other railroad, and shall also be subject to a limited use in common with the owner thereof, when neces-

sary, does not restrict the right of one railroad company to condemn lands of another for crossings.—Id.

10. Under Comp. Stat., p. 216, § 601, providing that land appropriated to a public use can not again be so appropriated, unless the use to which it is to be applied is a more necessary public use, a new use need not be a different use from that for which the land was originally appropriated.—Id.

11. Under Comp. Stat., p. 216, § 601, providing that land appropriated to a public use can not be again appropriated for such use, unless the use to which it is to be applied is a more necessary public use, a railroad company may acquire the part of a right of way of another company not used for its railroad, where such right of way is the most desirable route for the new road, though it might be possible to build it without using the right of way.—Id.

12. Plaintiff railway company may condemn part of the right of way of defendant company, where such right of way is 25 feet on each side of the center line of defendant's tracks, and runs along the side of a hill in a mining country, and defendant has graded only the space occupied by its roadbed, and the business of both roads is to carry ore from different ore houses on the same level, and, if plaintiff were required to build elsewhere, it would cause great expense, and its road would interfere with the operation of mines, and would cut through shaft and other houses, and, at points where plaintiff's road would have to cross defendant's, plaintiff would have to build tunnels or bridges.—Id.

13. The mere fact that a railroad company may in the future require, for a double track, a portion of its right of way not occupied by its roadbed, will not preclude the condemnation of the unoccupied part by another company—Id.

14. Under Code Civ. Proc., § 2214, subd. 3, water appropriated for irrigation purposes may be condemned for the purpose of procuring a city water supply, where the use for which it is to be taken is more necessary than the existing use—Helena v. Rogan, 27 Mont. 135; 69 Pac 709.

F. EXERCISE OF DELEGATED POWER, 15.

15. The right to take private property from its owner against his will can only be invoked pursuant to law, and there must always be a rigorous compliance with the provisions of the law.—Glass v. Basin & M. C. Co., 22 Mont. 151; 55 Pac. 1047.

G. DETERMINATION OF QUESTION AS TO VALIDITY OF EXERCISE OF POWER, 16.

16. One railroad corporation is not empowered, under Rev. Stat., art. 3, p. 464, to be the judge of the necessity of taking or using the roadbed or right of way, built or secured by another railroad company through a canyon or defile, but the necessity is a question for decision in the district court of the county in which the canyon is located.—Montana Central Ry. Co v. Railroad Co., 6 Mont. 417; 12 Pac. 916.

II. COMPENSATION, 17-24.

A. Necessity of Payment Before Taking, 17-18.
B. Taking or Injuring Property as Ground for Compensation, 19-21.
C. Measures and Amount, 22-24.

A. NECESSITY OF PAYMENT BEFORE TAKING, 17-18.

17. A sum paid into court by a railroad company, on the award of damages made by commissioners as compensation for occupation by such railroad of land sought to be condemned for railroad purposes, is, though the owner has appealed from the award, a just compensation, within the meaning of Const., art. 3, § 14, and hence is sufficient to justify an order allowing the railroad company to take possession pending the appeal.—State v. McHatton, 15 Mont. 159; 38 Pac. 711.

18. Where a railroad company commenced condemnation proceedings to acquire a right of way across plaintiff's land, and procured an ex parte order permitting it to take possession of the land without payment, and staying all actions and proceedings against it, such order was void, and any entry on plaintiff's land thereunder was a trespass—Sweeny v. Montana Central, 25 Mont. 543; 65 Pac. 912.

B. TAKING OR INJURING PROPERTY AS GROUND FOR COMPENSATION, 19-21.

19. By the vacation of a public road there is no taking of private property for public use, within the meaning of Const., art. 3, § 14—State v. Deer Lodge, 19 Mont. 582; 49 Pac. 147.

20. Under Const., art. 3, § 14, a landowner is entitled to compensation for damages owing to the grading of a street on which his property abuts, in accordance with a grade fixed by the city, notwithstanding that such grade is the first one ever fixed.—Less v. Butte, 28 Mont. 27; 72 Pac 140.

21. Under Code Civ. Proc., § 2221, damages accruing to adjacent property from an improper construction of a railroad cannot be allowed.—Montana Railroad v. Freezer, 29 Mont. 210; 74 Pac. 407.

C. MEASURE AND AMOUNT, 22-24.

22. In proceedings for the condemnation of a mining claim for railroad purposes the owner may prove the value of the land for town lot purposes, whether built upon or not, in addition to proving its value as a prospect, but his recovery is confined to the value for one or the other purpose. (See 137 U. S. 340.)—Montana R. Co. v. Warren, 6 Mont. 275; 12 Pac. 641.

23. The value of a mining prospect upon which shafts have been sunk, but which has produced no returns, is not purely speculative, but it has a market value, and such value is to be ascertained in proceedings for condemnation of the claim for railroad purposes, under the same rule as is the value of other property; and testimony as to the value of the property is not necessarily based upon sales of the same or similar property.—Id.

24. Where land condemned for a railroad was valuable for both mining and town lot purposes, it was error, in ascertaining its market value, to compel the owner to elect whether he would prove the value as town lots or as a mine.—Northern Pacific v. Forbis, 15 Mont. 452; 39 Pac 571.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION, 25-46.

A. Right to Institute Proceedings, 25-26.
B. Jurisdiction and Venue, 27-28.
C. Pleading, 29-34.
D. Determination as to Right to Take, 35.
E. Evidence as to Compensation, 36-37.
F. Assessment, 38-41.
G. Appeal and Review, 42-46.

A. RIGHT TO INSTITUTE PROCEEDINGS, 25-26.

25. The fact that a person constructed an irrigating ditch for the conveyance of water across the lands of another without first acquiring the right of way, in ignorance that it was necessary, will not preclude him from afterwards condemning a right of way therefor under the statute.—Ellinghouse v. Taylor, 19 Mont. 462; 48 Pac. 757.

26. Since the amendment of Pol. Code, § 4800, by Laws 1897, p. 203, to read as in such act provided, and omitting the provisions of such section and of the Act of Mar. 7, 1893, amendatory thereof, requiring a city, before condemnation proceedings to acquire title to property for a water supply, to endeavor to agree with the owners of such property for the purchase thereof, in proceedings by a city to condemn property for such purpose it is not necessary to allege or prove that the city had endeavored to obtain the consent of the owners of the property to the taking thereof.—Helena v. Rogan, 26 Mont. 452; 68 Pac. 798.

B. JURISDICTION AND VENUE, 27-28.

27. Under Code Civ. Proc., § 610, 2216, proceedings to condemn water appropriated for irrigation purposes may be brought and tried in the county in which the land is situated, though the water is to be taken in another county.— Helena v. Rogan, 27 Mont. 135; 69 Pac. 709.

28. After filing a complaint in the proper county, in a condemnation case, plaintiff could not, under Civ. Code, § 3231, change the place of trial at his own instance to another county merely by a recital in the summons that the hearing would be had there, and the order made at such hearing was without jurisdiction.—State v. District Court, 29 Mont. 153; 74 Pac. 200.

C. PLEADING, 29-34.

29. In an action brought by an incorporated city under Rev. Stat., p. 149, § 583, to condemn private land for an alley, the complaint must show the necessity of the use for which the condemnation is sought.—Helena v. Harvey, 6 Mont. 114; 9 Pac. 903.

30. Where, in a proceeding to condemn a right of way, plaintiff alleges title in defendant, a contention that the verdict for damages was not supported by the evidence, because there was no evidence that defendant's title was valid, can not be considered.—Helena & L. S. & R. Co. v. Lynch, 25 Mont. 497; 65 Pac. 919.

31. A complaint by a city for the condemnation for a water supply of water rights in a stream, alleging that defendants "claim to be the owners of and entitled to the right" of a designated quantity of water of the stream "for irrigating purposes" in a certain county, is fatally defective for failing to describe the lands, the number and sizes of the ditches thereon or appurtenant thereto, and the place of diversion, though it would involve great labor and expense to so describe the property.—Helena v. Rogan, 27 Mont. 135; 69 Pac. 709.

32. A complaint by a city for the condemnation for a water supply of certain water rights in a stream is not defective for failing to allege that the water supply can be procured without incurring an indebtedness which, with the existing indebtedness, will exceed 3% of the assessed valuation, or that the limit was extended by having the question submitted to the voters, and that a majority of the votes was in favor of the proposition, notwithstanding Const., art. 13, § 6.—Id.

33. A complaint in proceedings to condemn for a city water supply water already appropriated to a public use must allege facts which show that the use for which the water is to be taken is more necessary than the existing use, the relative degrees of necessity being a question for judicial determination.—Id.

34. A complaint by a city for the condemnation of water rights in a stream for a water supply is not defective for failing to allege that it has a right of way to the stream, or that it will be able to get one.—Id.

D. DETERMINATION AS TO RIGHT TO TAKE, 35.

35. Under Comp. Stat., p. 993, § 1240, according the holder of lands, without available water facilities on the same, an absolute right of way over the lands of others, for the purpose of constructing ditches, does not permit the exercise of such right until it has been definitely ascertained by a proper proceeding in eminent domain.—Emerson v. Ditch Co., 18 Mont. 247; 44 Pac. 969.

E. EVIDENCE AS TO COMPENSATION, 36-41.

36. In actions for damages, where land was taken for canal purposes, the testimony of a witness as to damages may be considered, although he does not testify as to benefits.—Gallatin Canal Co. v. Lay, 10 Mont. 528; 26 Pac. 1001.

37. Where the pleadings in a proceeding to condemn a right of way for an irrigating ditch show that the use to be made of the water is a public ues under the constitution, a finding of such fact is not necessory to sustain a decree for plaintiff.—Ellinghouse v. Taylor, 19 Mont. 462; 48 Pac. 757.

F. ASSESSMENT, 38-41.

38. Under Comp. Stat., p. 812, § 685, in force in 1887, which provided that commissioners to assess damages for a right of way for a railroad might be appointed by the court in the judicial district where the land was situated, and gave the court exclusive jurisdiction, subject only to the right to change the venue for cause, where the court for L county appointed commissioners to assess damages for lands in J county, in the same district, and the report of such assessment was filed in L county, the appeal from such assessment to the district court of J county, without first obtaining a change of venue, gave the court no jurisdiction.—Allport v. Railroad Co., 12 Mont. 279; 29 Pac. 966.

39. The fact that the petitioner for the opening of a highway was appointed one of the viewers does not, in the absence of statutory prohibition, affect the validity of the proceedings, as the viewers are merely advisory to the commissioners, and the land owner has the right to have the question of damages submitted to a jury, and has an appeal therefrom to the district court.—Crowley v. Commissioners, 14 Mont. 292; 36 Pac. 313.

40. Under Comp. Stat., p. 218, § 607, providing that courts may regulate and determine the place and manner of making crossings, the court may, in a condemnation proceeding, refer to the commissioners the question of damages.—B. A. & P. Ry. Co. v. Montana Union, 16 Mont. 504; 41 Pac. 232.

41. In condemnation proceedings for a right of way over mining claims it was not necessary to define the word "prospect," as used in the instruction, since the term is well understood in all mining districts of the west.—Helena & L. S. & R. Co. v. Lynch, 25 Mont. 497; 65 Pac. 919.

G. APPEAL AND REVIEW, 42-46.

42. In a proceeding to condemn a right of way, the verdict assessing the damages will not be set aside, the evidence being conflicting, and there being sufficient to support the verdict.—Helena & L. S. & R. Co. v. Lynch, 25 Mont. 497; 65 Pac. 919.

43. In condemnation proceedings for a right of way for a ditch and flume over mining claims, an instruction, contrary to Civ. Code, §§ 1897-1899, that the right of defendant to the use of any water in the ditch was dependent on an agreement between the parties, was harmless error where there was no evidence to which the instruction could apply.—Id.

44. The fact that the jury found the amount taken in condemnation proceedings of greater value than that fixed by the commissioners, and the incidental damages to be $1,100, whereas the commissioners adjudged there were none, does not indicate that the jury were influenced by passion and prejudice justifying interference with the verdict.—Id.

45. Where a resort to certiorari to review an order condemning land for a water ditch is precluded by the right of appeal given by statute, the question whether there is any third plain, speedy and adequate remedy is immaterial.—State v. District Court, 29 Mont. 153; 74 Pac. 200.

46. Code Civ. Proc., § 2214, precludes a resort to certiorari in condemnation cases.—Id.

IV. REMEDIES OF OWNERS OF PROPERTY, 47-48.

47. In an action against a railroad company for damages to property by reason of the construction of the road, where plaintiff testified as to his inability to sell the premises for $4,500, the price asked before the commencement of the suit, it was error to refuse to allow defendant, on cross examination, to inquire whether plaintiff had not sold the property, or entered into a contract to sell it, for $4,500, since the commencement of the suit.—Root v. Railway Co., 20 Mont. 354; 51 Pac. 155.

48. In an action against a railroad company for damages to property by reason of the construction of the road, evidence of diversion of travel from the street in front of plaintiff's property is admissible only as bearing on any depreciation in value following the diversion.—Id.

V. TITLE OR RIGHTS ACQUIRED, 49.

49. A railroad does not take the owner's estate in minerals in land condemned for its right of way, nor, only so far as to preserve its easement, the right to work the ground for such minerals.—Northern Pacific v. Forbis, 15 Mont. 452; 39 Pac. 571.

EQUITY.

I. Jurisdiction, Principles, and Maxims, 1-10.
II. Laches and Stale Demands, 11-12.
III. Parties and Process, 13-15.
IV. Pleading, 16-17.
V. Submission of Issues to Jury, and Re-hearing, 18-25.
VI. Decree and Enforcement Thereof, 26-27.

I. JURISDICTION, PRINCIPLES, AND MAXIMS, 1-10.

1. In an action of mandamus against a county treasurer to compel him to pay interest on a county warrant, the defense was made that the warrant had not been endorsed, "Not paid for want of funds," as required by statute. *Held*, that such endorsement would be looked upon as having been made because it ought to have been made.—Territory v. Gilbert, 1 Mont. 371.

2. Legal and equitable relief can not be obtained in the same proceeding; and, in a suit commenced on the common law side of the court, a judgment for damages for the diversion of water, and which perpetually enjoins parties from using the water, is irregular and void.—Woolman v. Garringer, 1 Mont. 535.

3. The Organic Act, in clothing the supreme court and district courts of this territory with both common law and chancery jurisdiction, confers them as separate powers and distinct jurisdictions.—Id.

4. In judicial proceedings in pursuance thereof the well known and recognized distinctions between law and equity must be maintained, and the peculiar and characteristic features of these different jurisdictions preserved and exercised separately and not together.—Id.

5. Where an agent deposited money in bank for his principal, taking a certificate payable to himself or order, which he delivered to the principal but refused to endorse, the principal may sue the bank on the certificate, and hence can not maintain a bill in equity to compel the bank to pay after the court has ordered the agent to endorse the certificate.—Fultz v. Walters, 2 Mont. 165.

6. C obtained a decree for the foreclosure of a mortgage upon certain mining ground of F, E and M; F paid to C one-half of the judgment, and C released to him one-half of the mining ground described in the decree; E and M agreed orally that the release of F should not affect their liability under the decree. The agreement, which an attorney was employed to reduce to writing, in legal effect, through a mistake or ignorance of the law by the attorney, released F, E and M. *Held*, that the authority and jurisdiction of a court of equity to relieve against a mistake of law of this character is undoubted, when the court is satisfied that in so doing it is carrying into effect the express agreement of the parties.—Collier v. Field, 2 Mont. 205.

8. In equity cases the court must determine in limine whether it has jurisdiction, and hence must decide whether the complaint states a cause of action cognizable in equity.—Wilson v. Harris, 21 Mont. 374; 54 Pac. 46.

9. A court of equity, having obtained jurisdiction of an action for one purpose, may retain that jurisdiction for all purposes necessary to the complete protection of the plaintiff's rights.—McConnell v. Mining Co., 30 Mont. 239; 76 Pac. 194.

10. Defendant agreed to take a contract for the purchase of land, and that, if plaintiff should pay one-half the price, defendant would see that there should be conveyed to plaintiff a part of the land. There was no writing between them. Plaintiff, relying on the agreement, made two payments on the contract, and tendered a third, and also half of all the taxes on the land, and defendant thereafter refused to recognize plaintiff's rights. *Held*, that a court of equity had jurisdiction to prevent the consummation of the fraud, regardless of whether a resulting trust arose from the dealings between plaintiff and defendant.—Lynch v. Herrig, 32 Mont. 267; 80 Pac. 240.

II. LACHES AND STALE DEMANDS, 11-12.

11. The wife of G recovered judgment against B in November, 1870. In this month B filed a motion to retax the costs, which is

pending, and also motions to revive two judgments against G, which are pending. About five years afterward B commenced this action, and prays for an injunction to restrain the sheriff from selling property to satisfy this judgment until these motions have been heard and determined. *Held*, that B did not use reasonable diligence to secure the determination of his motions, and that he was not entitled to an injunction.—Boley v. Griswold, 2 Mont. 447.

12. Where warrants were illegally issued by county commissioners on March 14, and an order was made on the following day to issue bonds to fund the warrants, and an action was begun to restrain the issuance of the bonds on May 28, following, before the bonds were issued, there was no lack of diligence in commencing the action.—Hoffman v. Gallatin, 18 Mont. 224; 44 Pac. 973.

III. PARTIES AND PROCESS, 13-15.

13. Where property owners having the right to divert waters from a creek seek to restrain a diversion therefrom by a third person, all the property owners using such waters are not necessary parties, and hence allegations to that effect in defendant's answer were properly stricken out.—Beach v. Water Co., 25 Mont. 379; 65 Pac. 111.

14. Such owners may join in a suit to restrain a third person from diminishing the volume of water to the use of which they are entitled.—Id.

15. Where the complaint in a suit to restrain defendant from diverting the waters of a creek does not show that plaintiffs had not brought in all the claimants of such waters, the objection that there was a defect of parties can not be taken by demurrer.—Id.

IV. PLEADING, 16-17.

16. Under a complaint alleging that plaintiff and his grantors, on and before a certain date, were the owners and in the possesion of a certain ditch; that they had a prior right to the use of the water conveyed thereby; that while in peaceful possession of same defendant wrongfully diverted the water from said ditch upon said date and threatened to continue such diversion; that plaintiff would be deprived of the use of the water and that great and irreparable injury would result unless defendant was enjoined from said diversion, plaintiff is entitled to equitable relief.—Fabian v. Collins, 3 Mont. 215.

17. In an action to enjoin the diversion of water, where the replication is defective, such defect is waived if defendant allows evidence to be produced on the trial the same as if the facts alleged in said replication had been properly pleaded.—Id.

V. SUBMISSION OF ISSUES TO JURY, AND REHEARING, 18-25.

18. In a court of chancery, where an issue is submitted to a jury to aid the conscience of the court, the verdict of the jury is not controlling upon the court, but merely advisory. (Affirmed 20 Wall. 670.)—Gallagher v. Basey, 1 Mont. 457.

19. In a foreclosure suit the judge may submit a part of the issues to a jury and determine part of them himself.—Clark v. Nichols, 3 Mont. 372.

20. In a suit in equity to quiet title the decree emanates from the judge sitting as a chancellor. In such an action he may try the case without a jury, or he may submit special issues to the jury; but their findings of fact are not binding on him, and he may adopt or disregard the same or make findings of his own and render his decree thereon. (See 127 U. S. 348.)—Mantle v. Noyes, 5 Mont. 274; 5 Pac. 856.

21. The fact that in an equity case the jury are allowed to return a general verdict is harmless error, where they also return special findings for the same party, which are accepted by the court, and on which judgment is rendered.—McCauley v. McKeig, 8 Mont. 389; 21 Pac. 22.

22. Comp. Stat., p. 121, § 250, which requires all issues of fact to be tried by a jury, does not change the established principles governing courts of equity in dealing with the finding of a jury on the issue presented; and such a finding may be disregarded in making a decree relating to equitable rights.—Arnold v. Sinclair, 12 Mont. 248; 29 Pac. 1124.

23. The time for giving notice of intention to move for new trial in an equity case begins to run from notice of decision by the court, and not from the return of special findings submitted to the jury.—Power v. Lenoir, 22 Mont. 169; 56 Pac. 106.

25. Findings not within the issues made by the pleadings will not support a decree.—Largey v. Leggat, 30 Mont. 148; 75 Pac. 950.

VI. DECREE AND ENFORCEMENT THEREOF, 26-27.

26. A decree which is rendered upon the verdict of a jury in an equitable action that has been tried as a suit at common law is void, since an equitable action can not be tried as an action at law. (Overruled, Creighton v. Hershfiled, 2 Mont. 386.) (See Hornbuckle v. Toombs, 18 Wall. 648.)—Creighton v. Hershfield, 1 Mont. 639.

27. The judgment in equity cases is not controlled by the prayer for relief.—State v. Tooker, 18 Mont. 540; 46 Pac. 530.

ESCROWS.

1. Where plaintiff made a deed for land, by an agreement with defendant that he would accept the deed and pay a certain consideration therefor, if the title were satisfactory, placed it in the bank with instructions to deliver it to defendant "upon receipt of the contract price," there was no delivery and acceptance, and until the conditions were performed the sale was not completed, and plaintiff could not recover the price.—Helm v. Kleinschmidt, 12 Mont. 586; 31 Pac. 542.

2. Where the owner of real estate executes a deed to her daughters, from whom she takes back a life lease of the premises, and some months later the owner, with one of her daughters, delivers to a third party a package containing the deed and lease, and inscribed with directions to deliver the same to the owner, and in case of her death to one of the daughters, the leaving of the papers with the depositary did not constitute an escrow, there being no condition to be performed before delivery.—Martin v. Flaherty, 13 Mont. 96; 32 Pac. 287.

3. A grantor in a deed placed in escrow, to be delivered in a specified time on the performance of certain conditions, who alleged that the conditions were never performed and that the deed was never delivered, while the grantee alleged that the conditions were performed and that the deed was delivered, has the burden of proving non-delivery.—Swain v. McMillan, 30 Mont. 433; 76 Pac. 943.

ESTOPPEL.

I. By Record, 1-2.
II. By Deed, 3-9.
III. Equitable Estoppel, 10-24.
A. Nature and essentials, 10.
B. Grounds of estoppel, 11-23.
1. Inconsistent acts, claims, or conduct, 11-15.
2. Failure to assert title, 16-17.
3. Dealing with person asserting title or exercising authority, 18.
4. Stipulations and consents in pleadings, 19.
5. Acquiescence, silence, and negligence, 20-23.
C. Pleading, 24.

I. BY RECORD, 1-2.

1. Where, in an action for goods sold, plaintiffs, by demurrer to an answer alleging a special contract and damages by its breach, obtain a ruling that the contract is void, whereupon defendant pleads that fact in bar, a ruling at the close of the evidence and argument that the contract is valid, is error, and plaintiffs are estopped to take advantage of it, defendant being by the rulings deprived of his right to recoup.—Newell v. Meyendorff, 9 Mont. 254; 23 Pac. 333.

2. A decree of a trial court, designed to protect the rights of the parties pending an appeal to this court from a final judgment, being void, does not estop the party at whose instance it is entered from applying to this court for an injunction to preserve such subject pending the appeal.—Finlen v. Heinze, 27 Mont. 107; 69 Pac. 829; 70 Pac. 517.

II. BY DEED, 3-9.

3. A grantor, with full knowledge of the facts, is estopped from testifying against his own warranty of title, that the same is fraudulent and void. (See 14 Otto 618.)—Fredericks v. Davis, 3 Mont. 251.

4. The doctrine that the subsequently acquired title of one party inures to the benefit of another, applies only where the latter is a purchaser of a title from the former.—Meyendorf v. Frohner, 3 Mont. 282.

5. A subsequently acquired title inures only to the benefit of the purchaser from the party who acquires the same, and not to one who has acquired possession and title by judgment.—Id.

6. Where there is no estoppel pleaded and no fraud alleged, the deed must speak for itself: mere silence does not work an estoppel, in the absence of fraud. (See 111 U. S. 389.)—Stafford v. Hornbuckle, 3 Mont. 485.

7. The sureties in a stay bond on appeal are estopped from contending, in an action on the bond, that the judgment from which the appeal was taken had never been entered, and that consequently the bond was void, where both the bond itself and the record on appeal recite such entry.—Parrott v. Kane, 14 Mont. 23; 35 Pac. 243.

8. Comp. Stat., p. 662, § 267, provides that if any person convey any real estate by conveyance purporting to convey the fee simple, and shall not have the legal estate, but shall afterwards acquire the same, the estate subsequently acquired shall pass to the grantee. In a deed to a mining claim the grantor "granted, bargained and sold" the same, and the habendam expressly covenanted that the grantor conveyed all right, title, interest and estate which might thereafter be acquired by any patent issued by the government under the proceedings previously instituted. *Held*, that under the statute the words "granted," etc., and under the common law the habendam, were sufficient to estop the grantor from asserting an after acquired title inconsistent with the title intended to be conveyed.—McDermott Mining Co. v. McDermott, 27 Mont. 143; 69 Pac. 715.

9. A deed to a mining claim conveying all of the owner's interest, and all estate that might be acquired under proceedings previously instituted, was in form sufficient to estop the grantor from asserting a title inconsistent with that intended to be conveyed. The grantee failed to do the required representation work for a certain year, and did not resume work the next year until a third party had in good faith relocated the claim, and the relocator conveyed to the original grantor. Held that such grantor was not estopped by his deed from asserting title under the deed to him from the relocator.—Id.

III. EQUITABLE ESTOPPEL, 10-24.

A. Nature and Essentials, 10.
B. Grounds of Estoppel, 11-23.
C. Pleading, 24.

A. NATURE AND ESSENTIALS, 10.

10. Plaintiff advertised chattels for sale under a mortgage from T to plaintiff, after which they were taken from plaintiff's possession on execution against T. In an action to recover possession, *held*, that the mortgage and notice of sale did not estop plaintiff from denying that T had any interest in the property, at the time of levy, if plaintiff did not intend that the creditor should rely on the information contained in the mortgage and notice, and such information did not induce the creditor to issue the execution.—Sweetman v. Ramsey, 22 Mont. 323; 56 Pac. 361.

B. GROUNDS OF ESTOPPEL, 11-23.

1. Inconsistent Acts, Claims, or Conduct, 11-15.
2. Failure to Assert Title, 16-17.
3. Dealing With Person Asserting Title or Exercising Authority, 18.
4. Stipulations and Consents in Pleadings, 19.
5. Acquiescence, Silence, and Negligence, 20-23.

1. Inconsistent acts, claims, or conduct, 11-15.

11. The objection that an assignment, for preferred creditors, of a building on leased ground, after the lease had expired, is void, because it was personalty, and immediate actual possession, as required by Comp. Stat., p. 653, § 226, was not taken by the trustee, can not be urged by an unpreferred attaching creditor, whose attachment, if it be considered personalty, would be void, because levied on it as realty without taking actual possession.—Tuttle v. Bank, 19 Mont. 11; 47 Pac. 203.

12. A landlord who sues his tenant for the alleged reasonable rental value of the premises occupied, while admitting that a written lease, fixing a higher rental, exists between the parties, can not raise the objection on the trial that evidence to show a modification of the lease by parol as to the rent reserved is inadmissible under the statute of frauds.—Maul v. Schultz, 19 Mont. 335; 48 Pac. 626.

13. Where defendant contended that a third contract had never become operative by reason of plaintiff's failure to comply with conditions precedent, defendant could not object that an implied contract on which plaintiff's first cause of action was based, and a written contract alleged to support his second cause of action was merged in such third contract.—Stagg v. St. Jean, 29 Mont. 288; 74 Pac. 740.

14. Where defendant contended that a third contract executed between the parties had never matured by plaintiff's failure to perform conditions precedent, defendant could not urge such third contract as an estoppel to prevent plaintiff from maintaining an action on previous contracts.—Id.

15. Defendant is not estopped to claim that he succeeded to plaintiff's right in a mine by contract with plaintiff by reason of his bringing suit in plaintiff's name, after the date of the contract, to enjoin a third person working on a mine; this being under an arrangement with plaintiff, and he not being misled thereby.—Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

2. Failure to assert title, 16-17.

16. A wife who has recorded her title to her separate property is not estopped to assert her title thereto merely because she remained silent when she knew her husband was obtaining credit by claiming that the property was his.—Griswold v. Boley, 1 Mont. 545.

17. Where an assignee of a mortgage recorded the assignment, and a purchaser of the mortgaged premises afterwards paid the debt to the assignor, failure of the assignee to make any claim to the ownership of the mortgage until after the lapse of two years from the assignment, and after the assignor had become insolvent, did not estop the assignee from enforcing the security.—Cornish v. Woolverton, 32 Mont. 456; 81 Pac. 4.

3. Dealing with person asserting title or exercising authority, 18.

18. Where one appointed administrator of an estate, having received a mortgage belonging to such an estate, is induced to surrender it, and accept in lieu thereof a mortgage on other property, notwithstanding the subsequent revocation of his appointment for want of jurisdiction, the party so inducing him is estopped to deny his authority to receive the latter mortgage in lieu of the one surrendered.—Radford v. Gaskill, 20 Mont. 293; 50 Pac. 854.

4. Stipulations and consents in pleadings, 19.

19. By designating a pleading as a defense, a party is estopped from afterwards asserting that it is a counterclaim, entitled to be treated as such.—Babcock v. Maxwell, 21 Mont. 507; 54 Pac. 943.

5. Acquiescence, silence, and negligence, 20-23.

20. An agent authorized to draw in his own name for a particular purpose, can not draw in the name of his principal, and the principal is not estopped from refusing payment of a second draft by the payment of a previous and similar draft.—Bank of Deer Lodge v. Mining Co., 3 Mont. 146.

21. Where an appropriator of water prepares and witnesses the execution of a deed of a mine which describes the property "with the water right and ditches and other appurtenances thereunto belonging to the aforesaid mining ground," and knows that the mine can not be successfully worked without the use of the water, he is estopped from asserting any right to the water adverse to his grantee.—Fabian v. Collins, 3 Mont. 215.

22. The silence of the owner of property, after a wrongful seizure of it as the property of another, where not in any way inducing the seizure or sale by the sheriff, or otherwise deceiving him, or done with intention to mislead or deceive him, does not estop the owner from suing the sheriff for the value of the property.—Smith v. Caldwell, 22 Mont. 331; 56 Pac. 590.

23. A co-owner of a placer claim, for himself and as agent for other owners, including plaintiff, by oral agreement sold one acre thereof to defendant, the deed to be delivered when patent was obtained, and the purchase price to be paid then. Defendant under such agreement entered into possession and improved such acre. Thereafter plaintiff was informed of such agreement and assured defendant that it would be carried out, and, relying on the agreement and such assurance, he made further valuable improvements. Two years thereafter such claim was partitioned by such owners, plaintiff thereby acquiring the entire legal title to such acre, and brought ejectment to recover it. *Held*, that under Code Civ. Proc., § 3265, subd. 3, plaintiff was estopped to deny the validity of such oral agreement, and held such legal title for defendant's benefit.—Cobban v. Hecklen, 27 Mont. 245; 70 Pac. 805.

C. PLEADING, 24.

24. To constitute estoppel in pais the answer should allege that the false representations were made with the intent that the opposite party should act upon the same.—Meyendorf v. Frohner, 3 Mont. 282.

EVIDENCE.

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I. JUDICIAL NOTICE, 1-3.

1. Courts will not take judicial notice of the place where private property is situated, or its distance from the seat of government, and if its distance exempted it for a certain time from the operation of any law, it is the duty of those claiming the exemption to make the same appear by proof. (Reversed in Hoyt v. Russell, 117 U. S. 404.)—Russell v. Hoyt, 4 Mont. 412; 2 Pac. 25.

2. The rules and regulations as to the cutting of timber on the public lands, prescribed by the secretary of the interior under authority of congress, will be considered such an act of the executive department of the United States as the courts will take judicial notice of under Rev. Stat., p. 156, § 625; and it is not necessary to set out such rules in a complaint seeking to recover for an infringement thereof.—United States v. Williams, 6 Mont. 379; 12 Pac. 851.

3. The supreme court will take judicial notice that on a certain date certain persons were not attorney general and state treasurer, respectively, but that their successors had been elected, qualified and inducted into office.—State v. Board, 32 Mont. 13; 79 Pac. 402.

II. PRESUMPTIONS, 4-5.

4. In an action to recover a quartz lode, plaintiff offered in evidence a paper purporting to be the original declaratory statement, signed by the discoverer of the lode and sworn to before W P, the county recorder. W P, as a witness for defendant, testified that his signature to the jurat of the statement was not genuine. Plaintiff contended that defendant did not prove that the witness W P was the recorder W P. *Held*, that the identity of names is prima facie evidence of identity of persons.—Stapleton v. Pease, 2 Mont. 550.

5. Under Code Civ. Proc., § 3266, subd. 32, accounts which are shown to have once been good and collectible are presumed to so continue.—Thornton-Thomas Co. v. Bretherton, 32 Mont. 80; 80 Pac. 10.

III. BURDEN OF PROOF, 6.

6. Where, in an action for money paid, defendant pleads as setoff that plaintiff should have sold certain stock for defendant at a certain price, which plaintiff denies, the burden of proof is on defendant.—Coquard v. Weinstein, 16 Mont. 312; 40 Pac. 696.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY, 7-18.

A. Facts in Issue and Relevant to Issues, 7-9.
B. Res Gestae, 10.
C. Similar Facts and Transactions, 11-13.
D. Competency, 14-18.

A. FACTS IN ISSUE AND RELEVANT TO ISSUES, 7-9.

7. At the trial in an action for the conversion of certain hay, plaintiff testified that said hay belonged to him and was in an enclosed field when wrongfully taken. Defendant, under a general denial, offered evidence to prove that plaintiff agreed to and did sell him the property, and that under this agreement he entered the field and took the property. The evidence was rejected. *Held*, that the evidence relating to the ownership should have been admitted, and that, under the denial, the evidence relating to the privilege to enter the premises was properly excluded.—Staubach v. Rexford, 2 Mont. 565.

8. Where the act of a brakeman in mounting a car was not per se negligent, it is competent to show that, under the same circumstances, experienced brakemen perform the same act as he did.—Prosser v. Montana Central, 17 Mont. 372; 43 Pac. 81.

9. In an action for trespass and permanent injury to land, it was error to receive testimony of plaintiff and another as to what was offered for a strip across the land for a railroad, where there was no evidence that the one making the offer was the agent of the railroad company, or had any authority to make the offer.—Sweeney v. Montana Central, 25 Mont. 543; 65 Pac. 912.

B. RES GESTAE, 10.

10. Under Code Civ. Proc., § 3126, providing that where a declaration or act forms part of a transaction which is itself the fact in dispute, or evidence of that fact, such declaration or act is part of the transaction, evidence as to acts and declarations of deceased with reference to the relation an alleged adopted child sustained towards him in his life time is admissible as part of the res gestæ.—Burns v. Smith, 21 Mont. 251; 53 Pac. 742.

C. SIMILAR FACTS AND TRANSACTIONS, 11-13.

11. In an action to recover for personal injuries occasioned by the overturning of defendant's coach, evidence of former accidents occurring under the same driver is admissible to prove the bad nature of the roads or want of familiarity with them, but not as proof of the negligence of the driver at the time of the accident complained of.—Higley v. Gilmer, 3 Mont. 90.

12. Where, in an action against a deputy sheep inspector for negligently dipping plaintiff's sheep in an improper dip, plaintiff claimed that by reason thereof a large number of the sheep died, and others were so affected that they were worthless for breeding, an offer of proof that other sheep were dipped in a similar mixture under like circumstances, and that no "fatal" results ensued, was properly denied.—Bair v. Struck, 29 Mont. 45; 74 Pac. 69.

13. In an action for the price of a stove alleged by defendant to have been worthless, the admission of testimony of a third person that he had purchased a stove of plaintiff bearing the same trade mark, which proved to be worthless, was error.—Lauder v. Sheehan, 32 Mont. 25; 79 Pac. 406.

D. COMPETENCY, 14-18.

14. Where defendant has testified to an oral agreement with plaintiff's agent, modifying a written agreement, plaintiff, by cross examination, may show the full nature of the oral agreement.—Alderson v. Marshall, 7 Mont. 288; 16 Pac. 576.

15. On the second trial of an action for the price of goods the stenographer who took the testimony on the former trial was permitted to testify on behalf of plaintiffs that C, one of defendants, had testified as to a certain letter written by himself to plaintiffs. Defendants then made the stenographer their witness, and asked him to state the testimony of C on the former trial as to the circumstances in regard to the writing of this letter, which had already been introduced. *Held*, that such former testimony was admissible under Comp. Stat., p. 224, § 626, providing that when a detached act, declaration or writing is given in evidence, any other act, declaration, etc., which is necessary to make it understood, may also be given.—Du Vivier v. Phillips, 18 Mont. 370; 45 Pac. 554.

16. Where the reputation of a person is in issue, and a witness shows himself to have been for a long time in a position to know and hear what is said of such person in the community where the person and the witness reside, the fact that the witness has never heard the person's character questioned is evidence tending to prove good character.—Matusevitz v. Hughes, 26 Mont. 212; 66 Pac. 939; 68 Pac. 467.

17. Where plaintiff introduced evidence on a particular issue without objection, he could not thereafter object to the introduction of evidence by defendant on the same issue.—Yank v. Bordeaux, 29 Mont. 74; 74 Pac. 77.

18. Under Code Civ. Proc., § 3130, the act of plaintiffs, in an action against the officers and directors of a corporation for fraudulently diverting and misappropriating the corporate funds, in first introducing some insufficiently identified by-laws, though denying the legality of their adoption, renders the others admissible on behalf of the defendants.—McConnell v. Milling Co., 30 Mont. 239; 76 Pac. 194.

V. BEST AND SECONDARY EVIDENCE, 19-32.

A. Facts and Transactions Described in or Evidenced by Writings, 19-21.
B. Contents of Writings, 22-23.
C. Original Writing as Best Evidence, 24-25.
D. Grounds for Admission of Secondary Evidence, 26-27.
E. Preliminaries to Admission of Secondary Evidence, 28-30.
F. Character and Degrees of Secondary Evidence, 31.
G. Determination of Question of Admissibility, 32.

A. FACTS OR TRANSACTIONS DESCRIBED IN OR EVIDENCED BY WRITING, 19-21.

19. In an action to recover damages for trespass on a placer claim appellants did not offer to introduce the written rules and customs of the district, or show that they had been lost or destroyed. *Held*, that such rules were the best evidence in the case as to the existence of the claim and that other evidence could not be admitted without showing loss or destruction of such rules. (See 9 Otto 261.)—Campbell v. Rankin, 2 Mont. 363.

20. In an action on an account, in which defendant claimed that the amount sued for was paid to plaintiff, by causing a credit to be given to plaintiff, on his indebtedness to a third party, with plaintiff's consent, the testimony of such third party's book-keeper as to whether or not the books of such party showed any such credit, is competent.—Ramsey v. Cattle Co., 6 Mont. 498; 13 Pac. 247.

21. Evidence relating to the number of obligees in a bond was properly excluded where the bond was in evidence.—Montana M. Co. v. Milling Co., 20 Mont. 394; 51 Pac. 824.

B. CONTENTS OF WRITINGS, 22-23.

22. Evidence of the contents of a written contract, without properly accounting for the absence of the contract itself, is inadmissible.—Watson v. Smelting Co., 31 Mont. 513; 79 Pac. 14.

23. The court records are the best evidence of who dropped proceedings to revoke probate of a will in the court.—Spencer v. Spencer, 31 Mont. 631; 79 Pac. 320.

C. ORIGINAL WRITING AS BEST EVIDENCE, 24-25.

24. Where it appears in an action to recover a quartz lode that the declaratory statement signed by the discoverer of the lode, and sworn to before the county recorder, introduced by plaintiff, is not the original document and that the original document is not lost, but is on file in the land office, such copy is inadmissible.—Stapleton v. Pease, 2 Mont. 550.

25. In an action against a master for medical services rendered a servant who was injured while performing his duties, it appeared that one W telegraphed to defendant from the place where the injury occurred, asking whether defendant would pay the "doctor's bill." Defendant answered W by wire. *Held*, that since W initiated the correspondence, the telegraph company was his agent, and not that of defendant, and hence defendant's reply telegram delivered to the company for transmission was the original, for evidentiary purposes, and not the reply telegram delivered by the telegraph company to W.—Bond v. Hurd, 31 Mont. 314; 78 Pac. 579.

D. GROUNDS FOR ADMISSION OF SECONDARY EVIDENCE, 26-27.

26. In a creditor's suit to set aside a sale by the husband to his wife as fraudulent, a transcript of a bill of sale of the property from the husband to the wife, filed in the county clerk's office, is admissible in evidence for the purpose of showing the nature of the transfer, where the original was shown to have been lost.—Finch v. Kent, 24 Mont. 268; 61 Pac. 653.

27. Pol. Code, § 1364, as amended by Laws 1901, p. 120, authorizes judges of election to assist voters who can not read and write, etc., in making out their ballots, the judges to certify on the outside of the ballots that it was made out with their assistance. Sec. 1358, as amended by Id., p. 118, et seq., provides that no elector shall place any identifying mark on his ballot. Sec. 1413, authorizes the use of ballots as evidence in election contests. *Held*, that where it appeared in an election contest that a voter's ballot had been so endorsed, it was necessary to show that it could not be thereby identified, in order to let in, as secondary evidence, the voter's own testimony as to how he voted.—Lane v. Bailey, 29 Mont. 548; 75 Pac. 191.

E. PRELIMINARIES TO ADMISSION OF SECONDARY EVIDENCE, 28-30.

28. There being enough competent evidence submitted to the court as a foundation for secondary evidence of the contents of a deed, the fact that thereafter hearsay testimony was received, is not ground for reversal.—Brooke v. Jordan, 14 Mont. 375; 36 Pac. 450.

29. A sufficient foundation was laid to authorize the admission in evidence of copies of certain conveyances by showing that the originals were not within the control of the party.—Montana M. Co. v. Milling Co., 20 Mont. 394; 51 Pac. 824.

30. Under Code Civ. Proc., § 3228, where plaintiff relied on a telegram, the burden was on him to prove the loss of the original, to authorize the admission of a copy.—Bond v. Hurd, 31 Mont. 314; 78 Pac. 579.

F. CHARACTER AND DEGREES OF SECONDARY EVIDENCE, 31.

31. Where the original record books of a mining district are lost, the copy made thereof by the deputy recorder, under a law requiring district records to be filed in the recorder's office, in a book which has been recognized by usage and preserved in the recorder's office, is better evidence of a location appearing therein than the bare memory of witnesses. (See 14 Otto 279.)—Belk v. Meagher, 3 Mont. 65.

G. DETERMINATION OF QUESTION OF ADMISSIBILITY, 32.

32. The question of the existence of facts constituting a foundation for the admission of secondary evidence is one for the determination of the court. (See 11 Wall. 610.)—Kleinschmidt v. Dunphy, 1 Mont. 118.

VI. ADMISSIONS, 33-51.

A. Nature, Form, and Incidents in General, 33-35.
B. By Grantors, Former Owners, or Privies, 36-38.
C. By Agents or Other Representatives, 39-49.
D. Proof and Effect, 50-51.

A. NATURE, FORM, AND INCIDENTS IN GENERAL, 33-35.

33. In trover for wood, a conversation in which plaintiff demanded of one of defendants $74 for the wood, adding that if such sum was not paid he would sue, is admissible in evidence, where there is nothing to show that the conversation took place while negotiating for a peaceful settlement, or with a view to compromise.—Swenson v. Kleinschmidt, 10 Mont. 473; 26 Pac. 198.

34. In an action to remove a cloud from the title to a mining claim, plaintiff averred that defendant had no interest therein. On direct examination he testified that he knew of defendant's asserted claim of an interest two years before he brought suit, and on cross examination he testified that he had not attempted to purchase defendant's interest, nor authorize his attorney to endeavor to do so. He was asked if he did not authorize his attorney to endeavor to purchase defendant's interest. *Held*, that it was error to sustain an objection to such question, as disclosing an attempt to make a compromise; for it might have appeared, if the question had been answered, that it was an attempt on plaintiff's part to purchase defendant's claim outright.—Hughes v. Rowan, 27 Mont. 500; 71 Pac. 764.

35. Where, in an action for money loaned, defendant claimed that plaintiff and C were partners, and that the money was loaned by plaintiff to be used in their business, and thereafter the notes of a third person who conducted the business of the firm were received by plaintiff in settlement of the advancement, a verified complaint in an action by defendant against the wife of such manager, in which defendant claimed to be the owner of such business, was admissible.—Tague v. Caplice, 28 Mont. 51; 72 Pac. 297.

B. GRANTORS, FORMER OWNERS, OR PRIVIES, 36-38.

36. The testimony of the endorser or assignor of a note as to the payment thereof, though such note was endorsed or assigned after maturity, is inadmissible in evidence against a subsequent owner and holder thereof.—Shober v. Jack, 3 Mont. 351.

37. The declarations of the seller, after the sale, but while still in possession, where the sale is attacked by a creditor on the ground of fraud, are admissible against the buyer to show the

character of the seller's possession and his interest in the premises.—Gallick v. Bordeaux, 22 Mont. 470; 56 Pac. 961.

38. In an action involving the priority of appropriations of certain water rights plaintiffs contended that the appropriation made by their predecessor in interest was made in July of a certain year, and the court found that the appropriation was made in October of that year. *Held*, that notwithstanding this finding, the evidence of declarations made by plaintiffs' predecessor, tending to show that in August of the year in question they had made no appropriation, was admissible, under Code Civ. Proc., § 3125.—Phillips v. Coburn, 28 Mont. 45; 72 Pac. 291.

C. BY AGENTS OR OTHER REPRESENTATIVES, 39-49.

39. Declarations by each of two persons engaged in the furtherance of a common design to defraud a third party are evidence against the other, though made in the latter's absence. —Kleinschmidt v. Dunphy, 1 Mont. 118.

40. A passenger for hire sued a common carrier for injuries received by the overturning of the carrier's sleigh. At the trial plaintiff offered in evidence the following statement made by the carrier's driver immediately after the accident and while he was in charge of the sleigh: "He could have avoided the overturning of the sleigh if he had been paying the slightest attention. It was his carelessness and there was no necessity for it." *Held*, that the statements were not within the scope of the driver's authority, and were not admissible.—Ryan v. Gilmer, 2 Mont. 517.

41. In an action against a carrier for injuries to a passenger, the driver's declarations, made at the time of the injury, that he could have avoided the accident if he had been paying the slightest attention, and that there was no necessity for his carelessness, are not within the scope of his authority, and hence inadmissible as against the carrier.—Id.

42. The declaration of a trustee of a corporation, who owns two-thirds of its corporate stock, that the corporation started with a clear balance sheet, is admissible in attachment proceedings against the corporation, brought because of its shortly afterwards contracting a fraudulent indebtedness to the trustee, and disposing of its property to him to defraud creditors.—Josephi v. Mady, 13 Mont. 195; 33 Pac. 1.

43. A check won by W in gambling was cashed by plaintiff under circumstances tending to put him on notice. An hour later plaintiff and W went together to the saloon where the check was won, where plaintiff said that he had paid only part of the amount of the check and wished to settle the matter. *Held*, that statements of W, not in the presence of plaintiff, that he had won the check at cards, and that plaintiff was going to cash it for him, were admissible, both as part of the res gestæ and as declarations of a co-conspirator before the completion of the conspiracy.—Harrington v. Mining Co., 19 Mont. 411; 48 Pac. 758.

44. Where plaintiff in conversion claimed title under a sale attacked as in fraud of creditors, declarations by one of the parties to the sale, showing that he was afraid the sale would not stand, and that he desired that a mortgage be given to cover emergencies, were admissible against plaintiff, though made when he was not present, since parties to a fraudulent sale are co-conspirators. —Pincus v Reynolds, 19 Mont. 564; 49 Pac. 145.

45. An admission by an assignor, through her agent, that a sale was not bona fide, made in a matter which was beyond the scope of the agent's authority, not relevant to any transaction then pending, and not referring to property in the agent's possession, should be excluded.—Wilson v. Harris, 21 Mont. 374; 54 Pac. 46.

46. A declaration of the correctness of an account for building materials, made by the agent of the owner of the building sometime after the materials were furnished, is binding on the agent only, being hearsay as to the principal. —Missoula Merc. Co. v. O'Donnell, 24 Mont. 65; 60 Pac. 991.

47. On an issue as to the title to property under a bill of sale, written declarations of the vendee's agent, representing her in the purchase, made several months after the bill was executed, but before the property was resold, to the effect that the vendee did not claim the property, and that it was not included in the bill, are hearsay and inadmissible, the uncontradicted evidence showing that the agent had no authority to sell or dispose of the property in any way.—Hogan v. Kelly, 29 Mont. 485; 75 Pac. 81.

48. The written declaration of an agent of plaintiff's vendor to defendants, wholly disconnected with the matter in controversy, and of an acrimonious character, tending to prejudice the jury against plaintiff, is erroneously admitted in evidence.—Id.

49. In an election contest it appeared that certain persons conspired to colonize voters by employing men prior to election to go into the county to obtain work and vote a certain ticket. Their expenses were paid, and the conspiracy was carried out, the colonized voters knowing the illegal purpose of their employment, and perjuring themselves in obtaining registration. *Held*, that their declarations, as well as those of the original conspirators, from the time of the negotiations for their employment up to and during the election, which were germane to the conspiracy or a part of the res gestae, were admissible.—Lane v. Bailey, 29 Mont. 548; 75 Pac. 191.

D. PROOF AND EFFECT, 50-51.

50. Where the record shows that the respondents requested the court to submit a certain issue to the jury, and that the court appended to the request the following note: "Not submitted, for reason that defendant conceded these facts," this note cannot be considered as the record or evidence of such a formal admission by the attorneys as to the impart verity.—Taylor v. Stewart, 1 Mont. 316.

51. When title is attempted to be proved by oral declarations of the grantors, it may be shown in rebuttal that such grantors made different and contradictory statements, and this is not in conflict with the rule that the declarations of a grantor in disparagement of his title are inadmissible. (See 111 U. S. 389) Stafford v. Hornbuckle, 3 Mont. 485.

VII. DECLARATIONS, 52.

52. In an action for commissions, conversations between plaintiff and the purchaser, relative to the commissions to be received by plaintiff from defendant, are incompetent.—Childs v. Ptomey, 17 Mont 502; 43 Pac. 714.

VIII. HEARSAY, 53-60.

53. In replevin of certain cattle from one who had traded mules for them, plaintiff can not introduce a letter written by another party to the sheriff, stating that he had a mortgage on two of the mules, which were in custody of the sheriff under attachment.—Davis v. Blume, 1 Mont. 463.

54. In an action on a verbal contract, the testimony of plaintiff as to what his clerk told him defendant had said to him (the clerk) in orally making the promise sued upon, is competent, and is not hearsay.—Frank v. Murray, 7 Mont. 4; 14 Pac. 654.

55. On an issue as to whether a horse in defendant's possession was the one sold him by witness, a description, in a bill of sale from a third person to witness, of a horse which the latter claimed to have subsequently sold defendant, was hearsay.—McIntire v. McCabe, 19 Mont. 333; 48 Pac. 390.

56. In a creditors' suit to set aside a sale of 3,400 sheep by a husband to his wife as fraudulent, evidence that the wife was generally reputed in the neighborhood where they resided to be the owner of the sheep was incompetent. —Finch v. Kent, 24 Mont. 268; 61 Pac. 653.

57. Testimony that a third person told plaintiff, who was seeking to introduce the testimony of a witness given at a former trial, that said witness had gone to the Klondike, was hearsay. —Reynolds v. Fitzpatrick, 28, Mont. 170; 72 Pac. 510.

58. Testimony, by a mortgagee of personalty, that the one who it was claimed had purchased it told him that the owners said that the sale could be made if he, the mortgagee, was willing, was inadmissible as hearsay.—Id.

59. In a will contest, evidence that one of the subscribing witnesses had, some years after the execution of the will, brought the document to witness and explained his possession of it, was inadmissible.—Farleigh v. Kelly, 28 Mont. 421; 72 Pac. 756.

60. On an action on an account for a hot air plant installed in defendant's building, the exclusion of the catalogue issued by the manufacturers of the plant, introduced for the purpose of showing the heating capacity thereof, was proper, the evidence being at most hearsay. —Stagg v. St. Jean, 29 Mont. 288; 74 Pac. 740.

IX. DOCUMENTARY EVIDENCE, 61-82.

A. Public or Official Acts, Proceedings, Records, and Certificates, 61-63.
B. Exemplifications, Transcripts, and Certified Copies, 64-73.
C. Private Writings and Publications, 74-78.
D. Production, Authentication, and Effect, 79-82.

A. PUBLIC OR OFFICIAL ACTS, PROCEEDINGS, RECORDS, AND CERTIFICATES, 61-63.

61. To explain the absence of certain witnesses, a subpœna, with the return of the officer that he was unable to find them, is admissible.—Heyfron v. Mahoney, 9 Mont. 497; 24 Pac. 93.

62. When a portion of one county is annexed to another, the assessment books of the former are admissible on an issue as to the proper salary of an officer of the enlarged county, to show the last valuation of the land annexed. —State v. Cook, 14 Mont. 201; 36 Pac. 44.

63. In a suit to enforce a mechanic's lien, the judgment roll in an action wherein one of the present defendants recovered a judgment, the lien of which he claims is superior to plaintiff's lien, is admissible, though the complaint therein is not verified.—Johnson v. Mining Co., 19 Mont. 30; 47 Pac. 337.

B. EXEMPLIFICATIONS, TRANSCRIPTS, AND CERTIFIED COPIES, 64-73.

64. In an action against a member of a firm who claims that the firm had become incorporated in another state, a certificate of articles of incorporation is inadmissible, where there is no certificate that the attestation of the certificate of articles of incorporation is in due form by the proper officers, as required by U. S. R. S., § 906.—Parchen v. Peck, 2 Mont. 567.

65. A certified copy of the record of a declaratory statement or deed is made competent evidence, under Civ. Code § 609, without producing or accounting for the loss of the original instruments.—McKinstry v. Clark, 4 Mont. 370; 1 Pac. 759.

66. Certified copies of declaratory statements of claims, filed in the recorder's office, are equally admissible in evidence with the originals, and without accounting for the absence of the originals.—Id.

67. A certified copy of a duly recorded declaratory statement under oath of the locator of a mining claim is admisible in evidence without first accounting for the original. (See 130 U. S. 290.)—Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. 153.

68. A certified copy of a deed, which has been duly recorded, is admissible in evidence without first accounting for the original—Id.

69. A certified copy of a certificate of incorporation, which has been duly recorded, is admissible in evidence without first accounting for the original.—Id.

70. Under Comp. Stat., p. 662. § 264, providing that when a conveyance is acknowledged or proved, certified and recorded, and it is shown that it is lost, or not within the power of the party wishing to use it, the record or certified transcript thereof may be read in evidence; and Comp. Stat., p. 868, § 839, providing that copies of all papers filed with the recorder of deeds, and certified transcript from the records, shall be prima facie evidence in all cases, records of conveyances and certified copies thereof are not admissible without proof of loss of the originals or inability to produce them.—Manhattan M. Co. v. Sweteland, 14 Mont. 269; 36 Pac. 84.

71. Under Comp. Stat., p. 202, § 542, providing that the copy of a document in the custody of an officer of the United States, certified by his official seal, or verified by his oath to be a true copy of the original, may be read in evidence, a copy of a declaratory statement for a townsite, certified by the receiver of the United States Land Office, which was not under his official seal, nor verified by his oath, was properly excluded.—Chambers v. Jones, 17 Mont. 156; 42 Pac. 758.

72. A copy of a paper certified by one as "acting commissioner of the general land office," with the seal of the office attached, does not show a vacancy in the office of commissioner, and is admissible under U. S. R. S., § 891, providing that "copies of any * * * papers in the general land office, authenticated by the seal and certificate of the commissioner thereof, or when his office is vacant, by the principal clerk, shall be evidence".—Murray v. Polglase, 17 Mont. 455; 43 Pac. 505.

73. The organization of a corporation under the state law was properly proved by a copy of its certificate of incorporation, certified by the secretary of state, under Code Civ. Proc., § 3207, providing that a public record of a private writing may be proved by a copy thereof certified by the legal keeper of the record.— Western Iron Works, v. Paper Co., 30 Mont. 550; 77 Pac. 413.

C. PRIVATE WRITINGS AND PUBLICATIONS, 74-78.

74. On the trial in an action on an account for transporting merchandise by ox trains between points several hundred miles apart, a sketch made by the plaintiff of the country between such points is not admissible, where it appeared that plaintiff had no knowledge of the country, and the sketch or map was not authenticated in any way.—Story v. Maclay, 3 Mont. 480.

75. A memorandum book containing an entry of but a single transaction, is not an account book within the meaning of the law, and is not admissible in evidence, although the entry was made at the time of the transaction and in the presence of the parties.—Ryan v. Dunphy, 4 Mont. 356; 5 Pac. 324.

76. To admit a book of account as evidence, preliminary proof must show that it was a book of original entries in which the ordinary business transactions and a course of dealing with various persons appear, entered at the time of the transaction; also that the person making the entries kept true and honest accounts; and the book itself should be first submitted to the inspection of the court.—Id.

77. In an action against a constable for conversion of personal property taken by him under an attachment against plaintiff's vendor, a written bill of sale from such vendor to plaintiff, although alone it may not have fully proved the sale and delivery, was competent evidence, tending, as far as it went, to prove a sale, and was therefore admissible.—Rodoni v. Lytle, 13 Mont. 123; 32 Pac. 491.

78. Memoranda used by a witness to refresh his memory as to the cost of goods are no evidence of the value thereof.—Kipp v. Silverman, 25 Mont. 296; 64 Pac. 884.

D. PRODUCTION, AUTHENTICATION, AND EFFECT, 79-82.

79. Where, in an action on a contract whereby the record stockholders of a bank guaranteed the payment of notes, the ledger of the bank showed defendant's name as a stockholder, and it appeared that he and another executed the contract of guaranty on behalf of themselves and other stockholders, the court was justified in finding that defendant was a record stockholder; for the ledger itself was prima facie evidence of that fact, requiring defendant to rebut the same.—Stanford v. Coram, 26 Mont. 285; 67 Pac. 1005.

80. In the absence of proof to the contrary, a contract by the executive officers of a corporation, and under its corporate seal, in its name and on its behalf, with reference to the business comprehended in its articles of incorporation, is not objectionable for failure to prove the authority of the officers to execute the contract.—Tague v. Caplice, 28 Mont. 51; 71 Pac. 297.

81. Where defendant's articles of incorporation provided that it was organized to buy and sell wood, etc., and the minutes of a stockholders' meeting showed a motion, duly passed, ratifying certain contracts modifying a prior contract with N employing him to manage the business, such contracts were not objectionable on the ground that their execution by the officers of the company were acts ultra vires.—Id.

82. Minutes of a stockholders' meeting, consisting of separate sheets of paper pinned to the leaves of a record book, are insufficiently identified to make them admissible.—McConnell v. Milling Co., 30 Mont. 239; 76 Pac. 194.

X. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS, 83-118.

A. CONTRADICTING, VARYING, OR ADDING TO TERMS OF WRITTEN INSTRUMENTS, 83-99.
B. INVALIDATING WRITTEN INSTRUMENTS, 100-102.
C. SEPARATE OR SUBSEQUENT AGREEMENT, 103-108.
D. CONSTRUCTION AND APPLICATION OF LANGUAGE OF WRITTEN INSTRUMENTS, 109-117.
E. SHOWING DISCHARGE OR PERFORMANCE OF OBLIGATION, 118.

A. CONTRADICTING, VARYING, OR ADDING TO TERMS OF WRITTEN INSTRUMENTS, 83-99.

1. WRITINGS EXCLUDING EXTRINSIC EVIDENCE, 83-91.
2. GROUNDS FOR OR PURPOSE OF PAROL OR EXTRINSIC EVIDENCE, 92-99.

1. Writings excluding extrinsic evidence, 83-91.

83. Parol contemporaneous evidence is not admissible to contradict or vary the terms of a valid written instrument, but such evidence is competent to enable the court to ascertain the intention of the parties to the deed, and make certain the language respecting its subject matter, and give effect to the deed.—Donnell v. Humphreys, 1 Mont. 518.

84. Parol evidence is admissible to show that the grantors in deed in which the property is described as "all the water of the right hand fork" of a gulch, intended to convey the water of the left hand fork of such gulch.—Taylor v. Holter, 1 Mont. 688.

85. The fact of suretyship may be proven by parol, but such proof does not change the contract or the liability of the party making it.—Smith v. Freyler, 4 Mont. 489; 1 Pac. 214.

86. Parol evidence can not be introduced to vary the written contract of guaranty of the debt of another.—Gillett v. Clark, 6 Mont. 190; 9 Pac. 823.

87. A contract entirely reduced to writing cannot be orally contradicted.—Ming v. Pratt, 22 Mont. 262; 56 Pac. 279.

88. Where it was claimed that a chattel mortgage was void as to subsequent purchasers of the goods mortgaged, by reason of the fact that the mortgagor was permitted to remain in possession and sell the goods without accounting to the mortgagee, extrinsic evidence was admissible to show the conditions actually existing and the conduct of the parties with reference to the mortgaged property.—Stevens v. Curran, 28 Mont. 366; 72 Pac. 753.

89. Under Civ. Code, § 2186, evidence of negotiations and conversations immediately preceding the execution of a written contract is incompetent to show an agreement concerning its matter made by one claimed to be bound thereby.—Largey v. Leggat, 30 Mont. 148; 75 Pac. 950.

90. Plaintiff claimed that she deposited with defendant money to be applied on the price of furniture, on an understanding that, if the sale should not be consummated, the money should be returned, and defendant claimed there was a sale and part payment. *Held*, that it was proper to admit testimony on behalf of plaintiff to explain the purpose and meaning of a receipt given by defendant to plaintiff.—Hennessy v. Furniture Co., 30 Mont. 264; 76 Pac. 291.

91. Parol evidence is inadmissible to contradict or vary recitals in the minute entries of the board of equalization's proceedings, and to show that final action on an increase of assessment was not actually taken until after the date recited in the minutes.—M. O. P. v. Maher, 32 Mont. 480; 81 Pac. 13.

2. Grounds for or purpose of parol or extrinsic evidence, 92-99.

92. In determining what property is conveyed by a deed, which describes the same as "the ditches known as the Silver Bow Company's ditches," "and more particularly known as the Humphrey & Allison ditches," the court should consider extrinsic parol evidence, tending to prove that the ditch known as the "Park ditch" was one of said ditches; that it was necessary to convey the water to said ditches; that said ditches would be of no value without the "Park ditch."—Donnell v. Humphreys, 1 Mont. 518.

93. The maker and payee of two notes agreed in writing that certain stock had been deposited as collateral security to secure the payment of the notes, and that on payment the stock should be delivered to said maker, but if the notes were not paid the stock should be delivered to the payee, to be by him held and disposed of as collateral security. Comp. Stat., p. 224, § 628, provides that, when the terms of an agreement have been reduced to writing, there can be no evidence of the terms of the agreement other than the contents of the writing. *Held*, that oral testimony that, at the time of making said notes and said agreement, it was understood by all the parties that said agreement obliged the payee to exhaust the collateral before suing on the notes was not admissible.—Fisher v. Briscoe, 10 Mont. 124; 25 Pac. 30.

94. A provision in a bond for title to an undivided interest in a mining claim that one-sixth of the net proceeds of all shipments of ore should be paid by the vendees to the vendor, to be applied on the agreed purchase price for such undivided interest, is wholly free from ambiguity, and the agreement can not be varied or added to by parol evidence that, according to a custom of miners, all the expenses of mining, as well as the expense of shipping ore, should be deducted before payment to the vendor.—Keefe v. Doreland, 16 Mont. 16; 39 Pac. 916.

95. Where a note sued on was payable only on the sale of the maker's interests in certain mines according to the terms of certain contracts made with the payee, an offer to prove that, after a sale of such interests, which did not occur until the time expressly limited by the contracts had expired, the maker had acknowledged the note, and promised to pay it, was an offer to prove a different contract and inadmissible.—Talbott v. Heinze, 25 Mont. 4; 63 Pac. 624.

96. Testimony by lessees that they would have signed the lease but for an understanding that the time would be extended was not admissible to show a contemporaneous oral agreement to extend, because showing mere mental reservations not disclosed to the lessor, and not in anywise affecting him.—Armington v. Stelle, 27 Mont. 13; 69 Pac. 115.

97. Where there was nothing contained in the description of property in a lease by which it could be determined from the lease itself, whether it was intended for occupation by human beings or not, which was one of the issues made by the pleadings, parol evidence was admissible to explain the purpose for which the property was leased, together with its condition and description.—Landt v. Schneider, 31 Mont. 15; 77 Pac. 307.

98. Parol evidence is admissible to show that the consideration for a written contract was forbearance to sue.—Noyes v. Young, 32 Mont. 226; 79 Pac. 1063.

99. Where a deed of certain land did not specify the particular appurtenant water right alleged to have been conveyed with it, extrinsic evidence was admissible to establish such appurtenant right.—Bullerdick v. Hermsmeyer, 32 Mont. 541; 81 Pac. 334.

B. INVALIDATING WRITTEN INSTRUMENTS, 100-102.

100. Where evidence has been introduced tending to show complicity and collusion in respect to the conveyance in question, it is competent to admit testimony as to the declarations of the party making the conveyance. (See 11 Wall. 610.)—Kleinschmidt v. Dunphy, 1 Mont. 118.

101. Plaintiff alleged mistake and fraud, and the evidence disclosed that the inducement held out to plaintiff to sign an agreement was based on fraudulent representations of defendant that a lease need not be mentioned in a contract of sale of a business and the lease. *Held*, that under Code Civ. Proc., §§ 2186, 3132, 2117, 2123, evidence was admissible showing the purchase of the lease and defendant's misconduct, over objection that it varied the contract.—Sathre v. Rolfe, 31 Mont. 85; 77 Pac. 431.

102. Where a contract of sale of a business omitted reference to a leasehold interest by fraudulent representations of defendants as to the lease being a separate writing, evidence showing the purchase of the leasehold interest was admissible, as being independent and collateral to the portion which was reduced to writing.—Id.

C. SEPARATE OR SUBSEQUENT AGREEMENT, 103-108.

103. In an action on an accepted draft, defendant may show by parol, in support of his counterclaim alleged to have existed prior to the acceptance, that it was agreed between the parties that the acceptance should not operate as a waiver of the claim, as such evidence does not vary the terms of the written instrument, but only rebuts the presumption of waiver.—Bohn Mfg. Co. v. Harrison, 13 Mont. 293; 34 Pac. 313.

104. Evidence of a parol agreement, made at the time of the execution of notes, that the maker should have the right to offset an account then existing in his favor, is not a variance from the contract embodied in the notes.—Bennett v. Tillmon, 18 Mont. 28; 44 Pac. 80.

105. In action on a written lease for rent, the tenant can not show that contemporaneously with, or prior to, the making of the lease, the landlord orally warranted the condition of the premises, or promised to make repairs.—York v. Steward, 21 Mont. 515; 55 Pac. 29.

106. Under Civ. Code, § 2186, and Code Civ. Proc., § 3132, evidence of a contemporaneous agreement between the parties to a written sublease of a mining claim, that in case the sublessors should buy the property the lease would be extended, was inadmissible.—Armington v. Stelle, 27 Mont. 13; 69 Pac. 115.

107. Under Civ. Code, § 2281, a subsequent oral agreement between the parties to a written sublease of a mining claim that in case the sublessors should buy the property the lease would be extended was void, being a mere executory agreement, without consideration.—Id.

108. By the terms of a written contract, services performed and materials furnished by plaintiffs in putting in a heating plant were to be paid for in a certain sum, the contract being

presented was a correct copy of the testimony as actually given. *Held*, error to admit the testimony.—Reynolds v. Fitzpatrick, 28 Mont. 170; 72 Pac. 510.

147. Under Code Civ. Proc., § 3146, where one seeks to introduce the testimony of a witness given on a former trial, the burden is on him to show the existence of one of the requisite conditions, for introducing such testimony.—Id.

148. A party offering the testimony of a witness on a former trial showed that a subpœna was issued, which was returned with the sheriff's endorsement that he could not find the witness, and the party testified that he heard that the witness lived at a certain place, and he had written his (the party's) daughter about it, who said she had not heard from him in two years; that he inquired of a man in another place, who said that the witness had gone to the Klondike, and inquired of other parties, who said that they did not know where he was. *Held*, error to admit the testimony on the former trial, as the proof failed to show that the witness was out of the state, or, if so, it did not show that he might not have started a few days before the trial.—Id.

149. The testimony of a witness on a former trial is inadmissible in the absence of a showing that it was given in an action between the same parties relating to the same matter.—Leggat v. Carroll, 30 Mont. 384; 76 Pac. 805.

XIII. WEIGHT AND SUFFICIENCY, 150-156.

150. In a civil action an affirmative defense may be established by a preponderance of evidence on the testimony of one witness; preponderance of proof does not mean the larger number of witnesses.—Story v. Maclay, 6 Mont. 492; 13 Pac. 198.

151. It is error to instruct that, where the witnesses for and against a given state of facts are of equal credibility, the preponderance of the evidence is to be determined by the number of witnesses.—Wastl v. Montana Union, 17 Mont. 213; 42 Pac. 772.

152. A finding that the value of capital stock on a certain day was much below its previous value is not justified merely by the fact that on said day there was no market sale for it.—Pabst Brewing Co. v. Brewing Co., 19 Mont. 294; 48 Pac. 234.

153. Where a witness testified, on an issue as to the value of certain horses, that he was then using 18 horses in his business, knew the team in question, guessed he knew pretty nearly the value of such horses, but did not know the market value of horses, and that the team was worth $250, it was for the jury to determine whether such contradiction deteriorated from the weight of his testimony.—Holland v. Huston, 20 Mont. 84; 49 Pac. 390.

154. Defendant admitted that the horses in question were worth $125. At forced sale under execution, they had brought $180. And a witness, qualified to express the opinion, testified that they were worth $250. *Held*, that under such conditions, a verdict for $267.39, including interest, in an action for their conversion, should not have been set aside for insufficiency of evidence as to value.—Id.

155. Though the burden is on the master, in an action for injuries to his servant, to prove contributory negligence or assumption of risk, if the existence of such defense is disclosed by plaintiff's witnesses, defendant is entitled to the same advantage thereof as though proven on his part.—Nord v. Mining Co., 30 Mont. 48; 75 Pac. 681.

156. Proof that a mortgage is of record is not proof that the mortgagee procured it to be recorded.—Swain v. McMillan, 30 Mont. 433; 76 Pac. 943.

EXCEPTIONS, BILL OF.

I. Nature, Form, and Contents in General, 1-3.
II. Settlement, Signing, and Filing, 4-22.
A. Time for presentation, allowance, and filing, 4-7.
B. Proposed bill and amendments, 8-10.
C. Settlement, 11-12.
D. Compelling allowance or settlement, 13.
E. Proceedings to establish exceptions, 14-16.
F. Certificate, signature, and seal, 17-19.
G. Amendment or correction, 20-21.
H. Striking from files, 22.

I. NATURE, FORM, AND CONTENTS IN GENERAL, 1-3.

1. Counsel must incorporate in their bill of exceptions so much of the evidence, in substance, as is necessary to explain the objection and exception reserved thereon, and a bill reciting, "the following testimony was taken before the referee: (Clerk will here insert testimony)", is insufficient, under Code Civ. Proc., § 1152.—State v. Napton, 28 Mont. 336; 72 Pac. 676.

2. Code Civ. Proc., § 1173 requiring that, when the notice of motion for new trial designates as the ground therefor errors of law occurring at the trial and excepted to by the moving party, the statement shall specify the particular errors on which the party will rely, does not apply to bills of exception, and does not require such bills to contain a specification of errors of law relied on.—Nord v. Mining Co., 30 Mont. 48; 75 Pac. 681.

3. Where plaintiff saved his exception to a ruling granting defendant's motion for nonsuit, and settled his bill of exceptions containing the testimony and exception to the ruling of the court, such exception is all that is required to be shown by the bill in order to save plaintiff's right to urge that the court's ruling in granting the nonsuit was erroneous.—Id.

II. SETTLEMENT, SIGNING, AND FILING, 4-22.

A. Time for Presentation, Allowance, and Filing, 4-7.
B. Proposed Bill and Amendments, 8-10.
C. Settlement, 11-12.
D. Compelling Allowance or Settlement, 13.
E. Proceedings to Establish Exceptions, 14-16.
F. Certificate, Signature, and Seal, 17-19.
G. Amendment or Correction, 20-21.
H. Striking From Files, 22.

A. TIME FOR PRESENTATION, ALLOWANCE, AND FILING, 4-7.

4. Under Cod. Stat., § 253, this court will not consider exceptions unless they are reduced to writing, signed by the judge and filed with

the clerk before the submission of the cause to the jury. (See 111 U. S. 775.)—Randall v. Greenhood, 3 Mont. 506.

5. This court could not by mandamus compel the lower court to enter an order extending the time in which to prepare a bill of exceptions, such matter falling entirely within the discretion of the trial court.—State v. District Court, 24 Mont. 566; 63 Pac. 389.

6. A trial judge should not certify to the correctness of a proposed bill of exceptions and amendments thereof until after both have been engrossed.—Yellowstone Nat'l Bank v. Gagnon, 25 Mont. 268; 64 Pac. 664.

7. Where a proposed bill of exceptions and amendments proposed by the adverse party, but not adopted, were neither presented to the judge within 10 days after the proposed amendments were served, nor delivered to the clerk for him within that time, as Code Civ. Proc., § 1155, requires, the court properly refused to settle the bill, the time not having been extended, and no excuse for the delay being shown.—Burns v. Napton, 26 Mont. 360; 68 Pac. 17.

B. PROPOSED BILL AND AMENDMENTS, 8-10.

8. A bill of exceptions containing the testimony given at the trial in narrative form, with the objections and exceptions, prepared and allowed after trial from the stenographer's notes, without notices to respondent, as required by Laws 1887, p. 82, § 5, will, on motion, be stricken from the record on appeal, since he should be given an opportunity to carefully examine the narrative of the evidence proposed to be presented to the appellate court for review, and to suggest amendments to make the same conform to the true meaning of the witnesses.—McKay v. Montana Union, 13 Mont. 15; 31 Pac. 999.

9. One who accepts a proposed bill of exceptions served under an erroneous order, and serves amendments thereto, does not thereby waive his right to attack the order.—Beach v. Water Co., 21 Mont. 184; 53 Pac. 493.

10. Objection that the bill of exceptions was not served in the manner provided by Code Civ. Proc., § 1831, is waived by the presenting of amendments to the proposed bill.—Fordham v. Northern Pacific, 30 Mont. 421; 76 Pac. 1040.

C. SETTLEMENT, 11-12.

11. A party who is present and participates in the settlement of a bill of exceptions waives all objections to its settlement not then made.—Coquard v. Weinstein, 15 Mont. 554; 39 Pac. 849.

12. It is improper for the court to refuse to settle a bill of exceptions tendered in due time, for, while the appeal will lie whether the bill is made a part of the record or not, the papers and other evidence used on the hearing and the rulings on the objections can not be of avail unless incorporated in the bill.—State v. District Court, 28 Mont. 227; 72 Pac. 613.

D. COMPELLING ALLOWANCE OR SETTLEMENT, 13.

13. Under Code Civ. Proc., § 1158, providing that the judge "may" sign a bill of exceptions after he ceases to be judge, he may be compelled to do so.—M. O. P. Co. v. Lindsay, 25 Mont. 24; 63 Pac. 715.

E. PROCEEDINGS TO ESTABLISH EXCEPTIONS, 14-16.

14. An original petition in this court to prove exceptions, the objection being that certain amendments were allowed by the trial court to the bill of exceptions as served, will be dismissed, where the amendments allowed are immaterial.—Forrester v. Mining Co., 23 Mont. 122; 58 Pac. 40.

15. Code Civ. Proc., § 1157, and rule 4, subd. 14, allowing a bill of exceptions to be proved before a referee, by leave of this court, when the trial judge refuses to settle it, a bill proved before a referee will be disregarded when his report fails to show that the judge's refusal to settle it because of delay in serving it was not justified.—Harding v. McLaughlin, 23 Mont. 334; 58 Pac. 865.

16. The remedy given by Code Civ. Proc., § 1157, rule 4, subd. 14, does not apply to a mere refusal of the judge to settle any bill whatsoever.—Id.

F. CERTIFICATE, SIGNATURE, AND SEAL, 17-19.

17. Where the entire record purports at the outset to be a bill of exceptions, but is not signed by the trial judge, it will not be considered as such. (See 117 U. S. 282.)—Kleinschmidt v. McAndrews, 4 Mont. 8, 223; 2 Pac. 286.

18. Under Comp. Stat., p. 134, § 294, and p. 138, § 301, providing that, when a motion for new trial is decided upon the judge's minutes, a bill of exceptions must be settled in the usual form, and that all bills of exceptions shall be reduced to form and signed by the judge, a bill of exceptions purporting to contain all the papers, stating "that all the foregoing papers and evidence were of the files of said cause at the hearing of said motion for new trial," and concluding: "Done and dated in court," with the date and the judge's signature, is not properly settled.—Montana L. & P. Co. v. Howard, 10 Mont. 296; 25 Pac. 1024.

19. Under Code Civ. Proc., § 1157, and rule 4, subd. 14, a bill of exceptions proved before a referee on leave granted, but not certified to as correct, will be disregarded.—Harding v. McLaughlin, 23 Mont. 334; 58 Pac. 865.

G. AMENDMENT OR CORRECTION, 20-21.

20. Mandamus will not lie to compel a judge to amend a bill of exceptions by incorporating therein particular matters: this being the exercise of a judicial, not a ministerial, duty.—M. O. P. Co. v. Lindsay, 25 Mont. 24; 63 Pac. 715.

21. An application to compel a judge to amend a bill of exceptions is insufficient. Plaintiff must allege and show, not only that the matters set out in the amendment are material, but also that there is no evidence, other than that contained in the settled bill and the proposed amendment, which is necessary to illustrate or explain the exceptions.—Id.

H. STRIKING FROM FILES, 22.

22. Where a bill of exceptions is settled and certified by the trial court, and filed, whether prepared at the time the decision excepted to is made, as provided in Code Civ. Proc. § 1154, or after the trial, in accordance with § 1155, and attached to the judgment roll, as required by § 1196, or prepared for a motion for new trial, after judgment, as authorized by § 1173, subd. 2, such bill is a part of the record on appeal required to be furnished by § 1736, and, when so furnished, it should not be stricken from the record on the ground that it was not served or filed in time.—Kranich v. Water Co., 26 Mont. 379; 68 Pac. 408; 71 Pac. 672.

EXECUTION.

I. Nature and Essentials in General, 1-4.
II. Property Subject to Execution, 5-9.
III. Issuance, Form, and Requisites, 10-14.
IV. Stay, Quashing, Vacating, and Relief Against Execution, 15-20.
V. Sale, 21-33.
A. Manner, conduct, validity, and confirming or vacating, 21-27.
B. Title and rights of purchaser, 28-33.
VI. Return, 34-36.
VII. Set-Off of Executions, 37.
VIII. Supplementary Proceedings, 38-40.

I. NATURE AND ESSENTIALS IN GENERAL, 1-4.

1. The court can order an execution to be issued in favor of the assignee of a judgment on motion and proof of the assignment.—McGregor v. Wells, 1 Mont. 142.

2. A motion for a new trial at law, without any special order that it shall operate as a stay of execution, is not sufficient to stay execution on the judgment.—Columbia Mining Co. v. Holter, 1 Mont. 429.

3. Under Code Civ. Proc., § 1210, providing that a party may at any time within six months after the entry of judgment have an execution issued for its enforcement, the making up of the judgment roll, as required by § 1196, is not a prerequisite to the issuance of execution.—Burton v. Kipp, 30 Mont. 275; 76 Pac. 563.

4. An agreement whereby judgment creditors agreed that the judgment should not be enforced till a claim of a third party against them was settled was too indefinite as to time to be enforceable.—Id.

II. PROPERTY SUBJECT TO EXECUTION, 5-9.

5. The Northern Pacific railroad was made a military and post road by its charter, and an office safe in one of its stations, which is shown by the evidence to be essential to the transaction of its business, may not be seized on an execution.—Northern Pacific v. Schimmell, 6 Mont. 161; 9 Pac. 889.

6. The judgment creditor of a stockholder in a corporation can not take the debtor's pro rata share of the corporation's real estate, as stock is personal property until dissolution of the corporation, necessitating a division of the assets.—Mining Co. v. Bank, 7 Mont. 530; 19 Pac. 210.

7. A judgment creditor who has attached real estate held by the debtor in trust, and purchased it with actual notice of the trust, obtains no right as against the cestui que trust.—Id.

8. Where the lessee of certain land erects a building thereon under an agreement that, at the expiration of the lease, the building shall belong to the lessor on payment of the cost thereof, the lessor to terminate the lease at his option at any time after default in payment of the rent, the building becomes a part of the realty, and is not subject to the debts of the lessee to third persons after he has made default in payment of rent, and the fact that the lessor has not paid the cost of the building, is immaterial, when a larger sum is due him from the lessee for rent.—Switzer v. Allen, 11 Mont. 160; 27 Pac. 408.

9. Sheep were leased under two consecutive leases. By the first lease the lessee was to have one-half the increase less 15% of the original number. If the loss during the lease was greater than 15%, he was to make up 85% of the original flock out of the same grade, the title to remain in the lessor during the lease and until delivery. Before the first lease expired, the lessee leased another flock, by a similar lease. Before the leases expired, the lessee, owing to financial difficulties, surrendered the flock last leased, and 58 head more than the lessor was entitled to under the first lease; but, as lessee had suffered heavy losses under the first lease, it was agreed that the lessor should retain these to make good any loss found to exist under the first on final division. *Held*, that the sheep surrendered were lawfully in possession of lessor, and not subject to an execution against the lessee.—Sweeney v. Darcy, 21 Mont. 188; 53 Pac. 540.

III. ISSUANCE, FORM, AND REQUISITES OF WRIT, 10-14.

10. Comp. Stat., p. 142, § 312, provides that "the party in whose favor a judgment is given may, at any time within six years after the entry thereof, issue a writ of execution, as prescribed in this chapter." This section originally read "five years" after and was amended to read "six years," after the adoption of § 349, which provides that, "after five years from the entry of a judgment, an execution can only be issued by leave of court on motion, * * * but the leave shall not be necessary when execution has been issued within five years." Sec. 307 provides that a judgment shall be a lien for six years after it is docketed, and § 41 limits six years to an action on a judgment. Sec. 410 abolishes the writ of scire facias, and provides that "the remedies obtainable in that form may hereafter be obtained by civil action." *Held*, that after six years from the entry of a judgment, no leave to issue execution could be granted.—Peters v. Vawter, 10 Mont. 201; 25 Pac. 438.

11. Under Comp. Stat., p. 142, § 312, where a motion for leave to issue execution was filed on Dec. 2, 1889, on a judgment which was entered on Dec. 8, 1883, but the motion was not called to the attention of the court until Dec. 16, 1889, the motion should not be granted, since it should have been called to the attention of the court and acted on within the six years.—Id.

12. Comp. Stat., p. 154, § 349, provides that after five years from the entry of judgment execution can only issue after leave of court on proof that some part thereof remains unsatisfied, but such "leave shall not be necessary when execution has been issued on the judgment within five years, and returned unsatisfied in whole or in part." *Held*, that the fact that execution issued with five years, and was not returned at all, does not prevent the granting of an execution after that time.—Northern Pacific v. Bender, 13 Mont. 432; 34 Pac. 848.

13. The failure of the clerk of the court to affix the seal of the court to an execution is a clerical misprision, rendering the execution voidable only, under Code Civ. Proc., § 1211.—Kipp v. Burton, 29 Mont. 96; 74 Pac. 85.

14. A sale made under an execution defective by reason of its failure to contain the seal of the court, made prior to the enactment of Laws 1899, p. 145, § 2, was validated thereby without amendment by the court, under Code Civ. Proc., § 1211.—Id.

IV. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION, 15-20.

15. If an action is pending between M and W, and W is served with garnishment as the

debtor of M in an attachment suit subsequently commenced, the court should proceed with the first action to final judgment and protect W, as garnishee, if necessary, by staying execution until the attachment suit is determined.—Marden v. Wheelock, 1 Mont. 49.

16. A motion for a new trial at law does not operate of itself to stay the execution of a judgment, but requires a special order to that effect, on such terms as the court may prescribe.—Columbia Min. Co. v. Holter, 1 Mont. 429.

17. No part of a judgment can be executed if the proper undertaking to stay the execution has been given.—Plaisted v. Nowlan, 2 Mont. 359.

18. A sheriff will not be enjoined from enforcing an execution and selling the property because of a motion pending, filed by defendant, to retax the costs, and also because of motions to revive two judgments against the husband of the judgment creditor, where said motions have been pending for five years.—Griswold v Boley, 2 Mont. 447.

19. A sheriff's sale of land to enforce a judgment subjecting it to a mechanic's lien will not be enjoined at the suit of the owner, who did not contract for the erection of the building and who was not made a party to the mechanic's lien proceeding, as the purchaser at the sale will acquire no title as against him.—McCormick v. Riddle, 10 Mont. 467; 26 Pac. 202.

20. Where a plaintiff has a plain, speedy and adequate remedy at law by appeal from a judgment, and by executing an appeal bond, and fails to execute the bond within the time specified, and the appellate court denies his motion for leave to file a new undertaking, an injunction restraining defendant from selling certain property on execution issued on the judgment will not be granted.—Beck v. Fransham, 21 Mont. 117; 53 Pac. 96.

V. SALE, 21-33.

A. MANNER, CONDUCT, VALIDITY, AND CONFIRMING OR VACATING, 21-27.

B. TITLE AND RIGHTS OF PURCHASER, 28-33.

A. MANNER, CONDUCT, VALIDITY, AND CONFIRMING OR VACATING, 21-27.

21. On a motion to set aside a sale on execution, it appeared that on January 27, the day following the entry of judgment, execution was issued and levied on defendant's property; that on the same day plaintiff agreed to hold the execution 10 days, when defendant expected to have the money with which to pay it; that on February 6, when the 10 days had expired, the property was advertised and sold to plaintiff on the 11th; that the day before the 10 days expired defendant showed plaintiff a telegram referring to the money, which read, "Your money will be there on time," to which plaintiff replied, "Alright;" that on February 9 defendant showed plaintiff another telegram which read, "Receive by mail draft on bank for money;" that to this telegram plaintiff replied, "Alright," without informing defendant that the property was already being advertised for sale; that defendant did not know of the intended sale until after it occurred. *Held*, that on defendant's offer to pay the judgment, it was proper to set aside the sale on the ground that plaintiff led defendant to believe the execution would be held a reasonable time for defendant to receive the money.—Bernard v. Herzog, 12 Mont. 519; 31 Pac. 74.

22. After plaintiff had purchased personalty in possession of third persons it was seized by an officer under execution against the seller. In an action against the officer for the proceeds of its sale, *held* that plaintiff's failure to notify defendant and the seller's creditors of the sale, prior to the levy, did not preclude his right to recovery.—Yank v. Bordeaux, 23 Mont. 205; 58 Pac. 42.

23. Under Code Civ. Proc., § 1225, prescribing the notice to be given of sales under execution, and § 1226, providing that an officer sell without the notice prescribed forfeits $500 to the aggrieved party, in addition to his actual damages, failure to give notice does not invalidate the sale, the remedy provided being exclusive.—Burton v. Kipp, 30 Mont. 275; 76 Pac. 563.

24. A sale made under an execution defective by reason of its failure to contain the seal of the court is validated by Laws 1899, p. 145, providing that all judicial sales of real property previously made to satisfy valid judgments shall be sufficient to sustain a sheriff's deed based on the sale, and all defects in the issuance of execution shall be disregarded.—Id.

25. Under Code Civ. Proc., § 1227, mere inadequacy of the price, not attended by fraud, mistake or surprise tending to influence the result, does not invalidate such a sale.—Id.

26. Code Civ. Proc., § 1227 provides that, when real property sold under execution consists of several "known lots or parcels," they must be sold separately. Sec. 3266 states the legal presumption that official duty has been performed. *Held*, that it must be presumed that an officer complied with the statute in the sale of a city lot, though it was composed of two parcels and was sold in gross, since the parcels may not have been known, or may have been offered separately and sold in gross only after it was found that there were no bidders for the parcels.—Id.

27. Under Code Civ. Proc. §§ 1220, 906, the officer is not bound to deliver possession to the claimant if the execution plaintiff furnishes an indemnifying bond.—Gallick v. Bordeaux, 31 Mont. 328; 78 Pac. 583.

B. TITLE AND RIGHTS OF PURCHASER, 28-33.

28. A judgment creditor acquires title to the property of a debtor under the sale on an execution that has been issued through his mistake, in excess of the judgment.—(See 14 Otto, 142.) Roush v. Fort, 2 Mont. 482.

29. A sale of real property under an execution, which has been issued in excess of the judgment through fraud of the creditor, and which the debtor has not sought to correct by an amendment, does not affect the rights of bona fide purchasers.—Id.

30. Under Civ. Pr. Act. § 279, a purchaser at an execution sale is substituted to and acquires all the right, title, interest and claim of the judgment debtor therein.—Chumasero v. Vial, 3 Mont. 376.

31. An execution creditor with notice takes the property subject to any lien or equity that might be enforced against the judgment debtor. (See 119 U. S. 235.)—McAdow v. Black, 4 Mont. 475; 1 Pac. 751.

32. A purchase by the holder of a judgment in attachment proceedings, on a sale under his own judgment, is not a bona fide purchaser, for a valuable consideration, entitling him to the protection of the registry laws, and such purchaser only obtains such interest as the debtor had in the property at the time of the attachment.—McAdow v. Black, 6 Mont. 601; 13 Pac. 377.

33. Proceedings instituted by a judgment creditor, in which the judgment, execution and sale thereunder are declared void, and the judgment creditor awarded a decree for the full

amount of his claim, are equivalent to an eviction of the purchaser at the execution sale, within Comp. Stat., p. 153, § 347, providing that, if the purchaser of real property sold on execution be evicted therefrom in consequence of irregularities in the proceedings, he may recover from the judgment creditor the price paid.—Elling v. Harrington, 17 Mont. 322; 42 Pac. 851.

VI. RETURN, 34-36.

34. The court can annul the sheriff's return on an execution which shows that he has applied one execution in payment of another in his hands. (See 13 Wall. 188.)—McGregor v. Wells, 1 Mont. 142.

35. A sheriff's return on an execution can not be quashed by motion on evidence of its illegality or falsehood.—Id.

36. Where a return on execution shows a levy and sale, and a return of the money to the purchaser, as the property did not belong to defendant, the sheriff may, in an action by the plaintiff in execution for money received from the sale, explain that at the time of the sale he did not know that defendant did not own the property.—McCarthy v. O'Marr, 19 Mont. 215; 47 Pac. 953.

VII. SET-OFF OF EXECUTIONS, 37.

37. There being no statute in this territory authorizing the sheriff to set off one execution in his hands in favor of another, or to apply one execution in payment of another, the court committed no error in annulling and setting aside the return. (See 13 Wall. 188.)—McGregor v. Wells, 1 Mont. 142.

VIII. SUPPLEMENTARY PROCEEDINGS, 38-40.

38. Under Comp. Stat., p. 156, § 351, authorizing an examination of a judgment debtor after execution, on proof that he has property which he unjustly refuses to apply to the satisfaction of the judgment, the court has no jurisdiction, where the judgment and execution on which the proceedings are based are defective, to order an amended judgment to be entered nunc pro tunc, and then grant an order of examination.—Barber v. Briscoe, 9 Mont. 341; 23 Pac. 726.

39. Where money has been paid into court upon a judgment in favor of the defendant, who was plaintiff in another action, an order of the district court requiring the money to be paid to a judgment creditor of such defendant, made upon a hearing analagous to proceedings supplemental to execution, all persons interested in the fund being present, is proper.—Bank v. Hayes, 11 Mont. 533; 29 Pac. 90.

40. In supplemental proceedings it appeared that defendant was the owner of an order on a certain society, which she had forwarded to it for payment; and it was ordered that, on receipt of the amount of the order, defendant pay to the clerk of the court therefrom a sum sufficient to satisfy the judgment. *Held*, that under Code Civ. Proc., §§ 1260, 1265, the order was unauthorized, and the court should have appointed a receiver to collect the order and apply it to the judgment.—In re Downey, 31 Mont. 441; 78 Pac. 772.

EXECUTORS AND ADMINISTRATORS.

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I. ADMINISTRATION IN GENERAL, 1.

1. Pending an appeal from an order directing letters of administration to issue to J, an alleged will was presented for probate by him, and pending its contest A was appointed special administrator. Subsequently the order appointing J was affirmed, but he failed to qualify. Thereafter the contestant filed a petition to set aside the order awarding administration to J, and to appoint another administrator upon the grounds that J had failed to qualify; that he had entered into agreements relating to the estate antagonistic to his duties; and that

large assets were in danger of being lost for want of attention. *Held*, that to authorize the granting of letters of administration in case of intestacy, such intestacy must be proved (Comp. Stat, p. 291, § 68), and that the court would take judicial notice of the pendency of the contest over the alleged will, and would not, in advance of the determination thereof, entertain proof on the question of intestacy; and that petitioner could not claim that the question of intestacy was determined by the order which was attempted to be set aside, for, while proof of intestacy is required, a determination to that effect is not necessary to sustain the order.—In re Davis' Estate, 11 Mont. 196; 28 Pac. 645.

II. APPOINTMENT, QUALIFICATION, AND TENURE, 2-25.

A. EXECUTORS, 2-3.
B. ADMINISTRATORS, 4-13.
C. PROCEEDINGS FOR APPOINTMENT, 14-16.
D. TEMPORARY OR SPECIAL APPOINTMENT, 17-19.
E. PUBLIC ADMINISTRATOR, 20-21.
F. OPERATION AND EFFECT OF APPOINTMENT, 22.
G. TERMINATION OF AUTHORITY IN GENERAL, 23.
H. REVOCATION OF LETTERS, 24.
I. REMOVAL, 25.

A. EXECUTORS, 2-3.

2. Where an application for appointment as executor was denied for the reason of non-residence, under Comp. Stat., p. 187, § 45, and at the time of the hearing of an appeal from the judgment the Code of Civil Procedure of 1895 had taken effect, which, in § 2410 thereof, omitted the disqualification of said § 45, the case will be remanded with directions to dismiss the application under the law then in force.—In re Conner's Estate, 16 Mont. 465; 41 Pac. 271.

3. Under Code Civ. Proc., § 2434, the court properly removed an executor who was palpably deficient in the understanding necessary to enable one to transact business, who made no sufficient effort to collect the debts due the estate, and who never read and did not know the contents of affidavits attached to his report, and who was ignorant of his personal business relations with the decedent whose estate he was administering.—In re Courtney's Estate, 31 Mont. 625; 79 Pac. 317.

B. ADMINISTRATORS, 4-13.

4. Under Comp. Stat., p. 289, § 55, prescribing the order in which letters of administration "must be granted," and § 59, providing that "no person is competent to serve" who is "adjudged by the court to be incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity," an applicant, who takes precedence in the order prescribed in § 55, is not disqualified by reason of drunkenness, because he is in the habit of using liquor to some extent, and at times to a considerable extent, when it also appears that he attends to important business, and has done so for many years, and that he is not considered incompetent by any of the witnesses, many of whom testify that his use of liquor is temperate.—Root v. Davis, 10 Mont. 228; 25 Pac. 105.

5. An applicant for letters of administration is not disqualified by reason of "improvidence," because, at the advanved age of 61, he is not possessed of property of any considerable value, and for five years has not supported his wife and minor children, when it appears that he has been separated from his wife during that time, and that, though he has not much property, yet he has carried on a large business for himself, and transacted important affairs for others, involving the custody and expenditure of large sums of money, in none of which matters it is proved that he was lacking in diligence, care and foresight.—Id.

6. An applicant for letters of administration is not disqualified by reason of want of integrity, because that, three years before he made application for letters, he excused himself under oath from grand jury duty on the ground that he was a citizen of another state, but that, upon the trial of his application for letters, he swore that he had resided in the state for five years, thus bringing himself within the statute forbidding the appointment of the non-resident (Comp. Stat. p. 289, § 55), as these facts do not show that applicant has committed perjury, but simply that he has made a distinction between "citizenship," which renders one eligible for grand jury service, and "residence," requisite as the qualification for an administrator.—Id.

7. A charge of disqualification through want of understanding, as provided in Comp. Stat., p. 290, § 59, can not be supported in the absence of evidence, and where such charge is not compatible with another charge affecting the integrity of the applicant, as an alleged design on the part of applicant to defraud certain heirs, and of a conspiracy to carry out such fraudulent purpose.—Id.

8. Comp. Stat., p. 290, § 58, which provides that, if the person entitled to letters of administration is a minor, letters must issue to his or her guardian, or any other person entitled, in the discretion of the court, does not apply to a surviving husband of wife under the age of majority, yet old enough to lawfully marry.—In re Stewart's Estate, 18 Mont. 595; 46 Pac. 806.

9. Under Comp. Stat., p. 289, § 55, providing that letters on the estate of an intestate shall issue to "the surviving husband or wife, or some competent person whom he or she may request to have appointed," a surviving wife may nominate and appoint a person as administrator, though she herself is disqualified by her minority.—Id.

10. Under Comp. Stat., p. 289, § 55, and p. 292, § 69, prohibiting the appointment of non-residents as administrators, and authorizing persons entitled to letters to confer upon another the right of appointment, such right can not be conferred by a non-resident.—State v. Woody, 20 Mont. 413; 51 Pac. 975.

11. The fact that one advances money in filing a petition for appointment as an administrator and redeeming lands from tax sale does not entitle him to the appointment.—Id.

12. Comp. Stat., p. 289, § 55, and Code Civ. Proc., § 2434, declare that no person shall serve as administrator of a decedent's estate who is not a bona fide resident of the state, though he may, if incompetent by reason of non-residence only, request the appointment of a resident, to whom letters may be issued. Comp. Stat., p. 292, § 69, provides that administration may be granted to a competent person, though not entitled to the same, on the filing of a written request of one entitled thereto; and Comp. Stat., p. 292, § 70, and Code Civ. Proc., § 2460, authorize the revocation of letters of administration granted to a person other than the surviving husband or wife, child, father, mother, brother or sister of the intestate, on the petition of any competent person, and the granting of letters to him. Code Civ. Proc., § 2446, author-

izes the granting of letters to any applicant when persons having a prior right thereto fail to appear and claim the same. *Held*, that where the petition of a resident of the state, filed after the repeal of Compiled Statutes, for the revocation of letters granted to the administrator appointed thereunder, and for petitioner's appointment, on request of non-resident next of kin, failed to show that any of such next of kin was a widow, father, mother, etc., of testator, he was not entitled to such letters on the ground that such next of kin had a prior right thereto.—In re Craigie's Estate, 24 Mont. 37; 60 Pac. 495.

13. Under Code Civ. Proc., §§ 2430, 2434, as amended by Laws 1899, p. 137, and Civ. Code, § 1867, the district court properly denied the request of a public administrator for letters of administration, and did not commit error in granting such letters to a resident of the state, whose appointment as administrator had been asked by decedent's non-resident brothers and sisters, the law contemplating that those most interested in the administration of the estate, though non-residents, shall have the right to nominate some person whom they may deem trustworthy to act in that capacity for them.—In re Watson's Estate, 31 Mont. 438; 78 Pac. 702.

C. PROCEEDINGS FOR APPOINTMENT, 14-16.

14. Where, in order to prove want of integrity on the part of an applicant for letters of administration, the contestants attempted, but failed, to show that he had entered into a conspiracy with his brother and son to defraud the balance of the heirs, telegrams that passed between applicant's son and his brother, relating to the estate, just prior to decedent's death, were inadmissible against the applicant, who was not shown to have had any knowledge of them.—Root v. Davis, 10 Mont. 228; 25 Pac. 105.

15. In order to prove want of integrity on the part of applicant, the contestants attempted to show that he had entered into a conspiracy with his brother and son to defraud the rest of the heirs of their rightful shares. One of the heirs testified that, on learning that decedent could not live long, she remarked to applicant that the old aunts would be surprised to find how much they had, and that applicant said that they need know nothing of it unless their nieces and nephews told them, and that they would be satisfied with very little. Applicant denied saying this. It was also shown that, at a meeting of the heirs after the funeral of decedent, in Massachusetts, applicant's brother stated to those assembled that it would take from 5 to 10 years to settle the estate, if there was any, in Montana, and that applicant confirmed the truth of this statement. Applicant's brother then requested the heirs to give him power of attorney to represent their interests in Montana, but this they refused to do. It did not appear that applicant had conferred with his brother prior to the meeting, and it was shown that they had seen each other but once in 30 years. It was shown that applicant's son claimed a number of shares of stock from decedent, and was inimical to the rest of the heirs. There was much correspondence between applicant's son and his brother, but it was not shown that applicant had any knowledge of it, nor that he knew of statements made by his brother which indicated that he (the brother) entertained sinister designs upon the estate. Many witnesses testified that applicant's reputation for integrity was good in the community where he lived. *Held*, that no conspiracy was shown, nor was it proved that applicant lacked integrity.—Id.

16. On an application for letters of administration, evidence of conversations between applicant's brother and third persons, in which the brother intimated an intention to defraud the other heirs, is inadmissible in the absence of proof of a conspiracy between the applicant and his brother, or of proof that the brother's remarks were made in applicant's presence.—Id.

D. TEMPORARY OR SPECIAL APPOINTMENT, 17-19.

17. Under Comp. Stat., p. 296, § 95, providing that the court may appoint a special administrator in certain cases, or may direct the public administrator to take charge of the estate, the court may appoint another than the public administrator, and in so doing is not required to follow the order of priority prescribed in § 55 so far as the public administrator is concerned.—State v. Judge, 10 Mont. 401; 25 Pac. 1053.

18. Comp. Stat., p. 289, § 55, provides that letters of administration shall be granted in a certain order, and § 95 provides that, when an administrator is removed, "the probate judge must appoint a special administrator," or "he may direct the public administrator of his county to take charge of the estate." Sec. 97 provides that, pending a special administration, the probate court must give preference to the persons entitled to letters testamentary or of administration. *Held*, that the court could not appoint the public administrator as special administrator on removal of the original administrator, where one who, under § 55, is entitled to priority of appointment, made application.—In re Ming, 15 Mont. 79; 38 Pac. 228.

19. Where the appointment of an administrator is delayed through a contest over the right to letters, the special administrator may be substituted in pending actions brought by decedent, under Code Civ. Proc., § 2500, authorizing a special administrator to take charge of the estate of the decedent, and to exercise such other powers as may be necessary for its preservation for the permanent administrator.—Quinn v. Quinn, 22 Mont. 403; 56 Pac. 824.

E. PUBLIC ADMINISTRATOR, 20-21.

20. In the absence of evidence to the contrary, it will be presumed that a public administrator taking charge of an estate procured letters of appointment as required by Pol. Code, § 4511.—State v. Woody, 20 Mont. 413; 51 Pac. 975.

21. A public administrator, by filing his application to administer an estate, does not acquire a vested right to administer, and to the office pertaining thereto, as against his successor, acquiring the office before an appointment is made.—Id.

F. OPERATION AND EFFECT OF APPOINTMENT, 22.

22. The fact that the public administrator did not file his petition and give notice, as required by Code Civ. Proc., § 2443, can not be urged by one seeking to be appointed administrator, who is not entitled to such appointment.—State v. Woody, 20 Mont. 413; 51 Pac. 975.

G. TERMINATION OF AUTHORITY IN GENERAL, 23.

23. The fact that the public administrator had not completed the administration of an estate on his retirement from office did not prevent him from thereafter completing the same, since such administration did not devolve on his successor.—In re Craigie's Estate, 24 Mont. 37; 60 Pac. 495.

H. REVOCATION OF LETTERS, 24.

24. Comp. Stat., p. 863, § 823, requires the public administrator, before entering upon the discharge of his duties, to execute a bond for $10,000 for the faithful performance of the same; and § 824 provides that the probate judge shall require him to give such additional bond as shall be necessary to secure the interests of estates in his hands. Sec. 825 declares that the public administrator's office shall become vacant on his failure to give the bond required by law, or bonds required by the probate judge, and that such judge shall fill such office by appointment. *Held*, that the fact that a public administrator failed to file an additional bond on taking out letters, as directed by the probate judge, did not create a vacancy in the office ipso facto, but was a ground for declaring a vacancy therein on judicial ascertainment only, and hence the refusal of a petition for the revocation of such letters and the appointment of another administrator, failing to specify the public administrator's neglect to file the bond, was proper, though such failure appeared of record.—In re Craigie's Estate, 24 Mont. 37; 60 Pac. 495.

I. REMOVAL, 25.

25. An administrator's report covering a period of five years, during which time no other reports were filed, was not only uncontested, but was approved by the heirs, all of whom were of age. Shortly afterwards some of the heirs sued to set aside a mortgage on the estate, executed by them when of age, on the ground that the administrator induced them to sign it by undue influence. *Held*, that a peremptory order temporarily removing the administrator on such fact coming to the knowledge of the court was erroneous.—In re Ming, 15 Mont. 79; 38 Pac. 238.

III. INVENTORY, 26.

26. A wife who administers upon the estate of a husband to whom she supposed she was lawfully married, and returns as belonging to him property which he purchased with her money, wrongfully taking the title in his own name, and allows the same to be set apart by the court as her homestead, is not thereby estopped from asserting an equitable title to the property as against the lawful wife seeking to enforce a dower right therein.—Rausch v. Rausch, 14 Mont. 325; 36 Pac. 312.

IV. COLLECTION AND MANAGEMENT OF ESTATE, 27-47.

A. In General, 27-36.
B. Real Property and Interests Therein, 37-47.

A. IN GENERAL, 27-36.

27. An executor should not be charged with the amount rebated from a claim due the estate by way of compromise, where he made diligent search for the property of the debtor from which to make the claim, and the debtor was apparently insolvent.—In re Ricker's Estate, 14 Mont. 153; 35 Pac. 960.

28. The mere fact that title to land stood in the debtor's name, the conveyance of which recited a consideration greater than the claim due the estate, would not operate to make the executor chargeable for such rebate.—Id.

29. An administrator is personally liable on a note, signed by him as such, the proceeds of which were placed with the payee, a bank, and drawn out on checks drawn by him to pay, generally, bills and debts of the estate.—First Nat'l. Bank v. Collins, 17 Mont. 433; 43 Pac. 499.

30. Under Code Civ. Proc., § 2737, the compromise of a claim against a life insurance company on a policy issued to decedent may be authorized to be made "to the best possible advantage," though the terms have not been definitely ascertained.—Mulville v. Pacific Mutual, 19 Mont. 95; 47 Pac. 750.

31. Under Pol. Code, § 4528, which provides that, when no direction is given for the government of a public administrator, the provisions of the preceding chapters must govern, the authority to compromise a claim, as provided for in Code Civ. Proc., § 2737, may be granted to a public or private administrator without distinction.—Id.

32. Where an administrator refuses to pay an attorney for the estate, and does not agree to abide by a finding of the court as to the amount due the attorney, the district court has no authority, on objections to the administrator's final accont by the attorney, to order the administrator to pay a certain amount of the estate funds to the attorney, since the employment and payment of counsel is a personal matter between the administrator and the attorney. —State v. District Court, 25 Mont. 33; 63 Pac. 717.

33. Since Code Civ. Proc., §§ 2500-2506, providing for special admisistrators, give them no power to have appraisers appointed, and since the provisions of the Code requiring appraisers to be appointed do not apply to special administrators, expenses incurred by a special administrator in the appointment of appraisers were improperly allowed to him in his final settlement. —In re Ford's Estate, 29 Mont. 283; 74 Pac. 735.

34. Since Code Civ. Proc., §§ 2500-2506, relative to special administrators, give them no power to pay the debts of the estate, and since the provisions of the Code requiring notice to creditors does not apply to special administrators, a special administrator can not pay the debts of the estate, nor limit the time for the presentation of claims by any notice which he might give, and should not receive credit on his final account for expenses incurred by him in publishing notice to creditors.—Id.

35. A special administrator is not entitled, on final settlement, to an allowance for the amount expended by him in procuring a revenue stamp for his bond.—Id.

36. An administrator can not charge the estate with the expenses incurred in advising with counsel with respect to interests and demands antagonistic to the claims of the heirs when he knows that such counsel is representing the antagonistic interests.—In re Davis' Estate, 31 Mont. 421; 78 Pac. 704.

B. REAL PROPERTY AND INTERESTS THEREIN, 37-47.

37. An executor or administrator entitled to possession of realty until, and for the purpose of, the final settlement of the estate, can not maintain ejectment for its possession.—Carrhardt v. Montana etc. Co., 1 Mont. 245.

38. An administrator has no authority to sell real estate except by an order of a properly constituted court, properly issued, with which he must strictly comply.—Broadwater v. Richards, 4 Mont. 80; 2 Pac. 546.

39. The making of an inventory or appraisal of real estate of a decedent, as required by Rev. Stat., p. 213, § 118 and p. 214, § 126, is not a prerequisite of the right to take possession thereof by the administrator; and it is not, therefore, necessary that the inventory and appraisement should be set out in the com-

plaint, in an action by an administrator for the possession of real estate of decedent, where the defendants, by the record, appear as mere trespassers.—Black v. Story, 7 Mont. 238; 14 Pac. 703.

40. Under Rev. Stat. div. 2, §§ 127, 225, 226, 532, giving to executors and administrators possession of the real and personal estate of decedents, and the right to bring actions to quiet title to and recover the same, and div. 2, § 6, giving them power to sue without joining the beneficiaries, an administrator has the right to bring ejectment in his own name, as administrator, for the possession of the real estate of the decedent as against trespassers.—Id.

41. Under the Probate Practice Act, authorizing executors to collect the rents, to bring suit to quiet title or to recover possession, and making them liable for wasting the estate, they have the right to the possession of the real estate after duly qualifying.—In re Higgins' Estate, 15 Mont. 474; 39 Pac. 506.

42. Under Rev. Stat., p. 233, § 209, providing that, when authority is given in a will to sell property, the executor may sell without the order of the probate court, but must make a return of such sales as in other cases, and that no title passes until the sale is confirmed by the court, a private sale by an executor under a power in the will to manage the estate as she should deem best, and for that purpose to sell any portion or the whole thereof, which is afterwards confirmed by the court, is not a judicial sale, but a sale under the power.—Goodell v. Stanford, 31 Mont. 163; 77 Pac. 522.

43. Such will empowered the executrix to convey real property to a trustee, who was to hold for a syndicate, which was to plat the same, and under the terms of which sale the purchase price, secured by a lien on the property, was made payable in installments.—Id.

44. Beneficiary vendees under a trust agreement, who assented thereto for years, entered into possession, sold portions of the property, made payments on the price, and in all respects ratified the transaction between the purchasing syndicate, of which they were members, and the vendor, until sued for the balance of the price, were estopped from claiming that they received any title to the property, or that the sale, which was one by an executrix under a power, was irregularly made.—Id.

45. The probate court being a court of limited jurisdiction, where a petition filed by an administrator to enforce a contract by deceased to convey certain water rights did not show on its face that the contract was in writing, but rather implied the contrary, it could not be presumed, in support of the probate court's decree enforcing specific performance, that the contract was in writing, and that the court, therefore, had jurisdiction to enforce the same.—Bullerdick v. Mermsmeyer, 32 Mont. 541; 81 Pac. 334.

46. Comp. Stat., p. 334, § 236, providing that when a person who is bound by contract in writing to convey any real estate dies before making the conveyance, and in all cases where such decedent, if living, might be compelled to make such conveyance, the probate court may require his executor or administrator to convey such real estate to the person entitled thereto, does not confer jurisdiction on the court to direct specific performance of an oral contract by which decedent in his life time agreed to convey certain water rights to his wife.—Id.

47. Where a decree of a probate court for specific performance of a contract by decedent in his life time to convey certain water rights to his wife was void for want of jurisdiction in the court at the time of its rendition, it was not validated by Laws 1899, p. 145, subsequently passed.—Id.

V. ALLOWANCE AND PAYMENT OF CLAIMS, 48-57.

A. Liabilities of Estate, 48.
B. Presentation and Allowance, 49-56.
C. Priorities and Payment, 57.

A. LIABILITIES OF ESTATE, 48.

48. Under Comp. Stat., p. 313, § 156, a claim against an estate, barred by the statute of limitations, can not be allowed.—In re Mouillerat's Estate, 14 Mont. 245; 36 Pac. 185.

B. PRESENTATION AND ALLOWANCE, 49-56.

49. Under Comp. Stat., p. 310, § 147, requiring executors of estates exceeding $10,000 in value to publish notice to creditors to present their claims within 10 months from the date of the first publication, no final decree that there are no debts can be entered until the time limited in the notice has expired.—In re Higgins' Estate, 15 Mont. 474; 39 Pac. 506.

50. Under such section, failure of such executors to give the notice required by the statute was not excused by ex parte affidavits made by persons interested in the estate, to the effect that there were no outstanding debts due such estate.—Id.

51. The duties of a special administrator, as defined by Code Civ. Proc., § 2500, being "to collect and take charge of the estate of the decedent * * * and to exercise such other powers as may be necessary for the preservation of the estate," his powers are limited, as by general law, to the collection and preservation of the property for the general administrator when appointed, and he has no power to allow or pay claims against the estate.—State v. District Court, 18 Mont. 481; 46 Pac. 259.

52. Under Code Civ. Proc., § 2793, the allowance of an individual claim of an administrator against the estate is not conclusive, but the parties interested may contest it when his account is presented.—In re Barker's Estate, 26 Mont. 279; 67 Pac. 941.

53. Under Code Civ. Proc., § 1721, a person, in his capacity as administrator, can not appeal from an order disallowing his individual claim against the estate, and on such appeal his individual rights will not be considered.—Id.

54. Code Civ. Proc., § 2608, providing that, where a claim against an estate is rejected, the holder must bring suit within a certain time or be barred, provides an exclusive remedy, and an order disallowing the claim is not appealable; Code Civ. Proc., § 1722, and Laws 1899, p. 146, enumerating appealable orders, not providing for such appeal.—Id.

55. Under the direct provisions of Code Civ. Proc., § 2603, all claims against the estate of a decedent must be presented within the time limited in the administrator's notice to creditors, or they are barred forever, except when it appears by the affidavit of the claimant, to the satisfaction of the court, that he had no notice, by reason of being out of the state.—Melton v. Martin, 28 Mont. 150; 72 Pac. 414.

56. The provisions of Code Civ. Proc., § 2604, are satisfied by an affidavit by one of a claimant's attorneys, stating that claimant is a corporation, and none of its officers except its said attorneys reside in the county.—Empire State Mining Co. v. Mitchell, 29 Mont. 55; 74 Pac. 81.

C. PRIORITIES AND PAYMENT, 57.

57. Code Civ. Proc., § 2810, gives a preference to mortgages and certain other classes of

claims against a decedent's estate, but contains no provision in reference to payment of expenses of administration. Sec. 2811 provides that the preference given to mortgages extends only to the proceeds of the property mortgaged. *Held*, that the administrator, on a sale of mortgaged chattels, must pay the mortgage debt, less the expense of sale, out of the proceeds of such sale, before he may apply any portion thereof towards the expenses of administration.—Horsfall v. Royles, 20 Mont. 495; 52 Pac. 199.

VI. DISTRIBUTION OF ESTATE, 58-73.

A. PARTIAL DISTRIBUTION, 58.
B. PROCEEDINGS FOR PAYMENT AND DISTRIBUTION, 59-70.
C. ORDER OR DECREE FOR DISTRIBUTION, 71-73.

A. PARTIAL DISTRIBUTION, 58.

58. Partial distribution may be made after the executrix has presented her final account, and before the same has been allowed, where the legatees execute a bond to the executrix to indemnify the estate.—In re Phillips' Estate, 18 Mont. 311; 45 Pac. 222.

B. PROCEEDINGS FOR PAYMENT AND DISTRIBUTION, 59-70.

59. The jurisdiction of probate courts over the distribution of estates of deceased persons is exclusive, and all orders and decrees relating thereto are final and binding upon all parties to the same. The only remedy is by appeal as provided by statute.—Ryan v. Kinney, 2 Mont. 454.

60. An administrator who has no interest in the estate apart from his official character can not appeal from an order entering a decree of distribution.—In re Dewar's Estate, 10 Mont. 422; 25 Pac. 1025.

61. Under the Probate Practice Act, the earliest period at which any estate may be distributed is that provided for by § 284, which allows distribution after four months from the issuance of letters of administration, provided the distributees give bond to secure the estate. *Held*, that where an administrator with the will annexed procures an order construing the will, and ordering distribution within 40 days after the issuance of letters, and immediately distributes accordingly, without requiring bonds, and it appears that no inventory or appraisement was made, and that no notices of the time for distribution were mailed to the heirs at law, and that no other statutory requirement subsequent to the issuance of letters was complied with, all proceedings subsequent to that time will be set aside, and the costs of such proceedings, including the costs of the appeal, will be taxed to the administrator.—In re McFarland's Estate, 10 Mont. 586; 27 Pac. 389.

62. An executrix may appeal from an order directing a partial distribution of the estate.—In re Phillips' Estate, 18 Mont. 311; 45 Pac. 222.

63. The right of the administrator with the will annexed, and of an heir of a beneficiary under the decedent's will, to appeal from an order granting a distribution of the estate, in proceedings under Code Civ. Proc., § 2835, in which the administrator and the heir both appeared in opposition thereto, will not be determined on a motion to dismiss the appeals, based on the theory that they are not aggrieved by the decree; they being "parties aggrieved," within Code Civ. Proc., § 1721, granting the right of appeal to parties aggrieved.—In re Davis' Estate, 27 Mont. 235; 70 Pac. 721.

64. A contention that a motion for new trial does not lie in proceedings for the distribution of a decedent's estate under Code Civ. Proc., § 2835, because all the facts alleged in the petition were admitted by defendants, is without merit on a motion to dismiss an appeal from an order denying new trial; that fact being a sufficient reason for the affirmance of the order on the hearing, but no reason for the dismissal of the appeal.—Id.

65. Under the provisions of Code Civ. Proc., §§ 2921, 2923, 2924, parties opposing the granting of a decree for a distribution of the estate of a decedent in proceedings under Code Civ. Proc., § 2835, may make a motion for new trial where the decree directs the distribution.—Id.

66. Code Civ. Proc., § 2840, authorizing a suit by persons interested in an estate to determine their distributive shares therein, does not require such suit to be brought where all parties interested have agreed as to the share each is to receive, and a decree has been entered pursuant to such agreement.—In re Davis' Estate, 27 Mont. 490; 71 Pac. 757.

67. Where, in proceedings for the partial distribution of an estate, it appears that one of the petitioning distributees, who applied by attorney, is incompetent, and has no guardian, an order directing distribution to him is erroneous.—Id.

68. Where a distributee of an estate has assigned his share, and the assignment has been recognized by the court, and is not disputed by the assignor, neither the administrator nor another distributee is interested or has a right to object to such share being paid to such assignee. —Id.

69. Where a contest of a will was settled by agreement of the parties, and a decree entered affirming such agreement, and fixing the shares of the estate to which the parties were entitled as agreed, such decree became the basis of administration as to the devolution of the property, and such parties and their assigns, though not heirs or legatees named in the will, had a right to partition for a partial distribution of the estate under Code Civ. Proc., § 2835.—Id.

70. The term "final judgment," as used in Code Civ. Proc., § 1722, subd. 2, as amended by Laws 1899, p. 146, refers only to those judgments known at common law as final judgments, and has no application to the statutory determinations and orders termed "orders or judgments" in probate proceedings.—In re Kelly's Estate, 31 Mont. 356; 78 Pac. 579; 79 Pac. 244.

C. ORDER OR DECREE FOR DISTRIBUTION, 71-73.

71. The orders of a probate court relating to the distribution of estates of deceased persons are final and can not be impeached in any collateral proceedings except for fraud.—Ryan v. Kinney, 2 Mont. 454.

72. A widow, as executrix of her deceased husband's estate, was not prejudiced by an order of partial distribution, where the sum left in her hands, after payment to the creditors, was sufficient to cover the expenses of administration, the amount devised to her as widow, and an amount for a reasonable family allowance. —In re Phillips' Estate, 18 Mont. 311; 45 Pac. 222.

73. Where no receiver has been appointed, and the assets in the hands of administrator have not been impounded in any way, the fact that there are suits, by strangers to the estate, pending against several distributees in which the plaintiffs seek to obtain liens on the interests of the defendants in the estate, and in which the administrator has been made a party, furnishes no reason why the court should refuse to order a distribution of the estate.—In re Davis' Estate, 27 Mont. 490; 71 Pac. 757.

VII SALES AND CONVEYANCES UNDER ORDER OF COURT, 74-82.

74. Any person interested in an estate may file objections to the confirmation of a sale of real estate, and produce evidence on the hearing to support the same.—Broadwater v. Richards, 4 Mont. 80; 2 Pac. 546.

75. Under an appeal to the district court from an order confirming a sale of real estate, such case, when it reaches the district court, shall be tried de novo, and the objectors may present any evidence pertinent to the objections, though not raised on trial in the court below.—Id.

76. Under Code Civ. Proc., § 1722, subd. 3, as amended by Laws 1899, p. 146, providing that appeals may be taken from orders directing a conveyance of realty in probate proceedings, an appeal will not lie from an order directing the execution of a lease of realty, as "conveyance," as used in the statute, does not include a lease.—Twohy's Estate, 23 Mont. 305; 8 Pac. 722.

77. Code Civ. Proc., § 2720, provides that the court or judge may authorize an executor to lease his decedent's lands on its being made to appear by a petition filed that it is for the best interests of the estate so to do; and § 2722, subd. 6, provides that no omission, error, or irregularity in the proceedings to secure an order authorizing an executor to lease his decedent's lands shall invalidate the same, or the lease made in pursuance thereof. *Held*, that the provision does not dispense with the necessity of a petition, and an order made without a petition is void.—State v. District Court, 24 Mont. 1; 60 Pac. 489.

78. One B, who had acted as spokesman for himself and others in negotiating with the executor for the lease of decedent's lands, after the court had made an order authorizing the executor to execute a lease to him and his associates, and the court, on a stipulation entered into between B and the executor, made an order permitting the withdrawal of the offer to lease and the security filed for the performance of the terms thereof. *Held*, that the subsequent order, directing the executor to execute a lease to B's associates, while the order withdrawing the proposal was unrevoked, and no new petition was filed, was unauthorized and void, under Code Civ. Proc., §§ 2720, 2722.—Id.

79. Under Code Civ. Proc., §§ 2720, 2722, providing that the court may authorize an executor to lease the land belonging to his decedent's estate when it appears to the court that it will be to the interest of the estate so to do, and providing that the court shall authorize the executor so to do by an order fixing the term, rental and other conditions of the lease, the court has no power, against the objection of the person designated in such an order as the lessee, to revoke the order directing the executor to lease land to such person at a fixed rental, where he has complied with the conditions of the order, though the executor has subsequently had a more favorable offer.—Id.

80. And the court has power to modify an order previously made as to amount of rental, where the executor and lessee have agreed thereto.—Id.

81. The court has authority to enter an order directing an executor to make a lease of his decedent's lands for the term and rental specified in the order, and is not limited to the statement of the minimum sum which the executor may receive, leaving it discretionary with him as to whether he will carry out the agreement entered into prior to the making of the petition.—Id.

82. Real estate of a decedent was sold by the administrator under order of the probate court. Thereafter certain persons claiming to be heirs of the deceased, and therefore entitled to a share in the land, claimed their share of the proceeds of the property from the administrator on the ground that they had no notice of the sale, or of the proceedings thereafter; and, on having refused to pay them, their claim was paid by the purchaser, whereupon he sued the administrator and his sureties to recover the amount so paid, the complaint alleging that there was no mention made of the alleged heirs, or of their claims, at any time or anywhere in the probate proceedings or record. *Held*, that since the administrator was not required to take notice of the claim of such heirs until their heirship had been established as prescribed by Code Civ. Proc., tit. 12, c. 11, art. 2, and the complaint alleged that no such proceedings had been had, plaintiff was not entitled to recover.—Kirk v. Baker, 26 Mont. 190; 66 Pac. 942.

VIII. INSOLVENT ESTATES, 83.

83. Under Comp. Stat., p. 312, § 154, providing that a claim allowed by an administrator, and approved by the probate judge, must "be ranked among the acknowledged debts of the estate, and be paid in due course of administration," an approval is not a final judgment; and a creditor of an estate which can not pay in full may contest an approved claim under § 265, et seq., providing that, when an account is rendered, the judge shall set a day for settlement, and any person interested in the estate may contest the account.—In re Mouillerat's Estate, 14 Mont. 245; 36 Pac. 185.

IX. ACTIONS, 84-100.

A. Rights of Action and Defenses in General, 84-89.
B. Set-off and Counterclaim, 90.
C. Jurisdiction and Venue, 91-92.
D. Time to Sue, 93.
E. Parties, Process, and Pleading, 94-99.
F. Appeal, 100.

A. RIGHTS OF ACTION AND DEFENSES IN GENERAL, 84-89.

84. An action in the nature of ejectment, for the possession of a claim on a quartz lode and damages for detention, was brought by an administrator as sole plaintiff. The complaint was amended by making several persons, alleged heirs at law, parties. Complaint alleged that plaintiffs were the owners and in possession of the quartz claims sued for; that defendants unlawfully ousted them, and still hold possession, and have taken out ore, thereby damaging the realty $5,000. Before the trial the heirs were stricken from the record, but the allegations of the complaint were left the same. *Held*, that the administrator, as such, could not sue for a recovery of the possession of, and damages done to realty, after death of decedent, and for withholding same.—Carrhart v. Montana, etc. Co., 1 Mont. 245.

85. The including of real property in the inventory of a decedent's estate gives the executor no exemption, before settlement of the estate, from suit on the part of a person claiming title in himself entirely adverse to that of the decedent.—Lamme v. Dodson, 4 Mont. 560; 2 Pac. 298.

86. Rev. Stat., p. 222, § 157, providing "that no holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor," does not apply to a claim of title to real estate.—Id.

87. No action on a claim against an estate for services performed at the request of the

executor can be maintained unless the same has been first presented to the executor for allowance.—Dodson v. Nevitt, 5 Mont. 518; 6 Pac. 358.

88. In an action on a judgment, where the judgment debtors are both dead, and the relief sought is against the administrators of one of them for the embezzlement and conversion of her decedent's estate, and is strictly personal, it is no defense that the claim was not first presented against the estate under the rule of probate practice.—Ryan v. Spieth, 18 Mont. 45; 44 Pac. 403.

89. Under Code Civ. Proc., § 2733, an action may be brought against an executor for damages caused by the act of his decedent in wrongfully procuring the appointment of a receiver for a going and solvent corporation.—Thornton v. Bretherton, 32 Mont. 80; 80 Pac. 10.

B. SET-OFF AND COUNTERCLAIM, 90.

90. Services performed for the benefit of an estate after the death of the testator are a part of the expenses of administration, and can not be set off in an action by the executor for money due the estate, but must be passed upon by the probate court.—Dodson v. Nevitt, 5 Mont. 518; 6 Pac. 358.

C. JURISDICTION AND VENUE, 91-92.

91. A proceeding against an administrator, charged with having committed waste, to recover the penalty imposed on him therefor by Laws 1871-2, p. 365, § 274, making an executor or administrator guilty of waste, and authorizing the probate court to determine the issue whether there be waste or not in the manner in which the validity of disputed claims against an estate is tried, is not a civil action, within the amendment to Org. Act, § 2, vesting the probate court with jurisdiction of civil cases in which the amount in controversy does not exceed $500, and hence it has jurisdiction of such proceedings, though the amount claimed exceeds that sum.—Deer Lodge v. Kohrs, 2 Mont. 66.

92. The district courts have not original jurisdiction to hear and determine whether the items of the expenses of administration were properly incurred; such matter belongs to the probate court.—Dodson v. Nevitt, 5 Mont. 518; 6 Pac. 358.

D. TIME TO SUE, 93.

93. The fact that an executor rejects a note presented as a claim against the estate does not authorize suit thereon before its maturity.—Radue v. Pauwelyn, 27 Mont. 68; 69 Pac. 557.

E. PARTIES, PROCESS, AND PLEADING, 94-99.

94. Where a judgment against an administrator has been recovered in one state, and only partly satisfied, it is not necessary to plead such judgment and part satisfaction in an action on the same demand against an administrator in another state.—Braithwaite v. Harvey, 14 Mont. 208; 36 Pac. 38.

95. Under Comp. Stat., p. 315, § 167, providing that an executor or administrator, if a creditor of decedent, may bring action on his claim against the estate, a widow, who is also executrix, cannot bring an action against herself as executrix to recover the amount paid out by her for the funeral expenses of decedent.—Phillips v. Phillips, 18 Mont. 305; 45 Pac. 221.

96. A complaint which alleges that plaintiff was duly appointed administrator with the will annexed of the payee of the note sued on, and that he qualified and received letters, and that the note has not been paid, states a cause of action.—Knight v. Le Beau, 19 Mont. 223; 47 Pac. 952.

97. A petition for the foreclosure of a mortgage against the estate of a decedent, and for a deficiency judgment as against his administrator, is sufficient on demurrer where it alleges a presentation of the claim as required by Code Civ. Proc., §§ 2603, 2604, though it does not allege that it was supported by affidavit, as required by said sections, or describe the vouchers produced.—Jones v. Rich, 20 Mont. 289; 50 Pac. 936.

98. Nor does the failure to state the action taken by the administrator render the petition ambiguous, though § 2606 provides for the action to be taken by him.—Id.

99. Where an administratrix is, by order of court, made a party to a suit commenced by her decedent, no allegation of her official capacity is required.—Noyes v. Young, 32 Mont. 226; 79 Pac. 1063.

F. APPEAL, 100.

100. An appeal is not allowed from the summary proceedings of the probate courts in determining charges against administrators.—Deer Lodge v. Kohrs, 2 Mont. 66.

X. ACCOUNTING AND SETTLEMENT, 101-120.

A. Duty to Account, 101-102.
B. Proceedings for Accounting, 103-104.
C. Compensation, 105-107.
D. Stating, Settling, Opening, and Review, 108-120.

A. DUTY TO ACCOUNT, 101-102.

101. The court, on approving the account of an executor, who is also a trustee under the will, and ordering a distribution of the estate, may direct him to credit his account as executor with so much of the estate as may be ordered transferred to his account as trustee.—In re Higgins' Estate, 15 Mont. 474; 39 Pac. 506.

102. The liability of an executor for the proper performance of his duties is terminated only after he has complied with the statutes, and the court has approved his settlement, and ordered a distribution.—Id.

B. PROCEEDINGS FOR ACCOUNTING, 103-104.

103. The probate court can make necessary orders for the benefit of the estates of deceased persons, but can not render judgment against administrators for receiving moneys belonging to estates and failing to account therefor.—Deer Lodge v. Kohrs, 2 Mont. 66.

104. Where executors present a will for probate to the district court sitting in probate, and qualify for the performance of their duties thereunder, the court has jurisdiction to order them to account, and file an inventory of the estate.—In re Higgins' Estate, 15 Mont. 474; 39 Pac. 506.

C. COMPENSATION, 105-107.

105. Under Comp. Stat., p. 342, § 276, providing that the administrator may retain in his hands the necessary expenses of the administration, the administrator's fees are to be determined by the law in force at the time of final settlement, unless the services were fully

performed before passage of the law.—In re Dewar's Estate, 10 Mont. 426; 25 Pac. 1026.

106. Where circumstances require the continuance of administration over a number of years, the executor should be allowed each year, on the annual account, the statutory commission on moneys actually disbursed during the preceding year.—In re Ricker's Estate, 14 Mont. 153; 35 Pac. 960.

107. The court has a discretionary power to grant a special administrator compensation for his services, although no provision therefor is made by the Code of Civil Procedure.—In re Ford's Estate, 29 Mont. 283; 74 Pac. 735.

D. STATING, SETTLING, OPENING, AND REVIEW, 108-120.

108. An order settling an administrator's account, disallowing two certain items, and directing him to deliver certain stock to a special administratrix, though included in one paper, is in effect several distinct and separate orders, and, though embraced in one notice of appeal, will be so treated for the purpose of the appeal.—In re Barker's Estate, 26 Mont. 279; 67 Pac. 941.

109. Code Civ. Proc., § 1724, declares that an appeal is taken from an order by filing a notice stating the appeal from the same, or some specific part thereof. In a proceeding to settle an estate, the court made an order settling the administrator's account, and he appealed, complaining of that part of the order disallowing two certain items, and also a portion thereof directing him to deliver certain stock to a special administratrix. Reading a recital in the first paragraph of the notice of appeal, with each of the three other paragraphs, which were numbered in consecutive order, there was a separate notice of appeal for each part complained of. *Held*, not an appeal from the order as a whole, but separate and distinct appeals from the different parts thereof.—Id.

110. An appeal will not lie from an order directing an administrator to turn over certain assets to his successor on resignation or removal.—Id.

111. The district court, in settling the account of an administrator, had jurisdiction to require him to turn over to the special administratrix certain property which had come into his possession in his representative capacity, though there was a dispute as to the ownership of the property, the administrator claiming it in his private capacity as agent for a third party.—State v. District Court, 26 Mont. 369; 68 Pac. 856.

112. Where the court in settling an administrator's account requires him to turn over to a special administratrix certain property which had come into his possession in his representative capacity, such administrator in his private capacity is not a party in interest aggrieved by the order, and can not bring certiorari to have it reviewed.—Id.

113. On appeal from an order approving the final account of a special administrator, where no contention is made by appellant of the lack of funds to justify the approval, and the record shows that the various items of expense were incurred on behalf of the estate and that the special administrator had vouchers for the same, such items can not be considered, unless upon the face of the account they appear to be such as should not have been allowed in any case.—In re Ford's Estate, 29 Mont. 283; 74 Pac. 735.

114. On appeal from an order allowing the final account of a special administrator, where the record fails to show whether sales of personal property were made pursuant to order of the district court, but the transcript does not purport to contain copies of all the papers in the case, it must be presumed, in the absence of anything to the contrary, that the sales were made according to law and were properly approved by the district court.—Id.

115. Under Code Civ. Proc., § 1722, subd. 3, as amended by Laws 1899, p. 146, orders refusing to vacate a decree of distribution and settlement of final account, and refusing to vacate an order settling an administrator's account and discharge him, which are not among the judgments or orders enumerated in the statute, are not appealable.—In re Kelly's Estate, 31 Mont. 356; 78 Pac. 579; 79 Pac. 244.

116. Where attorneys were retained generally, and represented the estate in all litigation for several years, the administrator's account for the amount paid such attorneys is sufficiently itemized by giving the dates of the commencement and close of such services, with the gross amount.—In re Davis' Estate, 31 Mont. 421; 78 Pac. 704.

117. The purpose of the intermediate accounts of an administrator being to inform the court and persons interested as to the receipts and disbursements and changes in property, if any, the administrator need not charge himself therein with the appraised value of the entire estate.—Id.

118. Evidence in support of an administrator's account *held* sufficient to sustain the allowance to an attorney for the estate of $12,500 for two and a half years services.—Id.

119. The report and findings of a referee on the account of an executor are merely advisory to the court, and may be adopted, modified or disapproved, as the court sees fit; and the court may, if it so desires, take further testimony, and make findings of its own on which to base its orders.—In re Courtney's Estate, 31 Mont. 625; 79 Pac. 317.

120. On appeal from an order settling the semi-annual account of an executor and revoking his letters, it will be presumed, in the absence of anything in the orders on the subject, that upon a final settlement of the estate the proper compensation will be allowed to the executor for his services.—Id.

XI. FOREIGN AND ANCILLARY APPOINTMENT, 121.

121. Where an administrator defends a suit in another state in the name of the administrator of the estate there appointed, he is not estopped from disputing such claim when sued thereon in his own state, as an administrator has no authority to act, or bind the estate outside of the jurisdiction of his own state.—Braithwaite v. Harvey, 14 Mont. 208; 36 Pac. 38.

XII. LIABILITIES ON ADMINISTRATION BONDS, 122-127.

122. In a suit on an administrator's bond the complaint alleged that the probate court had found assets in the hands of such administrator belonging to the estate and had made an order for payment of a certain sum due a creditor of said estate, but that the administrator refused to pay such creditor according to the order. *Held*, to be a sufficient allegation to show a breach of the condition of the bond, and to maintain an action therefor.—Ryan v. Kinney, 2 Mont. 454.

123. Under Laws 1876, p. 114, providing that any minor heir may commence and prosecute any suit against an executor or administrator and sureties upon the bond of such executor

or administrator, by attorney or next friend, and without the prepayment of costs or security therefor, an action upon the bond of an executor by an infant devisee may properly be brought in the name of the territory to the use of the infant, by his attorney lawfully authorized, without the intervention of an administrator de bonis non and before a final distribution. —Territory v. Cox, 3 Mont. 197.

124. Anyone interested in an estate has the right at any time, either before or after an accounting, and whenever a breach of the bond of an executor or administrator occurs, to bring an action upon such bond.—Id.

125. The delivery of an administrator s bond without the signature of the principal is not a violation of an agreement with the sureties that the bond was not to be filed with the probate court until he had signed it, where his name was signed in the body of the instrument before delivery.—Kenck v. Parchen, 22 Mont. 519; 57 Pac. 94.

126. The sureties on an administrator's bond can not defeat their liability on the ground that it was signed by them on condition that the administrator should sign before delivery, since such bond is good as to the sureties, without the signature of the principal, who procures and delivers it.—Id.

127. A judgment against an administrator in a probate proceeding determining the amount of his indebtedness to the estate is conclusive against the sureties, and can not be inquired into collaterally.—Id.

EXEMPTIONS.

1. Where property taken under execution is claimed under Comp. Stat., p. 147, § 321, exempting from execution the earnings of a judgment debtor for 30 days next preceding the levy of an execution, when it shall appear that such earnings are necessary for the use of his family, residing in the state, supported wholly or in part by his labor, the correct rule on hearing such claim is to allow an investigation of the facts as to the means through which the debtor's family actually received its support during the time in question, and not to confine it to the question whether the amount earned during the period was such as would be required for the support of the family; and, if so, the claim should be determined in favor of defendant.—Cushing v. Quigley, 11 Mont. 577; 29 Pac. 337.

2. Where the debtor's earnings had been, during 18 months preceding the levy, given to his wife, who conducted a boarding house in her name, and whose accumulations from her own and her husband's earnings during such time, over and above the support of the family, amounting to $1,200, there was sufficient evidence to sustain a verdict of the jury to the effect that the debtor's wages for 30 days prior to the levy, amounting to $131, were not necessary for the support of the family.—Id.

3. The giving of a chattel mortgage upon exempt property does not preclude a man from claiming such property as exempt against the claims of all other persons.—Cheney v. Caldwell, 20 Mont. 77; 49 Pac. 397.

4. Permitting the attachment of personal property which has been mortgaged, before requiring the officer to first pay off the mortgage debt, gives the officer no right, after paying the mortgage, to hold the property under attachment, if exempt.—Id.

5. Code Civ. Proc., § 1222, subd. 7, provides that the earnings of a judgment debtor for his personal services rendered at any time within 30 days next preceding the levy of an execution or attachment shall be exempt, where such earnings are necessary for the use of his family in the state and supported by his labor, except that only one-half shall be exempt for necessaries. The same section exempts to the miner his dwelling and necessary mining appliances to a value not exceeding $1,000. Const., art. 19, § 4, provides that the legislature shall enact liberal exemption laws; and Code Civ. Proc., § 4660, provides that words and phrases are to be construed according to the context and approved usage of the language. *Held*, that in view of the last three provisions the first mentioned statute exempts to a placer miner the gold dust taken from his claim within 30 days next preceding a levy, when he is a poor man whose family resides in the state and depends for support on his personal services in working the mine, and the debt is not for necessaries. —Dayton v. Ewart, 28 Mont. 153; 72 Pac. 420.

EXTORTION.

1. To constitute extortion under Act Jan. 14, 1869, providing that if any judge or other officer shall take any fee except such as be allowed by law, or demand greater fees than allowed by law, he shall be deemed guilty of extortion, it must appear that the person accused demanded and received illegal fees as an officer or under color of his office; and where a probate judge demanded fees as an attorney for making an application for entry of town lots and taking affidavits for them, though it was unlawful for him to receive an attorney's fee in the case, it would not amount to extortion.—Ming v. Truett, 1 Mont. 322.

2. Ignorance of a public officer that fees collected by him were illegal is no defense to an action for a statutory penalty.—Leggatt v. Prideaux, 16 Mont. 205; 40 Pac. 377.

3. The fact that fees were voluntarily paid is no defense in an action against a public officer for receiving them, under Laws 1891, p. 241, § 9, fixing the fees for certain officers, and making any such officer "who shall receive" any illegal fee liable for ten times the amount thereof.—Id.

4. The fact that a person, knowing fees demanded from him by a public officer are illegal, keeps silence, and allows him to collect them, is no defense in an action by him against the officer for the statutory penalty.—Id.

5. Under Pen. Code, § 7, an employee's right to work is not property, and therefore a complaint charging a foreman with extorting money from an employee by a threat to discharge him did not charge the crime of extortion defined by Pen. Code, § 911.—In re McCabe, 29 Mont. 28; 73 Pac. 1106.

FALSE PRETENSES.

1. Under Comp. Stat., p. 556, § 199, providing that any person who shall knowingly and designedly, by false pretenses, obtain money with intent to cheat, shall, on conviction, be punished, etc., an indictment averring that defendant knowingly and designedly, and with intent to cheat, made false pretenses that a certain quantity of wood had been chopped, that such pretense was relied on, and that thereby defendant procured money, is sufficient.—Territory v. Underwood, 8 Mont. 131; 19 Pac. 398.

2. In order to convict under Pen. Code, § 880, declaring guilty of larceny any person who, with intent to defraud the true owner of his property or to appropriate it to his own use, obtains from the possession of such owner, by false representation or pretenses, any money, it was necessary to prove that defendant obtained the money in question under circum-

stances showing that the owner parted with the title thereto, and not merely with the possession thereof.—State v. Dickinson, 21 Mont. 595; 55 Pac. 539.

3. On a trial for larceny by false pretenses, it was error to instruct that, in order to constitute the crime charged, it was necessary that the owner should part with the "possession" of his property, relying on such false and fraudulent pretenses, and that "if the owner, under such circumstances, parts with both the title and possession of such property, the act will not constitute larceny, and will not sustain a verdict of guilty," as proof of the two ingredients mentioned was indispensible to a conviction under an information charging such crime.—Id.

4. Under an information charging defendant with larceny by obtaining money by means of false pretenses, it was error to instruct that if defendant obtained "possession" of such money, with intent to feloniously convert it to his own use, in manner and form as charged, such act would amount to larceny, though prosecutrix knowingly and intentionally parted with the possession thereof, "provided she did not part with the title to the same," as such instruction authorized a conviction of larceny, under such circumstances, even where there was a taking against the will of the owner, notwithstanding the requirement of Pen. Code, § 1832, that the information must contain a statement of the facts constituting the particular crime charged.—Id.

5. In an information under Pen. Code, § 880, defining larceny by false pretenses, it was alleged that defendant falsely and fraudulently represented that he was a certain physician named, the discoverer of a certain specified remedy, and the founder and agent of the drug company by which it was manufactured and sold, and that by means of such pretenses he obtained from the possession of prosecutrix a certain sum of money, with intent, etc. Prosecutrix testified as to the representations alleged, and also that she had been induced to call on defendant by means of his advertisements; that she believed in his ability to cure, from what she had been told respecting the physician whom he represented himself to be; and that she paid him the money demanded, relying on his "guaranty," and believing that he would return the money, as agreed, if he failed to cure. *Held*, that such evidence was competent, as it tended to prove that prosecutrix had voluntarily parted with the title to the money in question on the faith of the representations made to her by defendant.—Id.

FENCES.

1. Civ. Code, § 1301, contemplates that the fence shall lie one-half on the land of each owner, each contributing his share to its erection and maintenance, and the ground upon which it stands; and thus the fence may stand on the land of each without any agreement.—Hoar v. Hennessy, 29 Mont. 253; 74 Pac. 452.

2. A division fence erected on a boundary line agreed upon between the adjoining owners is properly erected, under Civ. Code, § 1301, providing that co-terminous owners are mutually bound to fence their properties.—Id.

3. Pol. Code, §§ 3250-3259, amended by Laws 1901, p. 139, relative to legal fences, prescribing what are such fences, and defining the duty to maintain and repair partition fences, do not affect the right of an adjoining owner to build a division fence partly on the other's land.—Id.

4. At common law, in the absence of an agreement, an adjoining owner has no right to build his fence beyond his own land.—Id.

5. The burden is on an adjoining owner to show that a division fence built partly on his land by his neighbor is unreasonable for the purpose intended.—Id.

FINES.

1. A judgment of a justice in a criminal case, reciting that defendant was sentenced to pay a fine of $100, and that, failing to pay it, he was remanded to be confined in jail at the rate of one day for every $2, will be held to have been rendered under Pen. Code, § 2707 (and not under §§ 2226, 2227), and as the imprisonment of the defendant for the full period of 50 days operated ipso facto to satisfy and discharge the judgment in full, the defendant was entitled to recover money collected by execution issued on such judgment.—Petelin v. Kennedy, 29 Mont. 466; 75 Pac. 82.

FORCIBLE ENTRY AND DETAINER.

I. Nature and Elements, 1-2.
II. Nature and Form of Remedy, 3.
III. Title to Support Action, 4.
IV. Prior Possession of Plaintiff, 5.
V. Pleading and Evidence, 6-12.
VI. Damages, 13.
VII. Trial, 14-16.

I. NATURE AND ELEMENTS, 1-2.

1. An instruction that forcible entry means "any act which deprives the owner of his property," and need not "amount to personal violence, or such acts as to intimidate the owner, by means of which possession is relinquished," is erroneous, as it includes entries without force, in the presence of the occupant, and not against his objection.—Sheehy v. Flaherty, 8 Mont. 365; 20 Pac. 687.

2. Entering upon premises and procuring possession thereof from the agent and servant of the party in possession by threats of arrest if he does not surrender them within two hours, is a forcible entry and detainer within Comp. Stat, p. 246, § 716, defining such offense to be constituted by a forcible entry and the turning out by force, or frightening by threats, or other circumstances of terror, the parties out of possession, and detaining and holding the same.—Wells v. Darby, 13 Mont. 504; 34 Pac. 1092.

II. NATURE AND FORM OF REMEDY, 3.

3. Forcible entry and detainer is a mere possessory action, and not proper for trying titles.—Parks v. Berkley, 1 Mont. 514.

III. TITLE TO SUPPORT ACTION, 4.

4. In an action brought for forcible entry and detainer under Code Stat., p. 163, § 636, the defendant can not be permitted to show title in himself, or to disprove the title of plaintiff. Such an action was not designed to supercede the action of ejectment.—Boardman v. Thompson, 3 Mont. 387.

IV. PRIOR POSSESSION OF PLAINTIFF, 5.

5. Plaintiff leased a lot to M for $25 monthly in advance; 60 days default to forfeit lease and improvements. M built a building worth $2,500 and furnished it,—the lower floor for a

saloon, the upper for lodgings. The saloon was not opened, but the lodgings were let whenever possible. M turned the lease and building over to defendant, who took charge. Afterwards M sent him rent money. Plaintiff and her agent lived near by, but their only act of dominion was to give leave to mortgagees of M's chattels to move them downstairs and store them there until sold. When three months rent was due, M and defendant, who had both slept in the house the night before, and still had furniture and fixtures in it, came to the agent and offered him two months rent, which he refused, demanding all, but did not declare a forfeiture. Presently defendant came, tried the door and climbed through a window, in spite of one man's resistance, and ordered both out. *Held*, that this was not a forcible entry, since plaintiff had no peaceable possession, and, if the agent had taken the $50, there would have been no 60 days default.—Milligan v. Cuff, 14 Mont. 366; 36 Pac. 455.

V. PLEADING AND EVIDENCE, 6-12.

6. In an action of forcible entry and detainer, an allegation in the answer that defendant was in actual possession of the land, and entitled to such possession, does not raise an issue of title.—Parks v. Berkley, 1 Mont. 514.

7. Under Code Stat., p. 164, § 643, providing that defendant may show in his defense that he has been in quiet possession of the premises for one year next before the inquisition, plaintiff's consent will not be presumed from his silence for any shorter period than one year.—Boardman v. Thompson, 3 Mont. 387.

8. A complaint in an action brought under Comp. Stat., p. 246, § 716, defining forcible entry and unlawful detainer, will not support a judgment in the absence of averments showing either a forcible entry or a forcible detainer.—Morse v. Boyde, 11 Mont. 247; 28 Pac. 260.

9. Code Civ. Proc., § 2081, subd. 1, provides that forcible detainer consists in the unlawful holding of real estate by force or threats of violence, whether the same has been peaceably acquired or otherwise. Subd. 2 provides that it also consists in the unlawful taking possession of land in the night time or in the absence of the owner, and the refusal to surrender the same on five days notice to the former occupant, and that an "occupant," within the meaning of subd. 2, is one who within five days preceding such unlawful entry was in peaceable and undisputed possession. Sec. 2092 provides that plaintiff in forcible detainer must show right of possession, as required in a forcible entry case. The complaint in forcible detainer did not allege that defendant took possession in the night time or in the absence of the owner. *Held*, that the action was under § 2081, subd. 1, and therefore the complaint was not invalid in failing to allege that plaintiff had been in peaceable and undisputed possession within five days before the entry of defendant; plaintiff not being required to establish such fact either by subd. 1 or by § 2092.—Kennedy v. Dickie, 27 Mont. 70; 69 Pac. 672.

10. An allegation in forcible detainer that defendant has unlawfully withheld possession by menaces and threats of violence, and still unlawfully withholds possession of the property from plaintiff, is a sufficient allegation of such facts.—Id.

11. A complaint in forcible detainer showing that defendant has been in possession of the property for over a year is not bad, as showing a defense within Code Civ. Proc., § 2092, providing that quiet possession for one year by defendant or his predecessor shall be a defense, unless it also shows such possession to have been quiet.—Id.

12. Where the answer in forcible detainer expressly denies the allegation of a paragraph of the complaint, which charged a forcible detainer, and denies that plaintiff is entitled to possession of the land or has any right thereto, it is error to give judgment for plaintiff on the pleadings, on the ground that the answer raises no issues of fact.—Id.

VI. DAMAGES, 13.

13. Where, in forcible entry and detainer, the verdict finds defendant guilty, and fines him $1, and finds the monthly rental of the land, and there are special findings that plaintiff was in actual possession at the time defendant forcibly entered and detained possession, a judgment for possession and recovery of treble the rental value is proper.—Missoula E. L. Co. v. Morgan, 13 Mont. 394; 34 Pac. 488.

VII. TRIAL, 14-16.

14. A money judgment in forcible detainer is not sustained by a verdict which fails to find that defendant detained the property, since, under Code Civ. Proc., § 2094, damages may be assessed only when occasioned by forcible detainer.—McCleary v. Crowley, 22 Mont. 245; 56 Pac. 227.

15. In forcible detainer, a verdict is defective which fails to find that defendant detained the property.—Id.

16. A complaint to recover land alleged that defendant unlawfully withheld the same, and that the relation of landlord and tenant existed between the parties, which defendant denied, and alleged that plaintiff's grantor held the property as trustee to secure certain indebtedness due him from defendant, and not as owner, of which fact plaintiff had knowledge, and defendant demanded to be decreed the owner of the premises. On plaintiff's motion the equitable defense was tried first, resulting in a finding that plaintiff had no knowledge of the equities existing between defendant and plaintiff's grantor, and that the relation between the latter parties was that of trustee and cestui qui trust, as alleged by defendant. *Held*, that it was error to refuse to dismiss plaintiff's complaint, since the relation of landlord and tenant, as alleged by plaintiff, was inconsistent with the facts already found.—Boucher v. Barsalou, 25 Mont. 439; 65 Pac. 718.

FORGERY.

I. Nature and Elements of Offense, 1-4.
II. Information, 5-6.
III. Evidence, 7.
IV. Verdict, 8.

I. NATURE AND ELEMENTS OF OFFENSE, 1-4.

1. The signing by defendant, in another's name, of an order requesting S to "pay to the order of E (defendant) the amount of $20, and charge the same to him at my office," will not support defendant's conviction of forgery, the order not being such as would, if genuine, create a liability on the part of the signer.—State v. Evans, 15 Mont. 539; 39 Pac. 850.

2. It is forgery to sign a money order or check of apparent legal efficiency in an assumed name, if the name was assumed to defraud the person to whom the order or check is given, or if under such circumstances as are likely

to defraud.—State v. Vineyard, 16 Mont. 138; 40 Pac. 173.

3. A city warrant is a "draft" within the meaning of Comp. Stat., p. 523, § 96, making it forgery to falsely make, alter, forge or counterfeit any draft.—State v. Brett, 16 Mont. 360; 40 Pac. 873.

•4. Where a city warrant, valid on its face, is altered with the intent to defraud, the crime of forgery is complete.—Id.

II. INFORMATION, 5-6.

5. It is proper for an information for forging an endorsement of the name of a payee of a certificate of deposit, and for passing the same as true, to allege that defendant passed the instrument with the endorsement thereon with intent to defraud the payee.—State v. Patch, 21 Mont. 534; 55 Pac. 108.

6. An information charging the forgery of an endorsement on a certificate of deposit set out in the information in full, and having the words "D & Co., Bankers," at the top of the certificate above the date, and being signed by "D & Co.," and made payable to the depositor's order, is sufficient, though no bank is referred to in the information, and there are no allegations of extrinsic facts to show the relation of D & Co. with the bank in which the certificate recites the money has been deposited; Pen. Code, § 840, making every person counterfeiting an endorsement of a writing obligatory for money, with intent to defraud, guilty of forgery.—Id.

III. EVIDENCE, 7.

7. In a prosecution for forgery it appeared that defendant and one H. T. Swenson worked together under a mining lease,—all ore being, by agreement, shipped in the latter's name,—and that defendant, having delivered ore in the name of "H. J. Swanson," received a check payable to such name, which he presented to a third party for payment, permitting himself to be identified as the payee; that, prior to cashing the check, defendant asked S what his initials were, and, on being told "H. T.," said that by mistake he had given the initials as "H. J.," but S replied that it did not matter, as he (S) could get the check cashed. *Held*, sufficient to sustain a conviction.—State v. Vineyard, 16 Mont. 138; 40 Pac. 173.

IV. VERDICT, 8.

8. To utter a forged check is one of the methods of committing forgery under Comp. Stat., p. 523, § 96, and, where the jury find defendant guilty of uttering a forged check in the manner and form as charged in the indictment, it is sufficient to sustain a conviction for forgery.—State v. Malish, 15 Mont. 506; 39 Pac. 739.

FORNICATION.

1. Criminal intercourse between unmarried persons of different sexes is fornication.—Territory v. Whitcomb, 1 Mont. 359.

2. A party who has been indicted for the crime of fornication, can not be convicted unless it is alleged and proved that he was unmarried at the time specified in the indictment. (Modified in Territory v. Jaspar, 7 Mont. 1.)—Territory v. Whitcomb, 1 Mont. 359.

FRAUD.

1. A mere allegation that an action was corruptly and fraudulently dismissed amounts to nothing; the facts that constitute fraud must be set forth.—First Nat'l Bank v. How, 1 Mont. 604.

2. Allegations that relators made a contract with defendant because induced to believe they had no legal means to compel defendant to repair its canal, and that they were so induced to believe at the connivance of defendant, and as they believed at defendant's instance, will be disregarded as a plea of fraud or mistake, as they are mere legal conclusions.—State v. Improvement Co., 20 Mont. 198; 50 Pac. 420.

3. Fraud is never presumed, nor can it be proved unless the ultimate facts constituting it be specifically alleged, and where no facts are alleged, inferences and innuendoes are wholly insufficient as a pleading.—Butte Hdw. Co. v. Knox, 28 Mont. 111; 72 Pac. 301.

FRAUDS, STATUTE OF.

I. Promises to Answer for Debt, Default, or Miscarriage of Another, 1-5.
II. Agreements not to be Performed Within a Year, 6.
III. Real Property, and Estates and Interests Therein, 7-13.
IV. Sales of Goods, 14-18.
V. Requisites and Sufficiency of Writing, 19-22.
VI. Operation and Effect of Statute, 23-30.
VII. Pleading, Evidence, Trial, and Review, 31-40.

I. PROMISES TO ANSWER FOR DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER, 1-5.

1. A person who had a claim against a certain piece of property made a verbal promise to pay the lien of another against the same piece of property, in consideration of his forbearance to enforce his lien. *Held*, that the promise was not within the statute of frauds.—Carothers v. Connolly, 1 Mont. 433.

2. An oral acceptance of an order is not within the statute of frauds.—Lavell v. Frost, 16 Mont. 93; 40 Pac. 146.

3. An allegation that plaintiffs sold goods to defendants' employees under an agreement with defendants that they would pay plaintiffs the value thereof, retaining the amount out of the wages of such employees, sufficiently states an original promise on the part of the employers to pay for goods sold to the employees.—Hefferlin v. Karlman, 29 Mont. 139; 74 Pac. 201.

4. A promise by partners to pay an existing debt of a corporation to another in consideration of such other person giving them an agency for the sale of his coal is an original obligation, which, under Civ. Code, § 3612, subd. 3, need not be in writing.—McCormick v. Johnson, 31 Mont. 266; 78 Pac. 500.

5. Where S, being indebted to A, sells goods to M, and directs him to withhold from the purchase money and pay to A the amount of S's debt to A, the promise of M to do so is not a promise to pay the debt of another within the statute of frauds.—Adlam v. McKnight, 32 Mont. 349; 80 Pac. 613.

II. AGREEMENTS NOT TO BE PERFORMED WITHIN A YEAR, 6.

6. Where a contract between plaintiff and defendant as tenants in common provided for the erection of a house on their premises by defendant at his own expense, and requiring him to make an equal division of the rents between them when the rents received equalled one-half the cost, and there was an immediate performance by plaintiff by his surrender to defendant of the entire control of the property, with all revenues to be derived from it, until the stipulated rent to pay for the erection of the building, together with the use of the property in the meantime by the defendant for the purpose of revenue under the agreement, the contract was enforceable irrespective of whether it was in writing, notwithstanding Civ. Code, § 2185, subd. 1, providing that an agreement for leasing property for a period of more than one year is invalid unless in writing.—Ayotte v. Nadeau, 32 Mont. 498; 81 Pac. 145.

III. REAL PROPERTY, AND ESTATES AND INTERESTS THEREIN, 7-13.

7. Defendant was the owner and in possession of real property which was sold under judicial decree. Before the sale plaintiff and defendant entered into an agreement under which plaintiff bid off the property, advanced the purchase money and held the legal title for defendant. Defendant secured the payment of the money by certain rents, which paid the sum advanced by plaintiff. Defendant continued in the peaceable possession of the property for about five years, when plaintiff brought an action to recover possession. *Held*, that said agreement was not within the statute.—Reece v. Roush, 2 Mont. 586.

8. A verbal agreement of copartnership between two or more persons for the purpose of prospecting for and discovering quartz claims, and when discovered to acquire title thereto for the mutual benefit of the copartners, is not within the statute of frauds.—Hirbour v. Reeding, 3 Mont. 15.

9. An express verbal contract for the sale of real estate is void under the statute of frauds of the territory. (See 116 U. S. 491.)—Ryan v. Dunphy, 4 Mont. 342; 1 Pac. 710.

10. The locator of a mining claim takes as by grant from the government, and such possessory title is "real estate," under Rev. Stat., p. 435, § 211, and is within the statute of frauds, and can only be transferred by deed.—Hopkins v. Noyes, 4 Mont. 550; 2 Pac. 280.

11. An oral agreement by a purchaser at a judicial sale to take the deed in his own name, and convey to another, is void, as within the statute of frauds. (Civ. Code, § 2342.)—Largey v. Leggat, 30 Mont. 148; 75 Pac. 950.

12. A contract between tenants in common for the erection of a house on their premises by one at his own expense, and requiring him to make an equal division of the rents when the rents received equalled one-half the cost, is not within Civ. Code, § 2185, subd. 5.—Ayotte v. Nadeau, 32 Mont. 498; 81 Pac. 145.

13. A contract between tenants in common for the erection of a house on their premises by one at his own expense, and requiring him to make an equal division of the rents between them, when the rents received equalled one-half the cost, is not within Civ. Code, § 2342, as the contract was not for the sale of land or for any interest therein.—Id.

IV. SALES OF GOODS, 14-18.

14. A verbal promise by defendant to plaintiff that if plaintiff would buy certain property, and transfer the same to a third party, defendant would pay him $500, is not within the statute of frauds (Comp. Stat., p. 652, § 224), providing that every contract for sale of goods, chattels or things in action, for the price of $200 or over, shall be void unless in writing, or unless there is a delivery of a portion, or a payment of a portion of the purchase money.—Frank v. Murray, 7 Mont. 4; 14 Pac. 654.

15. A parol contract between a creditor and a debtor whose property has been attached by the creditor, that in consideration of the debtor's allowing the creditor to take judgment the latter will purchase the goods attached at the sheriff's sale, and give the debtor credit for their cash price, irrespective of his bid at the sheriff's sale, is not a contract for the sale of goods, so as to bring it within the statute of frauds.—Jacobs v. Union Merc. Co., 17 Mont. 61; 42 Pac. 109.

16. Under Civ. Code, § 2340, declaring invalid a sale of personal property for $200 or more, not in writing, unless the buyer accepts and receives part of the thing sold, an acceptance and receipt need not be concurrent with the purchase.—Slater Brick Co. v. Shackleton, 30 Mont. 390; 76 Pac. 805.

17. Under Civ. Code, § 2340, making valid a sale of personalty, for $200 or more, though not in writing, if the buyer accepts and receives part of the thing sold, such acceptance and receipt by one who assumes the buyer's contract is sufficient.—Id.

18. A contract between tenants in common for the erection of a house on their premises by one at his own expense, and requiring him to make an equal division of the rents between them when the rents received equal one-half the cost, is not within Civ. Code, § 2340, as the contract was not an agreement for the sale of the building.—Ayotte v. Nadeau, 32 Mont. 498; 81 Pac. 145.

V. REQUISITES AND SUFFICIENCY OF WRITING, 19-22.

19. Counsel for appellant directed the clerk of the district court, in writing, to complete the transcript on appeal and that they would guarantee payment of his fees therefor. *Held*, that such writing was a sufficient memorandum "expressing the consideration," within Cod. Stat., p. 393, § 12.—O'Bannon v. Chumasero, 3 Mont. 419.

20. A memorandum for the sale of land described the same as follows: "A piece of ground comencing on the corner of contemplated crossing of the street with Main, the cross street supposed to be 11th; said ground running on the line of Main street 100 feet front on the east, and extending back from Main street 125 feet to an alley; also two lots on Ewing street, 100 feet front on the west side by 141.5 feet deep to an alley." *Held*, to be not a sufficient compliance with the statute of frauds so as to authorize specific performance.—Ryan v. Davis, 5 Mont. 505; 6 Pac. 339.

21. An option to sell land at an agreed price, a consideration for the option being stated, is a sufficient compliance with the statute of frauds (Comp. Stat., p. 652, § 219), which only requires that the memorandum of sale shall be signed by the seller.—Ide v. Leiser, 10 Mont. 5; 24 Pac. 695.

22. Where one of several lessors of a building had no written authority to sign an extension agreement containing an agreement for a conveyance of the land, for one of the other lessors, as required by Civ. Code, § 2185, subd. 5, such extension agreement, which was for more than a year, was invalid.—Landt v. Schneider, 31 Mont. 15; 77 Pac. 307.

VI. OPERATION AND EFFECT OF STATUTE, 23-30.

23. Where three persons make a verbal contract to locate, pre-empt and develop quartz lodes, and a lode is located in the name of two but developed by all, the fact that a third party, who claims adversely to the locators, in settlement of the dispute between them, makes a deed of the lode to the two in whose name it was located, does not affect the right of the other to enforce his right to the lode under the contract.—Hirbour v. Reeding, 3 Mont. 15.

24. Where a tenant in the possession of land at the time of its sale makes a parol agreement with the vendee to purchase, his continued possession will not be such part performance as to take it out of the statute.—Lamme v. Dodson, 4 Mont. 560; 2 Pac. 298.

25. Payment of the purchase money is not sufficient part performance of a verbal contract to convey land to satisfy the statute of frauds. (See 138 U. S. 587.)—Ducie v. Ford, 8 Mont. 233; 19 Pac. 414.

26. To abstain from filing a claim to a disputed mine, and to relinquish possession of it on a verbal promise to procure a patent, and convey a half interest, is not such part performance as will satisfy the statute of frauds.—Id.

27. Where a person acquired land of which his grantor claimed to be the equitable owner by reason of a parol contract with the holder of the legal title, such person is not entitled to a decree of specific performance, though it be shown that part of the purchase money was paid to the joint holder of the legal title; payment of part of the purchase price, unaccompanied by other equities, being insufficient to take a parol contract out of the operation of the statute of frauds.—Boulder V. D. & M. Co. v. Farnham, 12 Mont. 1; 29 Pac. 277.

28. A contract accepting the assignment of a lease made to a firm, and assuming the obligations thereof, is not within the statute of frauds, though the signature of the assignor is in the firm name, where it is executed by a member of the firm authorized by the other members, and where the assignees have taken possession of the demised premises and have paid rent.—Edwards v. Spalding, 20 Mont. 54; 49 Pac. 443.

29. No recovery can be had for services in effecting a sale of realty rendered by plaintiff and accepted by defendant, unless there is a note or memorandum in writing of a contract for such services, as required by Civ. Code, § 2185.—King v. Benson, 2— Mont. 256; 56 Pac. 289.

30. Where plaintiff purchased a leasehold interest, paid the consideration, and went into possession of the premises with defendants' consent, and the promise to obtain the transfer of the lease was the inducement to sign the contract, omitting mention of the lease, on the sale of a business, without placing plaintiff in statu quo, he could not assert that the promise to procure the lease was void under the statute of frauds.—Sathre v. Rolfe, 31 Mont. 85; 77 Pac. 431.

VII. PLEADING, EVIDENCE, TRIAL, AND REVIEW, 31-40.

31. If a chattel mortgage is claimed to be void under the statute of frauds, the facts to authorize such proof must be specially pleaded.—Smith v. Auerbach, 2 Mont. 348.

32. Where a pleading alleges an agreement which would be within the statute of frauds, unless in writing, it will be presumed to be a written contract, and if denied such a one must be proved. The writing is a matter of proof and not of allegation.—Sweetland v. Barrett, 4 Mont. 217; 1 Pac. 745.

33. Where an agreement for the sale of realty is alleged in the complaint and denied in the answer, a contract in writing must be shown to entitle plaintiff to a decree. (See 116 U. S. 491.)—Ryan v. Dunphy, 4 Mont. 342; 1 Pac. 710.

34. In an action for the specific performance of a contract for the sale of an interest in a mining claim, a complaint which fails to state that the contract was in writing is not subject to a general demurrer.—Mayger v. Cruse, 5 Mont. 485; 6 Pac. 333.

35. Where a contract is set up that is within the statute of frauds, and is stated to be oral, a demurrer is regular. (Affirmed in same case, 138 U. S. 587.)—Ducie v. Ford, 8 Mont. 233; 19 Pac. 414.

36. Where plaintiff admits an agreement in his pleadings he can not object to any proof being received as to the agreement, because it was for an interest in land, and not in writing, and void under the statute of frauds.—Greeg v. Garrett, 13 Mont. 10; 31 Pac. 721.

37. Where, in a suit for specific performance, defendant admitted the making of the contract, and relied on a defense other than the statute of frauds to defeat the action, such statute was not available as a defense unless specially pleaded.—Christiansen v. Aldrich, 30 Mont. 446; 76 Pac. 1007.

38. Defendants, for the purpose of showing that the promise of plaintiff's firm to pay a debt owing them by a corporation was for a valuable consideration, and was not within the statute of frauds, may show the value of the business of the agency they gave on condition of such promise.—McCormick v. Johnson, 31 Mont. 266; 78 Pac. 500.

39. Where the value of property involved in a sale is sufficient to bring the contract of sale within the provisions of Civ. Code, § 2185, 2340, and Code Civ. Proc., § 3276, the burden is on plaintiff in an action for breach of the contract, to establish by a preponderance of the evidence that a valid contract under the statute was entered into between the parties, together with a breach of such contract, and the consequent damages.—Brophy v. Provision Co., 31 Mont. 279; 78 Pac. 493.

40. Under Code Civ. Proc., § 1528, the filing of an amendment to defendant's answer pleading the statute of frauds to an action to recover the price of certain land sold did not require a replication.—Duane v. Molinak, 31 Mont. 343; 78 Pac. 588.

FRAUDULENT CONVEYANCES.

I. **Transfers and Transactions Invalid, 1-25.**
- A. Nature and form of remedy, 1.
- B. Property and rights transferred, 2.
- C. Indebtedness, insolvency, and intent of grantor, 3-4.
- D. Consideration, 5-7.
- E. Confidential relations of parties, 8-10.
- F. Preferences to creditors, 11.
- G. Retention of possession or apparent title by grantor, 12-23.
- H. Knowledge and intent of grantee, 24-25.

II. **Rights and Liabilities of Parties and Purchasers, 26-31.**

III. Remedies of Creditors and Purchasers, 32-62.
A. Persons entitled to assert invalidity, 32-33.
B. Contest of claims to property levied upon, 34.
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I. TRANSFERS AND TRANSACTIONS, 1-25.
A. Nature and Form of Remedy, 1.
B. Property and Rights Transferred, 2.
C. Indebtedness, Insolvency, and Intent of Grantor, 3-4.
D. Consideration, 5-7.
E. Confidential Relations of Parties, 8-10.
F. Preferences to Creditors, 11.
G. Retention of Possession or Apparent Title by Grantor, 12-23.
H. Knowledge and Intent of Grantee, 24-25.

A. NATURE AND FORM OF REMEDY, 1.

1. An agreement between a creditor and a debtor, in consideration of certain credits and advancements given to enable the latter to start business, and evidenced by notes, that in case the debtor becomes involved, or is sued for any indebtedness, the notes shall become immediately due, unless they are secured, and a subsequent assignment made to secure such notes, are not in fraud of creditors, in the absence of any facts showing fraudulent intent.—Teitig v. Boesman, 12 Mont. 404; 31 Pac. 371.

B. PROPERTY AND RIGHTS TRANSFERRED, 2.

2. Where the debtor delivered his earnings to his wife, to be used for the support of the family, and the same were necessary for that purpose, in so doing he could not commit fraud upon his creditors.—Cushing v. Quigley, 11 Mont. 577; 29 Pac. 337.

C. INDEBTEDNESS, INSOLVENCY, AND INTENT OF GRANTOR, 3-4.

3. A parol gift of land from father to son, accompanied by the notorious and exclusive possession of the latter, with full knowledge of the possession and of permanent improvements made by the son, is valid as against the father's creditors, if the father at the time of the gift was solvent and possessed substantial means, and no fraud was contemplated.— Story v. Black, 5 Mont. 26; 1 Pac. 1.

4. A debtor, before action brought against him by his creditor, conveyed certain real estate to a third party, without consideration, and with intent to defraud his creditors, which intent was known to his grantee. The jury found that such debtor was, at or since the time he made such conveyance, the owner of sufficient property subject to execution for the satisfaction of such indebtedness, but it was not found that he was possessed of any property, other than that conveyed, when the original action was brought, or when the judgment therein was rendered, or when the action to subject such property thereunder was commenced. *Held*, that such conveyance should be set aside as fraudulent, and the property thereby conveyed sold to satisfy such original judgment.—Montana L. & M. Co., v. Gerhold, 17 Mont. 558; 44 Pac. 87.

D. CONSIDERATION, 5-7.

5. A deed and chattel mortgage given by a debtor, who was being pressed by his creditors, to secure his surety on obligations already assumed, and in consideration that the surety assume the payment of other debts due by the debtor, are not per se fraudulent as to the other creditors of the debtor.—Tudor v. De-Long, 18 Mont. 499; 46 Pac. 258.

6. Mere inadequacy of consideration is not of itself sufficient cause to invalidate a conveyance, except in extreme cases.—Muller v. Reukes, 31 Mont. 100; 77 Pac. 512.

7. Where the owner of land conveyed the same to one to whom the owner was indebted for advances, the real consideration being $2,100, and between $800 and $1,200 having been paid on the execution of the deed, the balance being covered by the advances, though the nominal consideration in the deed was only $1, such conveyance was not fraudulent as to the creditors.—Id.

E. CONFIDENTIAL RELATIONS OF PARTIES, 8-10.

8. Evidence that the parties to a chattel mortgage on the stock of merchandise were partners at the time the instrument was executed is competent on the issue as to the validity of the mortgage debt.—Heilbronner v. Lloyd, 17 Mont. 299; 42 Pac. 853.

9. A chattel mortgage otherwise valid is not fraudulent because of relationship between the mortgagee and one of the mortgagors.—Noyes v. Ross, 23 Mont. 425; 59 Pac. 367.

10. The mere fact that a conveyance of land is from a daughter to her mother, or vice versa, is not sufficient to stamp it with fraud.—Mueller v. Reukes, 31 Mont. 100; 77 Pac. 512.

F. PREFERENCES TO CREDITORS, 11.

11. A payment by a husband of a debt due by him to his wife is not per se fraudulent as against his creditors.—Lambrecht v. Patten, 15 Mont. 260; 38 Pac. 1063.

G. RETENTION OF POSSESSION OR APPARENT TITLE BY GRANTOR, 12-23.

12. A delay of but one day, where immediate delivery was impossible, will not necessarily render a sale void.—O'Gara v. Lowry, 5 Mont. 427; 5 Pac. 583.

13. The fact that the vendee of a horse and wagon employed the brother of the vendor to drive it and subsequently, for a short time, employed the vendor, does not show such want of continued possession in the vendee as to render the sale void.—Id.

14. Under Rev. Stat., p. 463, § 169, requiring that "every sale made by a vendor of goods and chattels in his possession, or under his control, * * * unless the same be accompanied by the immediate delivery, and followed by an actual and continued change of possession, of the thing sold or assigned, shall be conclusive evidence of fraud, as against the creditors of the vendors," it is a sufficient change of possession if the vendor parts with the actual possession of the thing sold, though

the possession of the vendee may be only constructive. Therefore, where certain horses in a corral were sold to a bona fide purchaser for value, and were given a distinguishing mark at the time of the sale, and then immediately turned on the range in the actual possession of no one, *held*, that there was an immediate delivery and change of possession, within the requirement of the act.—Dodge v. Jones, 7 Mont. 121; 14 Pac. 707.

15. The purpose of Rev. Stat., p. 436, § 169, requiring in sales of personal property, to be valid against creditors, an actual and continued change of possession of the thing sold, being to prevent fraudulent and colorable sales made to hinder and delay creditors, it is not fraud per se if the vendors, having given possession of the property sold to the vendee, subsequently, at the expiration of a reasonable length of time, retake possession of the same as agents of the vendee.—Id.

16. Under Comp. Stat., p. 653, § 226, providing that a sale of chattels in the possession of the seller, unless accompanied by an immediate delivery and followed by a continued change of possession, is conclusive evidence of fraud, as against the seller's creditors, a complaint in an action by a purchaser against a sheriff for conversion of property seized under an attachment against the seller, which shows the property to have been in the seller's possession when purchased, and does not allege an actual delivery and change of possession, is demurrable.—Harmon v. Hawkins, 18 Mont. 525; 46 Pac. 439.

17. Where a building which is personal property, is assigned for the benefit of creditors, a finding that immediate possession was delivered and taken by the assignee, as required by Comp. Stat., p. 653, § 226, so as to prevent the assignment from being void as to other creditors, on evidence of conduct of the assignees showing that, by delivery of the deed of assignment, they intended to and did voluntarily give up the possession to the assignee, will not, in the absence of any evidence of fraud, be disturbed because it is shown that the assignee took actual physical possession.—Tuttle v. Bank, 19 Mont. 11; 47 Pac. 203.

18. Where shares of stock are assigned in trust for benefit of preferred creditors, evidence that the assignor transferred a receipt therefor, the only evidence he had of his ownership, to the assignee in writing, and that the assignee voted the stock and exercised all the rights of ownership, shows a delivery to and taking of possession by him, as required by Comp. Stat., p. 653, § 226.—Id.

19. The mere fact that the seller of a saloon was in possession 13 days after the sale, and at the time of a levy on the property as belonging to him, is not conclusive evidence of a fraudulent sale, where there was no evidence of a cash consideration, a bill of sale, the putting up of a sign with the buyer's name on it, and the hiring of the seller as bartender; and the further fact that the seller was out of possession for not more than four hours, which was on the day of the sale and pending an arrangement, does not conclusively show fraud.—Gallick v. Bordeaux, 22 Mont. 470; 56 Pac. 961.

20. Where a joint owner of personalty which is in the possession of another joint owner as well as his own interest, the purchaser's failure to take possession does not, as against execution creditors of the seller, void the sale, under Civ. Code, § 4491, providing that every transfer of personal property by a person in possession or control of the property shall be conclusively presumed to be fraudulent if not followed by actual and continued change of possession.—Yank v. Bordeaux, 23 Mont 205; 58 Pac. 42.

21. Defendants, after contracting a debt to plaintiffs, executed a chattel mortgage to a third party on all of their property, consisting of a stock of goods, the consideration for which was a previous loan, with which the mortgagors had purchased a part of the goods. A further consideration was a debt assumed by the mortgagee. The value of the goods was only a reasonable security for this combined debt. The mortgagors were to remain in possession, and sell at retail, and one of them was to be allowed to retain living expenses from the proceeds. The balance, after the deduction of costs, was to go to the mortgagee. The mortgagee, in fear of losing the security, made a sale of the property by public auction prior to the maturity of the debt. *Held*, that the transactions were not in fraud of creditors.—Noyes v. Ross, 23 Mont. 425; 59 Pac. 367.

22. Under Civ. Code, § 4491, providing that every transfer of personality not accompanied by an immediate delivery and followed by an actual and continued change of possession is conclusively presumed to be void, where the inferences deducible from the evidence are sufficient to justify a finding that the sale of personality was or was not accompanied by an immediate delivery and actual and continued change of possession, a charge is sufficient that to constitute a sale of personalty good as against creditors there must be such delivery and change, but that, if immediately after the sale plaintiff take absolute control and posession of the chatels, he will not be required, in order to show possession against creditors of his vendor, to remove the chattels from the place of sale, if the possession was so open and for such a length of time as to give general notice of the status of the property and the claim of the vendee.—Morris v. McLaughlin, 25 Mont. 151; 64 Pac. 219.

23. Civ. Code, § 4491, applies to a sale of range cattle and the brand, and the buyer is not entitled to recover the cattle sold, but not delivered, as against a subsequent purchaser in good faith under a custom that, where one purchases an entire herd of range cattle and the brand, the purchaser becomes the owner of the remnants of the herd not delivered.—Ettien v. Dunn, 32 Mont. 311; 80 Pac. 369.

H. KNOWLEDGE AND INTENT OF GRANTEE, 24-25.

24. To render a conveyance fraudulent as against creditors, there must be mutual participation in the fraudulent intent on the part of both grantor and grantee.—Curtis v. Vailton, 3 Mont. 153.

25. Where one of several joint owners of personalty sells his interest, the purchaser need not notify the other co-owners of the sale, in order to make it valid as against execution creditors of the seller.—Yank v. Bordeaux, 23, Mont. 205; 58 Pac. 42.

II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS, 26-31.

26. One who gives a deed to a wife, with knowledge that the consideration therefor is paid by her husband in fraud of his creditors, can not impeach his own conveyance by showing the fraud. (See 14 Otto. 618.)—Fredericks v. Davis, 3 Mont. 251.

27. In an action for conversion of property by its sale under an execution against the person from whom plaintiff claimed to have purchased it, where defendant alleged that the sale

was fraudulent as against creditors of the seller, it was error to refuse an instruction that, if the sale was made to hinder creditors, plaintiff could not recover, and the error was not cured by an instruction that plaintiff could not recover if he was not the owner of the property when it was seized and taken.—Davis v. Morgan, 19 Mont. 141; 47 Pac. 793.

28. On a showing of fraud towards creditors in a debtor's conveyance, the court instructed that if a prior transfer from his partner to the debtor was made without consideration or secretly, or for any fraudulent purpose, or to allow the debtor to make the transfer in question with intent to defraud creditors of the partnership, then the conveyance in issue would be invalid. *Held*, error, as permitting the conveyance to be invalidated, though the grantee was an innocent purchaser for value.—Yoder v. Reynolds, 28 Mont. 183; 72 Pac. 417.

29. The court further instructed that if the grantee was not at the time of the conveyance the legal or real owner of the notes given by the debtor, the cancellation of which was the consideraion for the conveyance, but the facts concerning the true ownership were concealed for the purpose of defeating partnership creditors, and given to a payee who afterwards became his wife. *Held*, that both instructions were, as a whole, erroneous, as telling the jury, in effect, that the grantee did not have the right to secure himself by purchasing the property in good faith, even though he was liable on the notes.—Id.

30. The latter instruction was also erroneous, as it was immaterial to the creditors of the partnership whether the ownership of the notes was in the grantee or his wife.—Id

31. The court instructed that if the prior transfer to the debtor from his partner was made for value or in god faith, and was not disclosed to creditors, then it would not vest the title in the debtor alone, but, if the partnership or the debtor continued to carry on the business under the firm name, then the conveyance would be void as to creditors of the firm. *Held* error, as, whether the transfer between the partners was fraudulent or not, it gave to the debtor the legal title, so as to enable him to give an absolutely good title to a bona fide purchaser.—Id.

III. REMEDIES OF CREDITORS AND PURCHASERS, 32-62.

A. Persons Entitled to Assert Invalidity, 32-33.
B. Contest of Claims to Property Levied Upon, 34.
C. Right of Action to Set Aside Transfer, and Defenses, 35-36.
D. Limitations, 37.
E. Pleading, 38-43.
F. Evidence, 44-55.
G. Trial, Judgment, and Review, 56-62.

A. PERSONS ENTITLED TO ASSERT INVALIDITY, 32-33.

32. A creditor may attach property that his debtor has fraudulently sold, as soon as he hears of the fraudulent character of the sale, even where the indebtedness accrued subsequent to the sale, and he knew his debtor had claimed to have parted with his title to said property when credit was given.—Pincus v. Reynolds, 19 Mont. 564; 49 Pac. 145.

33. Where plaintiffs purchased certain goods covered by a chattel mortgage from the mortgagor, and retained actual possession of them, and the court found that the sale to plaintiffs was valid, it was not necessary for plaintiffs to obtain a judgment or levy an attachment on the goods as a condition precedent to their right to assail the mortgage in an action against the sheriff for seizing the goods thereunder.—Stevens v. Curran, 28 Mont. 366; 72 Pac. 753.

B. CONTEST OF CLAIMS TO PROPERTY LEVIED UPON, 34.

34. In an action of claim and delivery to determine the ownership of property taken on attachment, it is not a necessary prerequisite to enable the defendant sheriff to impeach claimant's title as acquired in fraud of creditors that the attaching creditor should have secured judgment and had execution thereon returned unsatisfied.—Botcher v. Berry, 6 Mont. 448; 13 Pac. 45.

C. RIGHT OF ACTION TO SET ASIDE TRANSFER, AND DEFENSES, 35-36.

35. In a suit by a divorced wife to subject to the payment of alimony, property fraudulently conveyed by the husband, it is not necessary that a judgment at law should have been had and execution issued; the equitable decree for alimony being sufficient to sustain a creditor's bill. (See 135 U. S. 232.)—Twell v. Twell, 6 Mont. 19; 9 Pac. 537.

36. Where a sheriff makes return on attachment levied in a suit against a debtor, commenced after an assignment by such debtor, to which the assignee is not a party, of no property to satisfy the attachment except the property attached, which is embraced in the alleged assignment, and it appears that an action at law is pending by the assignee against the attaching creditor for conversion in making the attachment, to which the debtors are not parties, a bill in equity will lie to remove the assignment as an obstruction to execution on a judgment for plaintiff in such action, on the ground that it is fraudulent.—Merchants Nat'l Bank v. Greenhood, 16 Mont. 395; 41 Pac. 250.

D. LIMITATIONS, 37.

37. Under Comp Stat., p. 69, § 42, subd. 4, providing that an action for relief on the ground of fraud shall be commenced within two years, where an action to set aside a sale of property as in fraud of a judgment against the seller was commenced in a year after the rendition of the judgment, it was not barred by limitations, since the right of action did not accrue until plaintiff's judgment was obtained.—Finch v. Kent, 24 Mont. 268; 61 Pac. 653.

E. PLEADING, 38-43.

38. Under Rev. Stat., p. 436, § 169, an assignment of goods without an actual delivery of possession is conclusive evidence of fraud as against creditors of the assignor; and where, in an action of claim and delivery by the assignee of goods against a sheriff who had attached the goods as those of the assignor, an allegation in the answer that the assignment is fraudulent as to the attaching creditor, and that the possession of the goods never passed from the assignor to plaintiff, presents a proper and material issue.—Botcher v. Berry, 6 Mont. 448; 13 Pac. 45.

39. Affirmative allegations in his answer, setting out that conveyances sought to be set aside as in fraud of creditors were made for the purpose of paying just debts of the grantor, constitute a sufficient denial of the allegations of fraud in the complaint.—National W. P.

Co. v. McPherson, 19 Mont. 355; 48 Pac. 550.

40. A general denial of all the allegations of the complaint not specifically admitted is not a sufficient denial of an allegation that conveyances which the action was brought to set aside were made with intent to defraud creditors.—Id.

41. Under Code Civ. Proc., § 1197, providing that a judgment becomes a lien on realty from the time it is docketed, a complaint by a judgment creditor to set aside his debtor's conveyance of realty as fraudulent, which does not allege the docketing of the creditor's judgment, is insufficient.—Wyman v. Jensen, 26 Mont. 227; 67 Pac. 114.

42. Where, in an action to set aside a conveyance of both real and personal property as fraudulent towards creditors, the complaint does not show that plaintiff has a lien on such property, it fails to state a cause of action for such relief, and an objection to the admission of any evidence thereunder should be sustained.—Id.

43. Where, in an action by a creditor to set aside an assignment by the debtor as fraudulent as to plaintiff, the complaint fails to give the location of such real estate or any description thereof, other than that it does not exceed a specified value, an objection to the admission of any evidence should be sustained; the complaint failing to disclose a lien in favor of the judgment creditor.—Id.

F. EVIDENCE, 44-55.

44. Evidence of general reputation in the neighborhood, concerning the ownership of certain cattle by a married woman, is competent to rebut the allegation that she had conspired to deceive and defraud the creditors of her husband.—Griswold v. Boley, 1 Mont. 545.

45. In an action against a constable for attaching, as the property of D & R, certain horses leased by them from M, and which M afterwards sold to plaintiff, and other horses bought by plaintiff and intrusted to D & R, with authority to sell them for plaintiff, defendant set up that there was no delivery to plaintiff, that plaintiff's claim was founded on a transfer made in fraud of the creditors of D & R, and that plaintiff permitted D & R to hold the property as their own, and to obtain credit on the faith of it. There being no testimony showing that D & R did in fact own the property, or that plaintiff had any knowledge that they claimed such ownership or authorized such claim, or that the credit was based on such claim, *held* to be error to admit evidence of acts of ownership and declarations made by D & R to third persons.—Brownell v. McCormick, 7 Mont. 12; 14 Pac. 651.

46. A finding that a corporation was organized at the suggestion and instigation of a creditor, who had full knowledge and control of its affairs, and that such corporation secured valuable credits, upon which it conducted its business, solely on account of the solvency and endorsement of such creditor, who stood in the relation of trustee and managing officer to such corporation, and that an assignment to him to secure a debt was fraudulent, is not warranted by evidence that the creditor sold goods to the corporaton on credit to start its business; that the corporation was organized at his suggestion, and that he agreed to assist it by endorsing its paper for a certain amount; that he knew nothing about the details of its business, had nothing to do with the management thereof, was not a stockholder or officer, but made occasional suggestions with reference to the management and especially in connection with the sum due him, and knew the financial condition of the business, examined the books occasionally, and took part in the management during the last two months of the business, after which he took a deed of assignment to secure preferred claims, including his own.—Teitig v. Boesman, 12 Mont. 404; 31 Pac. 371.

47. S, being insolvent, and owing both a bank and his wife, paid his debt to his wife in full by deeding to her property of less value than the amount of said debt, which property he obtained by money drawn from the bank. The bank took no steps to subject the real estate to its claim until 14 months after the deed was made, and a considerable time after they knew the circumstances, and allowed the overdraft to continue at the bank, and to rise in the course of business at one time to $2,000 more than it was when the first payment was made on the property. *Held*, evidence to show that the bank did not regard the transaction as fraudulent during that time.—Shepherd v. Bank, 16 Mont. 24; 40 Pac. 67.

48. In an action to set aside a conveyance of land from husband to wife in fraud of plaintiff's equitable rights, though the wife paid a valuable consideration, the burden was on her to show that she took without notice of plaintiff's rights; the rule casting such burden on her not being affected by Comp Stat., p. 654, § 232, declaring that the provisions of this chapter (relating to conveyances) shall not impair the title of a purchaser for value unless it appears that he had notice of the fraudulent intent of his grantor, or of the fraud rendering the grantor's title void.—Lewis v. Lindley, 19 Mont. 422; 48 Pac. 765.

49. In a suit by creditors to have a sale of a stock of goods from a mother to her daughter set aside, it is not sufficient evidence of fraud that a son, as agent for both parties, negotiated the sale, and was afterwards in the employ of the daughter.—Wilson v. Harris, 21 Mont. 374; 54 Pac. 46.

50. In an action by creditors attacking a sale by a mother to her daughter, proof that the mother was indebted to the daughter in a certain amount is not overcome by statements made by the mother's agent to mercantile agencies which made no specific mention of the indebtedness.—Id.

51. Where a creditor's bill to set aside a sale as fraudulent averred that the sale was made with the actual intent to defraud the creditor's vendor, the burden of proof is on plaintiff to show facts which will invalidate the sale.—Finch v. Kent, 24 Mont. 268; 61 Pac. 653.

52. Where an execution was returned nulla bona, and in proceedings supplemental to execution defendant was examined as to his property, his testimony so given was competent against him in a subsequent creditor's suit to set aside a sale of his property as fraudulent.—Id.

53. In a creditor's suit to set aside a sale of property made on Jan. 3, 1893, as in fraud of a judgment obtained by the vendor's creditors on Feb. 17, 1894, evidence that defendant did not owe plaintiff anything at the time of the sale was relevant.—Id.

54. In a creditor's suit to set aside a sale by a husband to his wife as fraudulent, both the husband and the wife may testify that the transfer was not made with the intention of defrauding any creditors, since their intention was material to the issue.—Id.

55. A debtor transferred his stock of goods by an itemized bill of sale, which did not include the good will of the business. *Held*, on an issue of fraud towards creditors in the conveyance, that evidence as to the value of the good will was inadmissible, under Code Civ. Proc., § 1372.—Yoder v. Reynolds, 28 Mont. 181; 72 Pac. 417.

G. TRIAL, JUDGMENT, AND REVIEW, 56-62.

56. Under an allegation that a wife's ownership of property attached as that of her husband is fraudulent as against creditors, the issue of fraud is fully covered by a finding that the property belongs to the wife as a sole trader.—Fredericks v. Clark, 3 Mont. 258.

57. In an action where it is sought to impeach a sale for fraud as to creditors, it is for the jury to determine whether the property was so situated, and the parties were so located at the time of the sale, that instant delivery could be made, and whether it was made as soon thereafter as practicable.—O'Gara v. Lowry, 5 Mont. 427; 5 Pac. 583.

58. In an action of claim and delivery against a sheriff, where it appeared that plaintiff had bought the goods seized, valued at $4,000, by surrendering to the debtor certain notes executed by him, and amounting to several thousand dollars, which notes he had bought for $9, that he kept the goods in the same store, and retained the same clerks, but changed the sign; and the jury found specially (1) that there was no fraudulent intent, and (2) that there was actual delivery and a continuous change of possession of the goods, and gave a verdict for plaintiff, *held* that such verdict would not be reviewed by the court, the facts being capable of an innocent interpretation.—Woods v. Berry, 7 Mont. 195; 14 Pac. 758.

59. In an action by the mortgagees of chattels to recover possession from a subsequent mortgagee, the jury found that plaintiff's mortgage, which was made by a partner, without the knowledge or consent of his co-partner, who was a joint owner, was taken by plaintiff with knowledge of such facts and with intent to defraud the mortgagor's co-partner and their creditors. Plaintiff assigned error upon instructions to the effect that if plaintiff had knowledge that the mortgagor's co-partner was a joint owner of the chattels and did not know of or consent to said mortgage, then it was void as to creditors, and that as the pleadings showed the possession of the chattels to have been in the defendant at the time of the commencement of the action, the possession was presumed to be rightful, and it devolved upon plaintiff to show by a preponderance of evidence that such possession was wrongful. *Held*, that, though such instructions might be erroneous, the findings of fraudulent intent or malum in se vitiated the entire transaction, and plaintiff could not recover.—Schwab v. Owens, 11 Mont. 473; 29 Pac. 190.

60. Plaintiff's husband, after marriage, turned over to plaintiff his money and property, of which he had considerable, but she had none; and afterwards he had the management of the business as the agent of his wife. The husband denied that the transfer was made to get the property out of reach of his creditors, but qualified it by stating that he would be foolish if he did not protect himself when a certain person threatened to sell him out, and give him no show. *Held*, that the evidence justified the court, on a verdict finding the conveyance free from fraud, in granting a new trial.—Kendall v. O'Neal, 16 Mont. 303; 40 Pac. 599.

61. Where a creditor's bill to set aside a sale as fraudulent averred that the sale was made with the actual intent to defraud the creditors of the vendor, a finding of constructive fraud, based on the fact that there was no continued change of possession after the sale, is not sufficient to support a judgment for the plaintiff, since he can not plead actual fraud and recover on proof of constructive fraud.—Finch v. Kent, 21 Mont. 268; 61 Pac. 653.

62. Comp. Stat., p. 653, § 226, provides that every sale of chattels by a vendor in his possession or under his control, not accompanied by an immediate delivery and followed by an actual and continued change of possession of the thing sold, shall be conclusive evidence of fraud, as against the creditors of the vendor. *Held*, in a creditor's suit to set aside a sale of sheep as fraudulent because there was no continued change of possession, where only a part of them remained in the possession of the purchaser at the time the creditors secured their lien, a judgment that the purchaser should deliver to the sheriff, for the benefit of creditors, all the sheep purchased, or account for their proceeds, was erroneous, since the purchaser was liable, under the statute, only for the identical chattels, remaining in his possession at the time the creditors' lien attached.—Id.

GAMING.

1. It is a question for the court and not for the jury to decide whether the game of cards, usually denominated "poker," is a game of chance, within the statute.—Kennon v. King, 2 Mont. 437.

2. The courts have enough to do without devoting their time to the solution of questions arising out of idle bets made on dog and cock fights, horse races, the speed of ox trains, the construction of railroads, the number on a dice or the character of a card that may be turned up.—Beattie v. Hoyt, 3 Mont. 140.

3. In an information under Laws 1887, p. 75, § 10, prohibiting the keeping of a gambling place without paying a license, where the offense of keeping such a place is sufficiently charged, an allegation that the keepers carried it on as the employees of another does not vitiate the information.—State v. Gray, 19 Mont. 206; 47 Pac. 900.

4. Under an information for keeping a gambling place without a license, wherein the game of "fan tan" is played, whether such game is one within the prohibition of the "Hunt Gambling Law" of 1889, for which no license can be obtained, is a question of fact for the jury. —Id.

5. Laws 1901, p. 166, § 2, prohibits the conduct of games of chance, and, among others, that of running a nickel-in-the-slot machine, "for money, checks, credits, or any representative of value, or for any property or thing whatever." *Held*, that a nickel-in-the-slot machine, involving in its operation the element of chance as to whether the player obtained in cigars more or less than the value of his money, was prohibited thereby.—State v. Woodman, 26 Mont. 348; 67 Pac. 1118.

GARNISHMENT.

I. Persons and Property Subject to, 1-7.
II. Proceedings to Procure, 8.
III. Service and Levy of Writ, 9.
IV. Lien, 10-11.
V. Proceedings to Support or Enforce, 12-16.
VI. Claims by Third Persons, 17-18.
VII. Operation and Effect of Garnishment, Judgment, or Payment, 19-21.

I. PERSONS AND PROPERTY SUBJECT TO, 1-7.

1. Civ. Pr. Act, p. 157, § 124, providing that "all debts due such defendant" may be at-

tached, does not include a judgment in favor of such defendant.—Perkins v. Guy, 2 Mont. 15.

2. A county is liable in garnishment for a debt due by it to its officer, under Comp. Stat., p. 106, § 189, declaring that all persons are subject to garnishment, and Comp. Stat., p. 647, § 202, providing that the word "persons" may extend to bodies politic and corporate.—Waterbury v. Deer Lodge, 10 Mont. 515; 26 Pac. 1002.

3. Public policy does not require that counties should be exempted from garnishment when, instead of being exempted by statute, their liability to the process is within the letter of the law.—Id.

4. A public school district is not exempt from garnishment.—Whalen v. Harrison, 11 Mont. 63; 27 Pac. 384.

5. Comp. Stat., p. 106, § 188, providing that the sheriff, on receiving information in writing that any person has personal property of defendant in his possession, shall serve on such person a copy of the writ, and notice that the property is attached; and § 190, providing for the examination under oath of one in possession of a debtor's property capable of manual delivery, and empowering the court to order same delivered to the sheriff, whose duty it would then be to attach the same, do not authorize the garnishment of a transferee of property capable of manual delivery under a conveyance fraudulent as to creditors.—Wilson v. Harris, 21 Mont. 374; 54 Pac. 46.

6. An owner of land which had been sold under foreclosure, and against whom a deficiency judgment had been entered, contracted to sell his equity to the purchaser, if the latter would secure and deliver to the debtor a receipt from the judgment creditor for all sums due him from the debtor. The debtor executed a deed and deposited it in escrow, to be delivered to the purchaser on the delivery of the receipt and the payment of the balance of the purchase price. Prior to any delivery of the receipt or any waiver of the same, the purchaser was served with garnishment process at the suit of the judgment creditor. *Held*, that the trial court having found the facts as to the contract as originally made, and that there had been no delivery of the receipt or waiver thereof, findings that the destruction of the deed in escrow after service, and the giving of another deed and the payment of the consideration, were for the purpose of evading the garnishment, could not aid plaintiff.—Cowell v. May, 26 Mont. 163; 66 Pac. 843.

7. The debtor executed a deed, and deposited it in escrow, to be delivered to the purchaser on the delivery of the receipt, and the payment of the balance of the purchase price, $10 being paid at the time. Prior to any delivery of the receipt or any waiver of the same on the part of the debtor, the execution purchaser was served with garnishment process at the suit of the judgment creditor. *Held*, that the purchaser was not liable, his liability to the debtor having been merely contingent.—Id.

II. PROCEEDINGS TO PROCURE, 8.

8. An order directing an action by a judgment creditor against a person or corporation alleged to have property of the judgment debtor, as provided for in Comp. Stat., p. 157, § 356, is not a part of the cause of action; and, where such action has been brought without it, the court may, in a proper case, manifest its consent by a retroactive order.—Sweeney v. Schlessinger, 18 Mont. 326; 45 Pac. 213.

III. SERVICE AND LEVY OF WRIT, 9.

9. Under Comp. Stat., p. 105, § 186, and Code Civ. Proc., § 1218, providing that an attachment or execution levy on personal property capable of manual delivery shall be by taking it into custody, the garnishment of the fraudulent vendee of the stock of merchandise of a judgment debtor by the creditor does not create a lien on such merchandise.—Wyman v. Jensen, 26 Mont. 227; 67 Pac. 114.

IV. LIEN, 10-11.

10. By garnishment of a debt due defendant, plaintiff acquires an inchoate right to a lien as to the garnishee's property. But where other creditors of the garnishee subsequently levy upon such property the right of the garnishee to a lien is limited to the pro rata interest it would be entitled to receive had the garnishee made a general assignment for benefit of creditors.—Montana Nat'l Bank v. Bank, 19 Mont. 586; 49 Pac. 149.

11. A lien on personal property capable of manual delivery, in possession of a transferee under a conveyance alleged to be fraudulent as to creditors, is not acquired by service of garnishment on the transferee, since Comp. Stat., p. 106, § 186, subd. 3, provides that personal property capable of manual delivery shall be attached by taking it into custody.—Wilson v. Harris, 21 Mont. 374; 54 Pac. 46.

V. PROCEEDINGS TO SUPPORT OR ENFORCE, 12-16.

12. Where an action is pending between plaintiff and defendant, and defendant is served with garnishment as the debtor of plaintiff in an action subsequently commenced, the court should proceed with the first action to final judgment, and protect the defendant as garnishee, if necessary, by staying execution until the attachment suit is determined.—Marden v. Wheelock, 1 Mont. 49.

13. Under Comp. Stat., p. 189, § 486, providing that any order for the payment of money may be enforced as a judgment by execution, and §§ 350-357, authorizing supplementary proceedings to discover and apply effects of defendant in case of the return of an execution against him unsatisfied, an execution may issue on an order requiring a garnishee to pay over money found due defendant by such proceedings.—Sperling v. Calfee, 7 Mont. 514; 19 Pac. 204.

14. Where an execution is issued against a garnishee, and returned unsatisfied, effects of such garnishee in the hands of, and debts due him by, a third person may be reached by the garnishment.—Id.

15. A complaint in garnishment showed the rendition of the original judgment, the issuance of the execution, the levy by garnishment, and the refusal of the garnishees to apply the funds. The answer of the garnishees was, in effect, that they held certain funds of the judgment debtor, but did not know whether they belonged to him personally, or as a representative. The complaint positively averred that the money belonged to him individually. *Held*, that the answer stated no defense, and that judgment was properly entered for the plaintiff on the pleadings.—Sweeney v. Schlessinger, 18 Mont. 326; 45 Pac. 213.

16. An owner of land which had been sold under foreclosure, and against whom a deficiency judgment had been entered, contracted to sell his equity to the purchaser, if the latter would secure and deliver to the debtor a receipt from the judgment creditor for all sums due him from the debtor. The debtor executed a deed and deposited it in escrow, to be delivered to the purchaser on the delivery of the receipt and the

payment of the balance of the purchase price. Prior to any delivery of the receipt or any waiver of the same, the purchaser was served with garnishment process at the suit of the judgment creditor. *Held*, that it was proper to admit evidence showing that, after service of the garnishment process, the deed in escrow was destroyed, and another one made and the entire consideration paid, for the purpose of showing what the original terms of the contract were at the time the process was served.—Cowell v. May, 26 Mont. 163; 66 Pac. 843.

VI. CLAIMS BY THIRD PERSONS, 17-18.

17. In an action to recover money garnisheed and withheld from plaintiff, where the answer denied plaintiff's ownership, but admitted defendant's refusal to deliver the same to plaintiff, plaintiff could have established a prima facie case by testifying to the ownership of the money, and thereby have cast upon defendant the burden of proving that the money was the property of some person other than plaintiff.—Michener v. Fransham, 29 Mont. 240; 74 Pac. 448.

18. On an issue of the ownership of certain money garnisheed and in the hands of the sheriff, where plaintiff claimed that he was its owner by virtue of an amount due on a contract for the sale of lumber, evidence that plaintiff's brother had been furnished money to purchase the mill from which the lumber to fill the contract was procured, and that plaintiff had expressed his satisfaction with the arrangement, and other evidence of such arrangement, was irrelevant, as tending to show that plaintiff's brother furnished the lumber, and was entitled to pay therefor, and should have been submitted to the jury.—Id.

VII. OPERATION AND EFFECT OF GARNISHMENT, JUDGMENT, OR PAYMENT, 19-21.

19. A garnishment makes the garnishee a trustee of the money due the defendant for the benefit of the plaintiff in the attachment suit.—Perkins v. Guy, 2 Mont. 15.

20. Plaintiff in garnishment can acquire no better title to the fund attached than his debtor has.—Oppenheimer v. Bank, 20 Mont. 192; 50 Pac. 419.

21. Where a garnishee paid into court, in answer to garnishment served upon her, the full amount of her indebtedness to the defendant in the proceedings, the judgment recovered therein against him operated to fully discharge the garnishee's indebtedness.—Taney v. Vollenweider, 28 Mont. 147; 72 Pac. 415.

GIFTS.

1. Where the owner of a majority of the stock of a national bank, 70 years old and in feeble health, on the eve of departure on a journey for his health, handed the certificates of stock to his nephew, saying, "I always intended that for you. Now take it. * * * I don't know whether I will ever come back or not. There may be an accident on the railroad. If I do not come back, or anything happens, I want you to have it. I am an old man, and there is no telling. * * * I do not think I can get over this. * * * I am too old. I can not expect it,"—and the nephew took the certificates, and kept them until after the donor's death, though the by-laws of the bank and the United States statutes provided that stock shall be transferrable only on the books of the bank, and the donor did not die until after his return from the journey, where his death was due to the illness of which he complained, and he had often expressed his intention of giving "the bank" to the donee, and stated that he did not intend that "the bank" should go into his estate, and the certificates had no form of assignment endorsed on them. (See 170 U. S. 36.)—Leyson v. Davis, 17 Mont. 220; 42 Pac. 775.

2. It is immaerial that, after the delivery of the certificates of stock claimed as a gift causa mortis, the stock was voted by proxy in the donor's name, where the proxy was signed before such delivery, with the name of the person who was to vote left blank, and the name was inserted and the stock voted under the direction of the donee.—Id.

3. On an issue as to the validity of a gift causa mortis of certificates of stock, where there was evidence that after the delivery to the donee, but before the donor's death, they had been voted by a third person as the donor's proxy, and in his name, it was proper to allow the proxy to testify that in voting the stock he was controlled by the donee.—Id.

GRAND JURY.

I. Nature and Constitution of, 1.
II. Qualifications of Jurors, 2-3.
III. Summoning, 4.
IV. Competency of Jurors, Challenges, and Objections, 5-10.
V. Powers and Duties, 11.
VI. Term of Service, 12.
VII. Conduct of Proceedings, 13-14.

I. NATURE AND CONSTITUTION OF, 1.

1. As Const., art. 3, § 8, declaring that prosecutions in criminal actions in the district court may be by indictment, provides that a grand jury shall consist of seven persons, of whom five must concur to find an indictment, such provision executing itself, without legislative enactment, and as the Criminal Practice Act of Montana Territory relative to indictments is not changed in any other respect by the adoption of the state Constitution, all offenses in the nature of felonies, or having their origin in the district court, must, in the absence of further legislation, be prosecuted under said act by indictment found by the concurrence of five members of a grand jury consisting of seven persons.—State v. Ah Jim, 9 Mont. 167; 23 Pac. 76.

II. QUALIFICATIONS OF JURORS, 2-3.

2. An affidavit in a criminal case which alleges that one of the grand jurors finding the indictment was not at the time a citizen, does not show any illegality in the proceedings, without further alleging that the juror had not declared his intention to become a citizen, as Rev. Stat., p. 571, § 780, only requires citizenship, or declaration of intention, as a qualification for service on the grand jury.—Territory v. Harding, 6 Mont. 323; 12 Pac. 750.

3. Comp. Stat., p. 1008, § 1304, authorizes any male person, of lawful age, who is a citizen of the United States, or has declared his intention to become such, to serve as a grand juror. Sec. 120 allows a challenge for alienage. *Held*, that a juror who had taken out his first papers, and after hearing a part of the testimony, and before indictment found, became a full citizen, was competent.—Territory v. Clayton, 8 Mont. 1; 19 Pac. 293.

III. SUMMONING, 4.

4. The judge ordered the sheriff to summon grand jurors for the term ocmmencing on the first Monday of January, 1890, and afterwards notified the sheriff to inform the persons summoned that their services would not be wanted. On January 7 the court ordered that, "it appearing that no grand jurors have been summoned, and that a grand jury is wanted," persons be drawn and summoned to serve. Laws 1889, p. 166, § 14, provides that when from any cause, on the meeting of or during the term of a court, a grand jury is wanted, or there is not a sufficient number of grand jurors present, or those summoned have been excused or discharged, it shall be lawful for the judge to have persons drawn and summoned to serve as grand jurors. Const., art. 3, § 8, provides that a grand jury shall only be drawn and summoned when the district court judge shall in his discretion consider it necessary, and shall so order. *Held*, that the order having recited that "it appears that a grand jury is wanted," it will be presumed that the judge considered his action necessary; and that a challenge to the panel, "for the reason that the same was not drawn in accordance with the essential provisions of the law," as permitted by Comp. Stat., p. 427, § 119, was properly overruled.—State v. King, 9 Mont. 445; 24 Pac. 265.

IV. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS, 5-10.

5. The right of challenge to the grand jury is a substantial right provided by statute for everyone held to answer for an offense which is submitted to the investigation of such jury, and where, from any cause, the accused is deprived of this right without its being waived expressly or by implication, it is good cause for setting aside an indictment.—Territory v. Ingersoll, 3 Mont. 454.

6. Under Rev. Stat., p. 305, § 121, providing that a person held to answer for an offense shall be brought into court before the grand jury is sworn, and be informed of his rights in regard to challenging the jury, and that if he "then fails to challenge the grand jury, or any member thereof, he shall be deemed to have waived all objections to the same, a defendant who is shown to have expressly waived his right of challenge can not afterwards object that one of the grand jurors was not a citizen, although he did not learn that fact until after the indictment was found and returned into court.—Territory v. Harding, 6 Mont. 323; 12 Pac. 750.

7. The right of defendants who are in jail, or under bond to answer indictments, to be present in court on the organization of the grand jury, and to interpose challenges to the panel, and to individual grand jurors, depends upon Rev. Stat., p. 305, §§ 119-122, and defendant can not be permitted to ask individual grand jurors whether they had formed an unqualified opinion as to the guilt or innocence of defendants, or whether they had any bias or prejudice against them; these questions not falling within the causes of challenge specified by the statute.—Territory v. Hart, 7 Mont. 42; 14 Pac. 768.

8. Under Rev. Stat., p. 305, §§ 119-122, defendants who are in jail, or under bond to answer indictments, are permitted to be present in court on the organization of the grand jury, and to interpose challenges to the panel and to individual grand jurors.—Id.

9. One who was present with counsel when the grand jury was empanelled, and failed to challenge a juror, can not, on motion to quash the indictment, object that the juror was not summoned.—Territory v. Clayton, 8 Mont. 1; 19 Pac. 293.

10. A member of a jury commission, who, by his own misconduct in office as a member of such commission, has rendered the making of the jury list so irregular that as to others it might be invalid, can not take advantage of his own wrongdoing when called on to answer a criminal charge presented by a grand jury selected from such jury list.—State v. District Court, 31 Mont. 428; 78 Pac. 769.

V. POWERS AND DUTIES, 11.

11. The jurisdiction of the grand jury, under Cr. Pr. Act, § 143, is co-extensive with that of the district court in which it is empanelled, and extends to every crime known to our laws.—Territory v. Corbett, 3 Mont. 51.

VI. TERM OF SERVICE, 12.

12. Under Code Civ. Proc., § 245, a grand jury organized in December, 1903, from the jury list of that year, and not discharged by the court, may return a valid indictment though the jury list for 1904 may have been made and filed before the date of the indictment.—State v. District Court, 31 Mont. 428; 78 Pac. 769.

VII. CONDUCT OF PROCEEDINGS, 13-14.

13. Pol. Code, § 460, requires the attorney general to exercise a supervisory power over county attorneys, and, where required by the public service or directed by the governor, to assist them in the discharge of such duties. Sec. 4450 requires the county attorney, among other things, to attend and give advice to the grand jury. *Held*, that on the happening of a specified contingency, the attorney general has the right to appear before the grand jury, and examine witnesses before it, in assisting a county attorney.—State v. District Court, 22 Mont. 25; 55 Pac. 916.

14. The right of the attorney general to appear before a grand jury and examine witnesses, in assisting a county attorney, is not affected by Pen. Code, §§ 1788, 1910.—Id.

GUARANTY.

1. Plaintiffs became guarantors for defendant on a bid to furnish supplies to a military post, to the effect that if defendant's bid was accepted he would execute a contract with sufficient sureties to furnish the supplies at the terms bid, or in default thereof they would make good the difference between defendant's bid and that of the next lowest responsible bidder. Defendant's bid was accepted, but he failed to execute the contract. Plaintiffs, without waiting for the contract to be awarded to the next lowest bidder, and without the knowledge or request of defendant, undertook to carry it out on their own account, expending $2,000 in the attempt, and failed. After the expenditure had been made defendant promised to repay plaintiffs the amount. *Held*, that plaintiffs could not recover from the bidder on account of the money so expended, since in undertaking to carry out the contract they were mere volunteers.—Savage v. Burns, 3 Mont. 527.

2. Under Code Civ. Proc., § 3650, a guarantor of the payment of a note is relieved from liability when the holder's cashier, with the holder's knowledge, accepts as payment from the principal debtor a conveyance of land, and cancels a note, and himself executes a note to the holder for the amount of the debt of the principal debtor.—Stanford v. Coram, 26 Mont. 285; 67 Pac. 1035.

3. A principal debtor executed his note to his creditor, a bank, and the latter assigned the same to plaintiff bank, under a guaranty by the stockholders of the payee to pay it. The note was thereafter renewed and made payable to the cashier of plaintiff, and endorsed to plaintiff, and carried as bills receivable. The original note was secured by real and chattel mortgages. The renewal note was secured by a real mortgage executed to plaintiff's cashier. Plaintiff's records did not disclose the existence of the mortgage. The cashier accepted as payment of the note a conveyance to him of the mortgaged property, and cancelled the note and delivered it to the principal debtor. The cashier executed his own note to plaintiff for the amount of the debt, which note was credited against the debtor's note as payment, and was treated as an asset of plaintiff. The cashier informed plaintiff's vice president that he was going to take the debtor's property in payment of the note. The vice president knew of the cashier's note, though he claimed to have no knowledge of the mortgages securing the principal debtor's note. Plaintiff did not object to, nor repudiate, the cashier's acts. The original payee went out of business, and plaintiff's cashier had charge of the settlement of its affairs, but was not authorized to act in any capacity for its individual stockholders. Plaintiff did not offer to return to the cashier his note. No demand was made upon the debtor for the payment of the note after its surrender to him. *Held*, that the evidence showed that the debtor's note was paid and discharged by the conveyance of the real estate to plaintiff's cashier, and hence the guarantying stockholders were discharged from liability.—Id.

4. A company executed its note to a bank, its creditor, and deposited a note from an individual debtor as collateral, who was also a debtor on a note to the bank. The company's note was assigned to plaintiff under a guaranty of payment by the stockholders of the bank. The collateral was not delivered to plaintiff, and its existence was unkownn to him. A stockholder of the bank, while acting as agent of other stockholders and as cashier of plaintiff, received a payment from the individual debtor on the collateral note and on the note payable to the bank. The money so received was first applied on the note to the bank, and the remainder was endorsed on the collateral; but no credit was made on the company's note assigned to plaintiff. *Held*, that plaintiff was not bound by the knowledge of its cashier, nor responsible for the misappropriation of the collateral note, he having no knowledge of its existence, except through the knowledge of his cashier, which could not be imputed to him in a transaction in which the cashier was not acting as his agent, but antagonistic to him.—Id.

5. A party guarantying a note and renewals can not be relieved from his obligation to pay interest and attorney's fees, as provided by a renewal note, on the ground that his burden has been increased, when the evidence does not show that the original note did not contain such provisions; for it will be presumed that the original and renewal notes contain the same provisions. —Id.

6. Where a person is liable on notes executed by a firm in payment of firm debts because a partner in the firm, a guaranty of the payment of the notes, executed by his attorney in fact, imposes no additional obligation.—Muth v. Goddard, 28 Mont. 237; 72 Pac. 621.

GUARDIAN AND WARD.

1. The absence of a statute authorizing a guardian to mortgage his ward's real estate does not render void a mortgage given by a guardian under an order of the district court by which no new debt is created, but merely an exchange of one creditor for another is affected, and an advantageous extension of time and reduction of interest secured.—Northwestern G. L. Co. v. Smith, 15 Mont. 101; 38 Pac. 224.

2. Comp. Stat., p. 374, § 404, requiring action against "the sureties" on the guardian's bond to be brought in a certain time, does not prescribe a limitation to action against the guardian.—Berkin v. Marsh, 18 Mont. 152; 44 Pac. 528.

3. Though Comp. Stat., p. 370, § 387, requires every guardian authorized to sell real estate to give a bond, before the sale, "with conditions to sell the same in the manner, and to account for the proceeds of the sale, as provided," etc., a bond reciting an order authorizing the principal, as guardian, to sell the real estate of his ward, and conditioned that he shall "faithfully execute the duties of the trust according to law," as prescribed in § 358, relating to guardians' general bonds, binds the sureties on a default by the guardian in accounting for the proceeds of the real estate.—Botkin v. Kleinschmidt, 21 Mont. 1; 52 Pac. 563.

4. Comp. Stat., p. 474, § 387, provides that a guardian authorized to sell real estate must, before the sale, give bond to the probate judge to sell the same in the manner, and to account for the proceeds of the sale as provided, in the chapter. *Held*, that a sale by a guardian duly appointed and qualified, and who omitted to give the special bond required, was not void.—Hughes v. Goodale, 26 Mont. 93; 66 Pac. 702.

5. Code Civ. Proc., § 2687, provides that if, after confirmation of a sale of real estate by an executor or administrator, "the purchaser neglects or refuses to comply with the terms of sale, the court or judge may, on motion of the executor or administrator, order a resale," the purchaser at the first sale to be liable for any deficiency. There is no other provision in the Code respecting the duties of a district court sitting in probate on default of a purchaser to comply with the terms of sale. *Held*, that such court had no power to set aside a guardian's sale of the property of the ward, and to authorize the guardian to retake possession thereof, on the failure of the purchaser to comply with the terms of purchase.—State v. District Court, 27 Mont. 415; 71 Pac. 401.

6. Laws 1899, p. 145, does not apply to proceedings wholly void under the law at the time at which they took place.—Davidson v. Wampler, 29 Mont. 61; 74 Pac. 82.

7. Laws 1899, p. 145, does not apply to a mortgage by a guardian given to secure debts contracted for the improvement of the estate.—Id.

8. Under Comp. Stat., §§ 366, 367, 369, conferring on the guardian power to sell his ward's estate for the purpose of raising funds to pay debts or to maintain the ward, the guardian can not be authorized to mortgage the land of his ward to secure a debt contracted for the improvement of the estate.—Id.

HABEAS CORPUS.

I. Nature and Grounds of Remedy, 1-5.

II. Jurisdiction, Proceedings, and Relief, 6-18.

I. NATURE AND GROUNDS OF REMEDY, 1-5.

1. An objection that the verdict was opposed to the charge that the state had not made out its case is equivalent to claiming that the verdict was not sustained by the evidence, in which case the remedy is by writ of error, and not

by habeas corpus.—In re Thompson, 9 Mont. 381; 23 Pac. 933.

2. On a trial for rape, defendant's counsel, at the close of the evidence for the state, asked for an instruction to acquit. This was denied, but the court said that, the state having failed to make out their case, "you may find a verdict of not guilty." The jury, however, returned a verdict of guilty. Defendant's counsel was then asked if he had any objection to the discharge of the jury. He asserts that he answered, "I have," but the court understood him to say, "I have none," and thereupon discharged the jury. Defendant's counsel then demanded that he be allowed to introduce evidence, which was refused, and sentence pronounced. *Held*, that these proceedings were not such that defendant can claim he had no trial, and that whatever, irregularities and errors occurred at the trial can not be inquired into on habeas corpus. —Id.

3. An order of the court in committing a person for contempt for refusal to pay alimony pending divorce can not be reviewed by habeas corpus, but the remedy is by proceedings to nullify the judgment.—State v. District Court, 14 Mont. 396; 40 Pac. 66.

4. That when a writ of habeas corpus was served on a sheriff the complainant was not in fact confined in jail, but was permitted to go about without apparent restraint, is sufficient to justify a refusal of the ptition for the writ. —In re O'Brien, 29 Mont. 530; 75 Pac. 196.

5. Where, in supplemental proceedings, the court erroneously ordered that defendant satisfy plaintiff's judgment out of the proceeds of an order on a certain society payable to defendant, instead of appointing a receiver to collect the order and make the application, and defendant was committed for contempt for failing to comply with the order, the court having had jurisdiction of the supplemental proceedings and of the person of the defendant, defendant could not obtain release from custody on habeas corpus, irrespective of any question as to the appealability of the order.—In re Downey, 31 Mont. 441; 78 Pac. 772.

II. JURISDICTION, PROCEEDINGS, AND RELIEF. 6-18.

6. Comp. Stat., p. 977, § 1182, provides, relative to procedure on habeaus corpus, that "it shall be the duty of such judge, if the time during which such party may be legally detained in custody has not expired, to remand such party, if it shall appear that he is detained in custody by virtue of the final judgment or decree of any competent court of criminal jurisdiction, or upon any process issued upon such judgment or decree, or in cases of contempt of court." *Held*, that where it appears by the return to the writ that the petitioner is in custody by virtue of a final judgment of a court having jurisdiction of the charge and the person, the proceedings at the trial whereby such final judgment was reached can not be reviewed.—In re McCutcheon, 10 Mont. 115; 25 Pac. 97.

7. The writ of habeas corpus can not be made to perform the functions of a writ of certiorari, but such writ may be invoked in aid of habeas corpus in cases where there is no final judgment, and the petitioner is held upon process from which there is no appeal.—Id.

8. A habeas corpus proceeding by a mother against a father to obtain possession of their child is a "special proceeding in the nature of an action," within the meaning of Comp. Stat., p. 192, § 495, providing that costs shall be allowed in such proceedings to plaintiff on a judgment in his favor.—State v. Newell, 13 Mont. 302; 34 Pac. 28.

9. One who invokes the writ of habeas corpus without meritorious cause may be properly taxed with costs under Comp. Stat., p. 194, § 506.—State v. Reynolds, 13 Mont. 423; 34 Pac. 613.

10. Where the relator applied to the district court for a writ of habeas corpus, and for certiorari to review an order of a justice of the peace in committing him to jail, at the same time, and in his application for the writ of habeas corpus attacked the validity of the commitment only, and no other proceeding of the justice, the application for certiorari was not ancillary to the application for the writ of habeas corpus, but an independent proceeding from which an appeal might be taken.—State v. Kennie, 24 Mont. 45; 60 Pac. 589.

11. Pen. Code, § 2270, giving the defendant an appeal to the supreme court from any judgment against him; and § 2272, allowing an appeal to the defendant from a final judgment of conviction, or from an order after judgment affecting his substantial rights,—do not give the right of appeal from an order denying a writ of habeas corpus, since the complainant in such a proceeding is not a defendant, and the determination of the court is not a "judgment," within such provisions; and as the Code of Civil Procedure authorizes an appeal in civil cases only, and there is no provision for an appeal in the habeas corpus act, there can be no appeal from an order denying such a writ.—Id.

12. Const., art. 8, § 11, confers on the district court and the judges thereof power to issue, hear and determine writs of habeas corpus on petition of any person in actual custody in their respective districts. Pen. Code, § 2740 provides that every person unlawfully imprisoned may prosecute a writ of habeas corpus to inquire into the cause of his imprisonment, and § 2742 authorizes the district courts, on petition by any person restrained of his liberty, in their respective counties or districts, to grant a writ of habeas corpus. Code Civ. Proc., § 1941 authorizes the supreme court to grant a writ of certiorari when an inferior tribunal exercising judicial functions has exceeded its jurisdiction. *Held*, that where a witness, who was committed by a notary public, was discharged under a writ of habeas corpus issued by the district court of the district wherein the commitment was made, this court has no power, under a writ of certiorari, to review the action of the district court, since the district court had authority to make the discharge, and was acting within the bounds of its appropriate jurisdiction.—State v. District Court, 24 Mont. 539; 63 Pac. 395.

13. On habeas corpus to secure the discharge of a prisoner held for perjury, where the petition avers that the transcript of the evidence in the case in which the alleged false testimony was given contains all the evidence, and the prosecuting attorney does not controvert such allegation, but the transcript does not show that the judgment roll was admitted or considered, the court will assume that it was not received, and therefore will grant the writ.—State v. District Court, 26 Mont. 275; 67 Pac. 943.

14. On certiorari issued in aid of a writ of habeas corpus to secure the release of one committed for violation of a restraining order, the remedy by certiorari only authorizes the court to determine that the lower court had jurisdiction of the subject matter and of the parties, and does not authorize an examination of the sufficiency of the evidence.—In re Boyle, 26 Mont. 365; 68 Pac. 409; 68 Pac. 471.

15. Where one is committed for contempt for violation of a restraining order, and the trial court has jurisdiction of the subject mat-

ter and of the parties, the sufficiency of the evidence can not be reviewed on habeas corpus. —Id.

16. In habeas corpus proceedings, no other relief can be granted than the release of complainant from unlawful custody; and the court can not therein review the action of the committing court in applying a deposit in lieu of bail to the payment of a fine assessed against complainant, nor determine who is entitled to the money, nor direct the official to whom it was paid to refund it to complainant.—State v. District Court, 32 Mont. 18; 79 Pac. 409.

17. Under Pen. Code, § 2753, where a petitioner for habeas corpus was convicted of murder, and oral judgment was rendered confining him to prison for 25 years, without any record being made, but at a special term, after notice to petitioner and his counsel, the minutes were corrected to show the judgment as rendered, and on the judgment thus rendered a commitment was issued, the petitioner was legally in custody, for the purposes of the judgment, and not entitled to his discharge.—In re Dye, 32 Mont. 132; 79 Pac. 689.

18. Where petitioner in habeas corpus is legally in custody, it is immaterial when the officer got his authority to hold him, if he obtained it before he made return, and the authority appears in the return.—Id.

HIGHWAYS.

I. Establishment, Alteration, and Discontinance, 1-21.
A. Establishment by prescription, user, or recognition, 1-5.
B. Establishment by statute or statutory proceedings, 6-20.
1. Jurisdiction and powers of local authorities, 6.
2. Notice, 7.
3. Commissioners and viewers, 8-11.
4. Location of road, 12-13.
5. Order and record, 14-16.
6. Waiver of irregularities and legalizing proceedings, 17-18.
7. Operation and effect, 19.
8. Evidence, 20.
C. Abandonment, 21.
II. Taxes, 22.
III. Indictment for Obstruction, 23.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE, 1-21.

A. Establishment by Prescription, User, or Recognition, 1-5.
B. Establishment by Statute or Statutory Proceedings, 6-20.
C. Abandonment, 21.

A. ESTABLISHMENT BY PRESCRIPTION, USER, OR RECOGNITION, 1-5.

1. In ejectment against a city by the owner of a mining claim, in respect of certain streets running across his claim, plaintiff produced in evidence a United States patent for mineral land, including the land in controversy, also the application for patent, including notice of location, and conveyances from the patentee to himself. Defendant disclaimed all title to the fee simple and claimed a right of way only, offering evidence to show that the streets in question had been used as public highways prior to the location of the claim. *Held*, competent for the reason that U. S. R. S., § 2477, providing that the "right of way for the construction of highways over public lands not resrved for public uses is hereby granted," was the grant of an easement by the government, of which the court would take judicial notice, and proof of its acceptance by public user, prior to the location, would establish an easement in defendant, valid against the government and its grantees; nor was the easement affected by the fact that defendant had not adversed the application for patent.—Murray v. Butte, 7 Mont. 61; 14 Pac. 656.

2. Where a road has been traveled by the public generally as a highway, and is kept in repair by the road authorities, a legal presumption arises that it is a public highway.—State v. Auchard, 22 Mont. 14; 55 Pac. 361.

3. Adverse use by the public for the period named in the statute of limitations will establish a highway by prescription, but the title will be confined to the very way traveled during the period, unless an attempt has been made by the proper authorities to erect a highway, when the extent of the title will be measured by the claim exhibited by the proceedings.—Id.

4. Evidence that one person had traveled a road "off and on" for several years, and another had seen the road, and "had frequently passed through there," for 18 or 19 years, is not sufficient proof that the road was open to the public generally for the period prescribed by the statute of limitations.—Id.

5. A highway by prescription does not exist unless the proof shows that the general public has used the way as one common to all the public, without substantial interruption, for the time prescribed by the statute of limitations applicable to lands.—Id.

B. ESTABLISHMENT BY STATUTE OR STATUTORY PROCEEDINGS, 6-20.

1. Jurisdiction and Power of Local Authorities, 6.
2. Notice, 7.
3. Commissioners and Viewers, 8-11.
4. Location of Road, 12-13.
5. Order and Record, 14-16.
6. Waiver of Irregularities and Legalizing Proceedings, 17-18.
7. Operation and Effect, 19.
8. Evidence, 20.

1. Jurisdiction and power of local authorities, 6.

6. Sec. 8 of the general mining act of congress of July 26, 1866, grants to the public a right of way for the construction of highways over public lands, which have not been otherwise appropriated; but neither the county commissioners nor the territorial legislature can take land for highways in which miners have acquired vested rights, without giving a just compensation for damages to those rights.—Robertson v. Smith, 1 Mont. 410.

2. Notice, 7.

7. A notice of a petition for laying out a highway, posted at a railroad depot about 600 or 700 feet from where the proposed road connects with the main highway, at which point there is no suitable place for posting it, is posted at a public place in the vicinity of the proposed road, within the meaning of Comp. Stat., p. 1158, § 1809, providing that such notice shall be so posted.—Territory v. Lannon, 9 Mont. 1; 22 Pac. 495.

3. Commissioners and viewers, 8-11.

8. The fact that two persons are related is no reason why both should not be viewers, in a proceeding to open a road.—Crowley v. Commissioners, 14 Mont. 292; 36 Pac. 313.

9. A recital, in a resolution of county commissioners authorizing the opening of a road, that in accordance with their order appointing persons who possess the statutory qualifications as a board of viewers, etc., the road is ordered opened, is a sufficient record in their proceedings that the viewers possessed the statutory qualifications.—Id.

10. In the absence of statutory provisions as to residence and citizenship of a petitioner for the opening of a road, the commissioners need not, in their proceedings, find on those points.—Id.

11. Under Comp. Stat., p. 1158, §§ 1809, 1810, providing that, on petition presented to the county commissioners for a county road, they shall appoint viewers to mark out the road, and give parties in interest notice that, at a time fixed, the viewers will meet at a designated point to attend to their duties, and that proof of such notice shall be made by affidavit accompanying the petition, it is necessary to jurisdiction that the affidavit show that notice of the place, as well as of the time, of the meeting of the viewers, was given.—State v. Auchard, 22 Mont. 14; 55 Pac. 361.

4. Location of road, 12-13.

12. The public agents charged with the duty of establishing highways may, after report of viewers, make slight deviations from the originally proposed location set forth in the petition. —Crowley v. Commissioners, 14 Mont. 292; 36 Pac. 313.

13. Where the point of beginning of a proposed road is shown by the plat filed to be at a different place from that named in the petition and the report of the viewers appointed thereon, and its further location is not fixed in any proceedings, except that it is to run in a northerly direction, to a point on a county road, not designated, the description is too indefinite to give the county commissioners jurisdiction to act on its location.—Pagel v. Fergus, 17 Mont. 586; 44 Pac. 86.

5. Order and record, 14-16.

14. Under Comp. Stat., p. 1158, § 1809, requiring a petition to the county commissioners for laying out a road to be accompanied by affidavit of posting notices, and § 1810, providing for the appointment of viewers and posting of notices by them, to be proved by affidavit filed with the county clerk, and § 1815, requiring the viewers to file a report with the county clerk, the absence from his files of such affidavit and report does not prove that proof of notice and the report were not produced before the commissioners. Carron v. Clark, 14 Mont. 301; 36 Pac. 178.

15. Under Comp. Stat., p. 1158, §§ 1809, 1810, requiring notices to be posted and affidavit thereof to be filed with the county clerk, absence of such affidavit from his files does not prove that notices were not posted.—Id.

16. The following recital in the minutes of the board of county commissioners: "County road. The matter of the road running through section 18, township 13 north range 12 east, was taken up, viewers report read and accepted, and declared a county road,"—is insufficient to constitute an order that a road shall be opened for travel, as required by Comp. Stat., p. 1161, § 1818, and does not operate as a condemnation of right of way for any part of the road.—Pagel v. Fergus, 17 Mont. 586; 44 Pac. 86.

6. Waiver of irregularities and legalizing proceedings, 17-18.

17. The consent of a landowner to a private road over his land does not give the board of county commissioners jurisdiction to establish a public road thereon, nor waive irregularities of proceedings therefor under the statutes.—Pagel v. Fergus, 17 Mont. 586; 44 Pac. 86.

18. Pol. Code, § 2600, providing that all highways laid out or erected by the public, or now traveled or used by it, are public highways, is a remedial statute, intended to cure irregularities, but not to supply jurisdiction, where none was acquired in the creation of such highways.—State v. Auchard, 22 Mont. 14; 55 Pac. 361.

7. Operation and effect, 19.

19. Under Comp. Stat., p. 1162, § 1822, providing that highways shall be 60 feet wide, unless otherwise ordered, proceedings to open a highway being silent as to the width, the law fixes it.—Crowley v. Commissioners, 14 Mont. 292; 36 Pac. 313.

8. Evidence, 20.

20. Though Comp. Stat., p. 1158, §§ 1809, 1810, require affidavits of posting notices in proceedings to open a road to be filed with the county clerk, where the affidavits are absent from their file it may be proven by a witness that he posted them.—Carron v. Clark, 14 Mont. 301; 36 Pac. 178.

C. ABANDONMENT, 21.

21. The owners of land along and through which a public road runs are not entitled to damages on vacation of the road by the proper authorities.—State v. Deer Lodge, 19 Mont. 582; 49 Pac. 147.

II. TAXES, 22.

22. Act Feb. 11, 1876, authorized and required the commissioners of Deer Lodge county to issue county warrants to reimburse certain persons for the construction of a wagon road in the county. The road was a public highway on which the people of the county were accustomed to travel. A part of the expense of construction was paid by private subscription and the remainder was unpaid. *Held*, that as the road was constructed for a municipal purpose and for the benefit of the people of the county, the legislature rightfully exercised its power in passing such act.—Wilcox v. Deer Lodge, 2 Mont. 574.

III. INDICTMENT FOR OBSTRUCTION, 23.

23. An indictment for an obstruction of a highway, which alleged that there was in the city an ancient highway, known as the —— alley, in a certain block, leading from thence to R street, and that the accused erected a fence across said alley, near the west end of said R street, contained a sufficient description of the alley.—Territory v. Ashby, 2 Mont. 89.

HOMESTEAD.

I. Nature, Acquisition, and Extent, 1-14.
- A. Persons entitled, 1-2.
- B. Acquisition and establishment, 3-5.
- C. Property constituting homestead, 6-11.
- D. Liabilities enforceable against homestead, 12-14.

II. Transfer or Incumbrance, 15-17.

III. Rights of Surviving Wife, 18.

IV. Waiver, 19.

V. Proceedings for Enforcement of Right, 20.

I. NATURE, ACQUISITION, AND EXTENT, 1-14.

A. Persons Entitled, 1-2.
B. Acquisition and Establishment, 3-5.
C. Property Constituting Homestead, 6-11.
D. Liabilities Enforceable Against Homestead, 12-14.

A. PERSONS ENTITLED, 1-2.

1. The abandoned wife may claim the homestead exemption of the husband.—Watterson v. Bonner, 19 Mont. 554; 48 Pac. 1108.

2. A married woman lived in a building with her family, including four minor children, which was built from her own earnings. The wife supported herself and children. For eight years the husband had slept in a cabin back of the house. He was indolent, but worked a little at intervals. He testified that it was his fault that he had not been steady at work. He often left the home after quarrels with his wife. *Held*, that she was not the head of the family, entitled to the exemption of a homestead. —Barry v. Assurance Co., 19 Mont. 571; 49 Pac. 148.

B. ACQUISITION AND ESTABLISHMENT. 3-5.

3. Under Comp. Stat., p. 147, § 322, providing that a homestead consisting of certain quantity of land owned and occupied by any resident of the territory shall be exempt from forced sale, the mere declaration of an intention to claim land as a homestead, without improvement or occupancy thereof, is insufficient to constitute the land a homestead.—Power v. Burd, 18 Mont. 22; 43 Pac. 1094.

4. Civ. Code, §§ 1670, 1693, allow one to select as a homestead a quantity of land not exceeding 1-4 of an acre, being within a town plat, city or village, and the dwelling house thereon and the appurtenances. Sec. 1701 requires claimant's declaration to describe the premises, but there are no provisions by which, after the homestead is selected, there can be a readjustment of the area in case of excess, and the surplus taken by a creditor. *Held*, that where a declaration inadvertently included 1-6 of an acre more than allowed, the whole claim was invalid.—Yerrick v. Higgins, 22 Mont. 502; 57 Pac. 95.

5. Under Civ. Code, §§ 1670, 1693, 1701, 1703, where a description of homestead was filed, the homestead attribute was impressed on all the property described in the declaration, although its value exceeded $2,500.—Vincent v. Vineyard, 24 Mont. 207; 61 Pac. 131.

C. PROPERTY CONSTITUTING HOMESTEAD, 6-11.

6. Under Rev. Stat., p. 101, §§ 311, 313, allowing a householder a homestead, no homestead can be set apart by a partner from lands held by the partnership, as against a firm creditor, and where such a creditor attaches real estate belonging to the firm, the members can not, by mutual releases, destroy the nature of the property, or of the tenancy, so that one of them can annul the lien of attachment by claiming a part of the land as a homestead.—Lindley v. Davis, 6 Mont. 453; 13 Pac. 118.

7. A co-tenant is an owner, within the meaning of Rev. Stat., p. 101, § 311, and as such is entitled to the homestead exemption allowed by said section in real estate held in co-tenancy. —Lindley v. Davis, 7 Mont. 206; 14 Pac. 717.

8. A partner is entitled, as against the creditors of the firm, to claim and hold a homestead in the partnership estate, under Comp. Stat., p. 147, § 322, exempting a homestead, to be selected by the owner, from forced sale or execution or other final process.—Ferguson v. Speith, 13 Mont. 487; 34 Pac. 1020.

9. The title of the land not being a matter which concerns the creditor, a debtor can claim a homestead on public lands of the United States.—Watterson v. Bonner, 19 Mont. 554; 48 Pac. 1108.

10. Under a claim of homestead are included all outhouses, fences and other improvements on the land claimed, unless they exceed the amount exempted.—Id.

11. Under the statutory limitation that a homestead shall not exceed $2,500 in value, the debtor will be protected to that extent, though it exceeds such value.—Mitchell v. McCormick, 22 Mont. 249; 56 Pac. 216.

D. LIABILITIES ENFORCEABLE AGAINST HOMESTEAD, 12-14.

12. A money judgment can not be impressed as a lien on a homestead without a showing that the money was borrowed for the purpose of buying the homestead, it not being sufficient that the money did buy the homestead.—Mitchell v. McCormick, 22 Mont. 249; 56 Pac. 216.

13. Code Civ. Proc., § 1197 provides that a judgment shall be a lien on all realty of the judgment debtor, not exempt, from the time it is docketed. Civ. Code, § 1674, declares that a homestead is subject to execution in satisfaction of judgments obtained before the declaration of the homestead is filed which constitute liens on the property, but that no judgment obtained prior to July 1, 1895, shall constitute a lien on such property. *Held*, that a judgment docketed in 1892 was not a lien on the homestead subject to execution under § 1674, whatever its value, hence a mortgage of the homestead given in 1895 took precedence of the 1892 judgment. —Vincent v. Vineyard, 24 Mont. 207; 61 Pac. 131.

14. Civ. Code, § 1693, declares that a homestead shall not exceed $2,500 in value. Sec. 1674 provides that a homestead shall be subject to execution in satisfaction of judgment obtained before the declaration of homestead was filed, which constitutes a lien on the property, but that judgments obtained prior to July 1, 1895, shall not constitute such liens. Sec. 1678 authorizes judgment creditors who have not liens under § 1674 to apply to the court for the appointment of appraisers. *Held*, that judgments not constituting liens could be enforced under § 1678, and that, after notice to the claimant, and a report of the appraisers that the value of the homestead exceeds $2,500, and that the property can be divided without material injury, the execution can be enforced against such excess, but that, if the property can not be divided, a sale will be ordered and the execution paid from the excess over $2,500. —Id.

II. TRANSFER OR INCUMBRANCE, 15-17.

15. Where a mortgage of a homestead is void because defectively acknowledged by the wife, its abandonment before suit to foreclose does not prevent defendants from pleading its validity.—American S. & L. Ass'n v. Burghardt, 19 Mont. 323; 48 Pac. 391.

16. Under Comp. Stat., p. 147, § 323, providing that a mortgage of his homestead by a married man shall be void unless the wife join in the execution thereof, where the acknowledgment is substantially defective, the mortgage is void.—Id.

17. A chattel mortgage executed by the husband on the improvements on land subsequently

claimed by the abandoned wife as a homestead is void, the wife not having joined therein.—Watterson v. Bonner, 19 Mont. 554; 48 Pac. 1108.

III. RIGHTS OF SURVIVING WIFE, 18.

18. Under Comp. Stat., § 306, pp. 134, 137, making it the duty of the probate court or judge, on the coming in of the inventory, to set aside to the surviving husband or wife all exempt property, including the homestead selected and recorded during decedent's life time, and if none had been selected and recorded, requiring that the judge select the same and set it apart from the decedent's estate and have it recorded, where a homestead was set apart to a widow by the probate court it was immaterial whether it acted on petition or on its own motion.—Bullerdick v. Hermsmeyer, 32 Mont. 541; 81 Pac. 334.

IV. WAIVER, 19.

19. Plaintiff's assignor was given a note and mortgage on homestead property. The property was sold by execution sale under a judgment docketed in 1892, and the creditor was paid excess over the homestead exemption, and the exemption was paid into court. *Held*, in an action by plaintiff to recover of such creditor, that plaintiff would not be required to satisfy his mortgage debt out of the sum paid into court, as the mortgage operated solely as a waiver of the homestead exemption in favor of the mortgage and his assigns, and did not inure to the benefit of other persons. (Civ. Code., §§ 1674, 3772.)—Vincent v. Vineyard, 24 Mont. 207; 61 Pac. 131.

V. PROCEEDINGS FOR ENFORCEMENT OF RIGHT, 20.

20. Under an admission that property in controversy is a homestead, and has been set apart as provided by law, it can not be objected that the homesteader did not allege its statutory value in the declaration of homestead.—Mitchell v. McCormick, 22 Mont. 249; 56 Pac. 216.

HOMICIDE.

I. **Murder,** 1-3.
II. **Manslaughter,** 4.
III. **Assault With Intent to Kill,** 5-6.
IV. **Excusable or Justifiable Homicide,** 7-11.
V. **Indictment and Information,** 12-28.
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- A. Presumptions and burden of proof, 29-31.
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- C. Dying declarations, 69-70.
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VII. **Trial,** 88-134.
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  5. Self-defense, 108-111.
  6. Grade or degree of offense, 112-132.
- D. Verdict, 133-134.

VIII. **New Trial,** 135-137.
IX. **Appeal and Error,** 138-144.

I. I. MURDER, 1-3.

1. It is not necessary to allege or prove premeditation, when the facts show that the murder was committed for the purpose of robbery.—Territory v. McAndrews, 3 Mont. 158.

2. An instruction that, if deceased was dedefendant's wife, and she was in such condition as to be unable to protect herself and to reach shelter, and defendant knew of her condition, and, from the circumstances, the temperature, his wife's wrappings, and where she lay, and the length of time he left her exposed, had reason to believe that leaving her thus would endanger her life, and if he wilfully so left her, and her death was caused by such exposure, he is guilty of murder, is proper.—Territory v. Manton, 8 Mont. 95; 19 Pac. 387.

3. Evidence that defendant was commanded to commit the homicide by one who threatened to take defendant's life if he refused, and, believing the threat would be executed, to save

his own life, killed the deceased, who was, when slain, a mile distant from the place where the threat was made, is sufficient to warrant a conviction of deliberate murder.—State v. Fisher, 23 Mont. 540; 59 Pac. 919.

II. MANSLAUGHTER, 4.

4. Evidence that defendant and his wife had both been drunk; that he allowed the wife to lay on the ice all night, poorly clad, near the house; that he and an employee who lived with him, brought her to the house next day, when she died, no effort having been made to get medical aid,—is sufficient to sustain a verdict of guilty of manslaughter.—Territory v. Manton, 8 Mont. 95; 19 Pac. 387.

III. ASSAULT WITH INTENT TO KILL, 5-6.

5. An assault with intent to kill contains all the essential elements of the crime of murder, and circumstances constituting a defense in a case of homicide would also constitute a defense in a case of assault with intent to kill.—Territory v. Edmonson, 4 Mont. 141; 1 Pac. 738.

6. It is no defense to a prosecution for an assault with intent to murder that the one assaulted was a trespasser on the grounds of defendant.—State v. Smith, 12 Mont. 378; 30 Pac. 679.

IV. EXCUSABLE OR JUSTIFIABLE HOMICIDE, 7-11.

7. On a murdetr trial in a case of self defense it is proper to instruct the jury that neither the utterance of threats by the deceased, nor the fact of his being armed, would of itself justify his killing by defendant: but that it must appear from the evidence that a reasonable man, under the same circumstances would consider himself in danger of losing his life or suffering great bodily harm.—Territory v. Burgess, 8 Mont. 57; 19 Pac. 558.

8. An instruction applying the measure of the circumstances justifying a killing in self defense to an individual of the class of men to which defendant belongs, instead of "a reasonable person,' is properly refused, under Pen. Code, § 362.—State v. Cadotte, 17 Mont. 315; 42 Pac. 857.

9. A person, when assailed in his own house, is not required to retreat therefrom, if the retreat may be safely made, to enable him to avail himself of the defense of self defense.—State v. O'Brien, 18 Mont. 1; 44 Pac. 399.

10. An instruction that accused could not kill his assailant until it appeared to him that he was about to commit a felony on him is error, since it limits the right of self defense to his ability to distinguish between felonies and misdemeanors, whereas he should be guided by reasonable apprehension of death or great bodily harm, regardless of the nature of the assault.—State v. Sloan, 22 Mont. 293; 56 Pac. 364.

11. Instructions that, before defendant could slay deceased, he must have been in imminent danger of death or great bodily harm, are erroneous, since they ignore the right of defendant, as a reasonable man, to act on appearance.—Id.

V. INDICTMENT AND INFORMATION, 12-28.

12. Code Stat., p. 273, § 21, makes murder to consist of two degress. The killing of a human being with malice aforethought, by means of poison, lying in wait, torture, or other wilful, deliberate or premeditated means, or in the perpetration or attempt to perpetrate arson, rape, robbery or burglary, is murder in the first degree. All other cases of killing with malice aforethought expressed or implied are murder of the second degree. The form of the indictment may be the same in both cases, and the degree of the offence is to be determined by the evidence of deliberation, etc.—Territory v. Stearns, 2 Mont. 324.

13. An indictment charging that defendant did the act causing death "feloniously, wilfully, and of his deliberate malice, and of his malice aforethought," is sufficient, as properly charging the purpose and intent of the defendant.—Territory v. McAndrews, 3 Mont. 158.

14. It is not necessary that an indictment for murder should allege that the weapon was in the hands of defendant at the time the crime was committed.—Territory v. Young, 5 Mont. 242; 5 Pac. 248.

15. Under Rev. Stat., p. 311, § 171, the reason for the technical conclusion of indictments for murder at common law disappeared, and the jury is left to designate the degree in their verdict.—Id.

16. An indictment charged that defendant was the husband of deceased, and as such owed her the duty of protection; that she was feeble, sick and unable to walk; that defendant had the ability to take care of her, but left her exposed in the night time to the cold and inclemency of the weather, refusing to provide her with clothing and shelter; that he did this feloniously, wilfully, purposely, premeditately, and of his malice aforethought, and that she, "languishing of such exposure, leaving, and of such neglect, omitting, and refusing to provide clothing and shelter, * * * did die;" and that thus the defendant feloniously, wilfully, purposely, premeditately, and of his malice aforethought, did kill and murder her. *Held*, that it sufficiently charged the offense of murder in the second degree, under Rev. Stat., p. 358, § 18, defining murder as "the unlawful killing of a human being, with malice aforethought, either express or implied," and providing that "the unlawful killing may be effected by any of the various means by which death may be occasioned."—Territory v. Manton, 7 Mont. 162; 14 Pac. 637.

17. An indictment charging that the accused "wth intent, him the said———, then and there to kill and murder, wilfully, unlawfully, maliciously, and feloniously did make an assault with a certain pistol," etc., sufficiently charges the crime of an assault with intent to murder.—Territory v. Layne, 7 Mont. 225; 14 Pac. 705.

18. An indictment charging "that one B, * * * with force and arms, in and upon one O, did feloniously, wilfully, and of his deliberate and premeditated malice, and of his malice aforethought, and with intent to kill and murder, make an assault," etc., is sufficient to charge murder.—Territory v. Burgess, 8 Mont. 57; 19 Pac. 558.

19. On a trial for murder, where the indictment charges an intent to kill deceased, and the proof shows that defendant intended to kill another person, and not deceased, an objection that there was a variance, and that the charge, that if the jury believed the evidence they might find the defendant guilty, was error, comes too late in a motion for new trial.—Territory v. Rowand, 8 Mont. 110; 19 Pac. 595.

20. Under the statute defining murder in the first degree, a charge in an indictment that defendant feloniously, wilfully and of his deliberately premeditated malice aforethought inflicted upon E a mortal injury or a mortal sickness of which E died, is not defective as failing to charge an intent to kill.—Territory v. Godas, 8 Mont. 347; 21 Pac. 26.

21. An indictment is not bad, in that the words "mortal injuries and a mortal sickness" should have read "mortal bruise or mortal wound".—Id.

22. An indictment charged that defendant did feloniously, wilfully, etc., attempt to commit a violent injury upon the person of D, he having then and there the present ability to commit said injury, by feloniously, etc., shooting at said D with a rifle, with intent him, the said D, feloniously, etc., to kill and murder. Comp. Stat., p. 511, § 59, defines an assault to be "a wilful attempt, coupled with a present ability, to commit a violent injury on the person of another." *Held*, that the indictment sufficiently charges an assault with intent to murder, and is not void as charging more than one offense.—Territory v. Milroy, 8 Mont, 361; 20 Pac. 650.

23. Where an indictment for murder charges an intent to kill deceased, and an intent is shown to kill another person, a verdict of murder in the second degree will not be set aside for the variance, as an intent to kill only is necessary to support such verdict, though the person killed was not the intended victim.—Territory v. Rowand, 8 Mont. 432; 20 Pac. 688.

24. Where the statute defining an assault with intent to commit murder does not specify any instrument as a means of effecting the criminal intent, none need be stated in the indictment.—State v. Sheerin, 12 Mont. 539; 31 Pac. 543.

25. Under Comp. Stat., p. 505, § 21, making "wilful, deliberate, and premeditated killing," murder in the first degree, an indictment charging the killing to have been done by defendant, "of his deliberate, premeditated malice aforethought," sufficiently charges that the killing was deliberate and premeditated.—State v. Metcalfe, 17 Mont. 417; 43 Pac. 182.

26. An information for murder need not contain an express averment of an intent to kill.—State v. Keerl, 29 Mont. 508; 75 Pac. 362.

27. Under Pen. Code, § 1834, providing that an information must be certain as to the party, the offense, and the circumstances charged; § 358, providing that guilt must be proved beyond a reasonable doubt; and § 357, providing that the victim must die of the mortal wound, and within a year and a day thereafter—an information for murder should directly allege that death resulted from the mortal wound inflicted by defendant.—Id.

28. Under Pen. Code, §§ 350, 352, 2145, an information charging that accused committed a murder wilfully, unlawfully, feloniously and premeditatedly, and of his malice aforethought, charges murder in the first degree, though it fails to use the word "deliberately."—State v. Hliboka, 31 Mont. 455; 78 Pac. 965.

VI. EVIDENCE, 29-87.

A. Presumptions and Burden of Proof, 29-31.
B. Admissibility in General, 32-68.
C. Dying Declarations, 69-70.
D. Weight and Sufficiency, 71-87.

A. PRESUMPTIONS AND BURDEN OF PROOF, 29-31.

29. Under the statute of Montana, after the fact of killing is proved, the burden of proof is upon the accused to show circumstances of mitigation or justification, and an instruction that "the burden of proof is upon the prosecution in this case; it does not shift in criminal cases, but is upon the prosecution through out," was properly refused.—Territory v. McAndrews, 3 Mont. 158.

30. A charge that, "if the life be taken with a deadly weapon, it will be presumed to have been done maliciously and intentionally, as the law presumes everyone to intend the legitimate result of his action," given as part of an instruction defining and illustrating the term "malice," is not erroneous.—Territory v. Hart, 7 Mont. 489; 17 Pac. 718.

31. A charge in the words of Comp. Stat., p. 508, § 40, that, the killing being proven, the burden of proving circumstances of mitigation devolves on defendant, is not error.—Territory v. Rowand, 8 Mont. 110; 19 Pac. 595.

B. ADMISSIBILITY IN GENERAL, 32-68.

1. Intent, Malice, Deliberation, and Premeditation, 32-34.
2. Commission of or Participation in Act by Accused, 35-36.
3. Character, Habits, Condition, and Relation of Parties, 37-39.
4. Motive, 40-45.
5. Preparations, 46.
6. Nature of Act and Attendant Circumstances, 47-54.
7. Justification, 55-57.
8. Self-Defense, 58-65.
9. Defense of Property, 66-68.

1. Intent, malice, deliberation, and premeditation, 32-34.

32. It is admissible to prove that defendant made threats against deceased two months before the alleged murder, as mere lapse of time does not exclude evidence tending to show malice.—Territory v. Roberts, 9 Mont. 12; 22 Pac. 132.

33. The record of the prosecution and conviction of defendant for repelling on a former occasion a bare trespass by D on the same road, by drawing a deadly weapon, and evidence of D that defendant then threatened to kill any trespasser in the future, were admissible to show the intent of defendant in being in the road, and armed, as he was, at the time of the assault.—State v. Donyes, 14 Mont. 70; 35 Pac. 455.

34. Evidence of a message sent by defendant to deceased the day before the homicide, stating that he did not want any trouble, but that, if deceased wanted any, he could get it, was admissible, together with the attendant circumstances.—State v. Sloan, 22 Mont. 293; 56 Pac. 364.

2. Commission of or participation in act by accused, 35-36.

35. On the trial of an indictment for murder it appeared from the testimony that defendant had no opportunity to abuse deceased, his daughter, until noon on Sunday, and the testimony of a witness on direct examination had shown the whereabouts of deceased, defendant and other persons on Sunday afternoon, and that they were around the house together, and that deceased was in bad condition all day Sunday. The testimony had not as yet shown that defendant or any other particular person had then committed the act. A question was asked the witness on cross examination whether she saw any person whipping or abusing deceased on the Saturday before the Sunday. *Held*, that it was proper cross examination, and also admissible as part of the res gestæ.—Territory v. Rehberg, 6 Mont. 467; 13 Pac. 132.

36. Defendant's wife had been jointly in-

dicted with him, but had been granted a separate trial. A witness had testified on direct examination to facts tending to show that defendant only had opportunity to do the beating of which deceased died. *Held*, that it was proper cross examination to ask whether witness knew of her own knowledge who did the beating, and whether defendant's wife was in the habit of abusing and beating deceased, and that such testimony was also admissible as part of the res gestæ.—Id.

3. Character, habits, condition, and relation of parties, 37-39.

37. On a trial for assault with intent to murder, where the testimony is direct, and accused and the injured are both witnesses, evidence that the injured party is a vicious and revengeful man, and in the habit of carrying and drawing a pistol, and getting the drop on his adversary, is not admissible.—Territory v. Perkins, 2 Mont. 467.

38. A refusal to allow defendant to ask a witness whether there was not a good deal of enmity between her husband (prosecutor) and one D, who directed the assault by defendant, was not erroneous, as it had no bearing upon the guilt or innocence of defendant, or as to how the witness felt toward him.—Territory v. Campbell, 9 Mont. 16; 22 Pac. 121.

39. The jury may consider the previous good character of one accused of murder, whether or not they are in doubt whether deceased was the aggressor.—State v. Sloan, 22 Mont. 293; 56 Pac. 364.

4. Motive, 40-45.

40. In a prosecution for murder, a complaint filed against accused by deceased is admissible in evidence to show motive.—State v. Geddes, 22 Mont. 68; 55 Pac. 919.

41. Where the state's theory was that the homicide was committed for the purpose of robbing deceased of money which defendant knew he intended to draw from the bank, evidence as to the amount of deceased's deposit was admissible, as tending to prove the motive.—State v. Lucey, 24 Mont. 295; 61 Pac. 994.

42. Any evidence that tends to show that defendant had a motive for killing deceased is always relevant. This rule is especially applicable to cases where responsibility for the homicide rests entirely on circumstantial evidence.—Id.

43. Proof of motive is not indispensable to a conviction, if the crime is otherwise clearly established.—Id.

44. In a trial for homicide occurring in a saloon a few hours after a conflict between defendant and deceased at another place, evidence of such conflict was admissible to show motive, though not part of the res gestæ; the cause and details being excluded.—State v. Shafer, 26 Mont. 11; 66 Pac. 463.

45. In a prosecution for homicide, insurance policies payable to decedent's wife—defendant's sister—should not be admitted to show motive, in the absence of evidence that defendant knew of their existence, and that they were valid, subsisting contracts, or that defendant believed them to be such.—State v. Felker, 27 Mont. 451; 71 Pac. 668.

5. Preparations, 46.

46. Defendant, as a witness, denied that on Thursday or Friday, before the killing on Saturday night, March 31, he went to one B's house with deceased and another; that he then stated to B that he had two Norwegian boys outside, and that they had money, and he wanted B to help fix them by putting them to sleep, to get the money. *Held*, that B could testify in rebuttal that, four or five days before the killing, defendant came to her house with two men; that defendant came in and told her that he had a good chance to make some money; that he had two fellows, lately from Norway, who had money; that he asked her for a spare room; that he wanted her to fix them—put them to sleep—and asked her if she did not know how; and that she refused to have anything to do with it, and defendant left.—State v. Osnes, 14 Mont. 553; 37 Pac. 13.

6. Nature of act and attendant circumstances, 47-54.

47. State's witness testified that he was standing at the head of the hall stairs, and heard defendant say, when going out of the door, that he "would kill the son of a ——; that defendant was talking to P; he did not say whom he would kill." It was uncontradicted that the accused parties had had a difficulty in said hall with deceased, and that they passed downstairs a few minutes before defendant shot deceased. Another witness testified that he saw defendant and P at the foot of the stairs and heard defendant say to P, "Smash the son of a —— when he comes down stairs." *Held*, that the evidence was admissible as part of the res gestæ.—State v. King, 9 Mont. 445; 24 Pac. 265.

48. On trial for an assault with intent to kill one W, it appeared that W attempted to do hauling across defendant's mining claim, on a road which, though broken, was not public, and that W's party found defendant at work in a shaft in the road, which rendered it impassable, and began to fill up the shaft with stones, when a quarrel ensued. *Held*, that evidence that W's team could not turn out and pass the shaft which defendant was digging was admissible as a part of the res gestæ to show the surroundings.—State v. Donyes, 14 Mont. 70; 35 Pac. 455.

49. Where defendant, immediately after shooting deceased, fled, and was captured about a quarter of a mile away, his statements to the captors that deceased hit him before he shot, and the statements of deceased, a short time after the shooting, that defendant applied opprobious epithets to him, and he struck him, are narrative, and not part of the res gestæ. —State v Pugh, 16 Mont. 343; 40 Pac. 861.

50. In a prosecution for murder, exclamations by deceased and witnesses of the homicide as defendant approached the house in which the difficulty occurred, and which he had just left, that "there he comes with a gun," are admissible as res gestæ.—State v. Biggerstaff, 17 Mont. 510; 43 Pac. 709.

51. Where, on a trial of one charged as accomplice in a murder, a letter from defendant to deceased, asking him to meet him at the time and place of the killing, is admitted, it is error to exclude evidence that defendant wished to meet deceased to settle a controversy between the latter and defendant's accomplice.—State v. Geddes, 22 Mont. 92; 55 Pac. 927.

52. Where the photograph of the wife of defendant's alleged accomplice in a murder, found upon defendant, was admitted in evidence to raise an inference of criminal intimacy, it is error to exclude evidence to corroborate defendant's explanation of his possession of the picture.—Id.

53. Evidence on a trial for murder, that it was a custom of accused, when gambling, to leave the table and go out, to rebut the theory of the prosecution that accused left to procure a pistol, is properly excluded, where accused had explained his purpose in going out.—State v. Shadwell, 22 Mont. 559; 57 Pac. 281.

54. Where defendant accounted for his scratched appearance shortly after deceased's

death by saying he had been ejected from a certain train, testimony of the train's crew that they were the only persons on the train, and that no one had been put off on the day in question, was admissible.—State v. Lucey, 24 Mont. 295; 61 Pac. 994.

7. Justification, 55-57.

55. On the issue whether, when defendant killed deceased, deceased was about to assault his wife—defendant's sister—or was so acting as to warrant defendant in believing that he was about to assault her, testimony of prior threats by deceased against his wife, though not communicated to defendant, was admissible.—State v. Felker, 27 Mont. 451; 71 Pac. 668.

56. On the issue whether defendant, when he killed deceased, believed that deceased was about to assault his wife—defendant's sister—testimony showing that, to defendant's knowledge, deceased had made prior assaults on his wife, was admissible.—Id.

57. The fact that the prior assaults occurred before November 30, while the homicide occurred December 15, did not make the evidence inadmissible, as too remote.—Id.

8. Self-defense, 58-65.

58. A refusal to allow defendant to prove certain threats which prosecutor had made against his life, and communicated to him, was not erroneous, where the evidence of the prosecution refutes the intention of prosecutor to carry them into execution at the time the crime was commited.—Territory v. Campbell, 9 Mont. 16; 22 Pac. 121.

59. On trial for murder, evidence of a "trouble" and a "sentiment worked up" thereby against defendant, was properly excluded till it was shown that it occurred before the killing, and that deceased was connected therewith.—State v. Gay, 18 Mont. 51; 44 Pac. 411.

60. Where there was evidence that deceased was the assaulting party, it was competent to prove that the general reputation of deceased for peace and quiet was bad, under a plea of self defense.—State v. Shafer, 22 Mont. 17; 55 Pac. 526.

61. It is error to refuse to allow defendant to state what kind of a man deceased was physically.—Id.

62. On a trial for murder, evidence as to deceased's conduct towards others in the presence of accused just prior to the killing is admissible.—State v. Shadwell, 22 Mont. 559; 57 Pac. 281.

63. On a trial for murder, a witness's personal observations of specific acts of violence towards third persons are admissible to prove the general reputation of deceased for quarrelsomeness.—Id.

64. Where, on a trial for murder, it is shown that at the same time accused killed deceased the latter had him against the wall of a saloon and was pushing a table against him, evidence of previous threats of violence towards accused by deceased is admissible to enable the jury to ascertain whether accused was prompted by malice or believed he was in danger of great bodily harm.—Id.

65. Accused testified that he and deceased were partners, and, while walking near their cabin, deceased abused him about some previous occurrence; that he broke off a pole and started after defendant, and knocked him down; that he lay there some time in pain, afraid and unable to get up; that, when deceased turned to go, he got up and fired the shots; that deceased had, for the space of three years, treated him cruelly and unreasonably, and had threatened to kill him. *Held*, that defendant's evidence was a sufficient foundation for the introduction of proof that deceased had repeatedly attempted to strike defendant, who made no resistance and never offered remonstrance, to show fear of great bodily harm.—State v. Peterson, 24 Mont. 81; 60 Pac. 809.

9. Defense of property, 66-68.

66. It was not prejudicial error to exclude the record in an action in which the court refused to restrain defendant from felling trees across the road on his claim, since defendant, as undisputed owner, was not justified in repelling a trespass on his claim by an attempt to murder.—State v. Donyes, 14 Mont. 70; 35 Pac. 455.

67. On trial for assault with intent to kill W, one of a party comng upon defendant's mining claim, evidence that one of W's party went to defendant's claim, intending to cross it against the will of defendant, was inadmissible, as it did not show that W so intended.—Id.

68. Defendant's notice of location of his mining claim was not admissible in justification of an attempt to kill, but it was admissible to show his intention in making the excavation about which the quarrel arose.—Id.

C. DYING DECLARATIONS, 69-70.

69. On trial the surgeon who attended deceased testified that he was mortally wounded, and, while in a dying condition, frequently said: "My God, boys! I am killed. O, boys, I am shot through the guts." A witness who was with deceased just before his death testified that he was rational, and talked as if he knew that he was dying; that he stated he wanted a Christian burial, and that he wanted to be buried at a certain place. *Held*, that declarations of deceased as to how he was wounded, and by whom, were admissible, though the declaration did not expressly state that he had no hope of recovering, or was going to die.—State v. Russell, 13 Mont. 164; 32 Pac. 854.

70. It appeared that deceased (entirely rational till death), just after being shot, said that he knew the wound was fatal, and that he could not recover and would never use his gun again, and, on the day he died, said that he would never see his home again; that from the time of shooting up to death, two days later, he suffered intense pain, and at no time expressed hope of recovery. *Held*, that dying declarations that defendant killed him were admissible.—State v. Gay, 18 Mont. 51; 44 Pac. 411.

D. WEIGHT AND SUFFICIENCY, 71-87.

71. Matters of justification, excuse or mitigation should be proven as any ordinary fact, by a preponderance of testimony, and an instruction that such facts should be proven beyond a reasonable doubt is error.—Territory v. Edmonson, 4 Mont. 141; 1 Pac. 738.

72. A conviction of murder arrived at through the testimony of a single witness, who was contradicted by other witnesses and who himself gave different testimony before the coroner's jury, will be set aside.—Territory v. Adolfson, 5 Mont. 237; 5 Pac. 254.

73. A threat to kill, followed by the placing of a bomb, with a lighted fuse attached, upon the porch of the house where the person against whom the threat was made lives, under such circumstances as to put him in peril of his life, is sufficient to sustain a conviction of assault with intent to kill.—Territory v. Reuss, 5 Mont. 605; 5 Pac. 885.

74. An instruction that, "if the jury have a reasonable doubt as to whether the defendant has been proved by the evidence guilty of murder in the first degree, they should find him

guilty of murder in the second degree, if the jury find him guilty of murder," is not erroneous.—Territory v. Manton, 7 Mont. 162; 14 Pac. 637.

75. On a trial for murder, where accused introduced evidence of his character for peace, an instruction that it stood as a witness for him, to be given its due weight with all the other evidence, is sufficient, unless more explicit instructions are requested by the accused.—Territory v. Hart, 7 Mont. 489; 17 Pac. 718.

76. The evidence showed that defendant and deceased quarreled over the right to cut hay on certain land; that defendant called on deceased to "come on," upon which the latter jumped from his wagon after handing a gun which he had to another; that deceased exclaimed that he was not armed, and had nothing to defend himself with; whereupon defendant stepped back, procured a pistol and fired three shots at deceased while his back was turned, and that defendant had frequently threatened to take deceased's life. Defendant and one witness testified that deceased was advancing with his gun pointed at defendant when the fatal shots were fired, and the physician testified that all the wounds were in the back. *Held*, that a verdict of guilty would not be disturbed.—Territory v. Clayton, 8 Mont. 1; 19 Pac. 293.

71. On a trial for murder, defendant's own testimony showed that he did not know deceased; that on the night of the homicide he had been warned to beware of an assault; and that he borrowed a revolver at a certain saloon; and the evidence showed that thereafter, with two companions, he entered another saloon, placed the revolver on the bar, and said "that somebody was going to lick him and fight him, and that he did not care if he got killed or anyone else;" that he afterwards returned to the first saloon; that he sought to quarrel with another, though he denied this; that deceased, who had been asleep and was intoxicated, being aroused thereby, approached one of defendant's companions, and a slight alteraction ensued. There was also evidence that defendant attempted to interfere, though he denied this. It appeared that deceased resented this by telling defendant that "it was none of his business," and by attempting to push him away, which effort caused deceased to stagger backward; that defendant walked a few steps away, and then shot deceased, continuing to point his pistol at him until he fell, whereupon he left and escaped under an assumed name. *Held*, that a verdict of murder in the first degree was warranted.—Territory v. Johnson, 9 Mont. 21; 22 Pac. 346.

78. Deceased was the mistress of accused, with whom she had quarreled. She was last seen alive with accused, leaving her house. Her body was discovered under a pile of rocks in an old prospect hole some weeks afterwards. Her watch had been torn from the chain, and was afterwards pawned by accused, who also disposed of deceased's wearing apparel, and moved to another part of the city, living under another name. He made contradictory statements as to the disappearance and whereabouts of deceased. *Held*, that a verdict of murder in the first degree would not be disturbed.—Territory v. Bryson, 9 Mont. 32; 22 Pac. 147.

79. Evidence that defendant threatened to kill a person assaulted and shot at him several times with a 41-calibre revolver, wounding him once, sufficiently shows a present ability to commit an assault with intent to murder.—State v. Sheerin, 12 Mont. 539; 31 Pac. 543.

80. On the trial there was no controversy as to the shooting by defendant. Deceased was unarmed, was intoxicated, and a comparative stranger. Defendant was armed, in company with friends, and it did not appear that he was disinclined to enter into the difficulty that resulted in his killing deceased. Defendant failed to surrender himself to the officers who were inquiring in his presence for the man who did the shooting. The state's witnesses were defendant's friends, and their testimony was as strong in his behalf as they could consistently make it. *Held*, that in view of the dying declarations of deceased, the verdict of murder in the second degree was sustained by the evidence.—State v. Russell, 13 Mont. 164; 32 Pac. 854.

81. On a trial for murder of one of a posse of officers attempting to arrest him, there was evidence that defendant had aided another in escaping from arrest, and had threatened to kill anyone attempting to arrest him; that the two had resisted arrest on several other occasions; that on one of these occasions, when one of the officers, whom he knew, commanded him to surrender, assuring them that he would not shoot, such officer was killed by defendant's companion; that on another occasion another officer was killed. Deceased, in his dying declarations, stated that he saw defendant shoot him. There was no evidence that the officers, on any occasion, fired till defendant had aimed his gun at them. *Held*, that a conviction of murder in the first degree was proper.—State v. Gay, 18 Mont. 51; 44 Pac. 411.

82. Pen. Code, § 358, provides that no person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of the killing by defendant as alleged, are established as independent facts,—the former by direct proof, and the latter beyond a reasonable doubt. *Held*, that since the corpus dilecti is directly proved when a dead body is found under circumstances warranting an inference that a person has been feloniously killed, direct proof of the identity of the victim is not required, but only direct proof of death.—State v. Pepo, 23 Mont. 473; 59 Pac. 721.

83. Defendant was indicted for P's murder. A badly decomposed body, with a crushed skull, was found lying in a bunk in a deserted cabin. A cracker box, watch charm, and a book with entries made by P, together with other articles belonging to him, were found in the cabin, and there was no evidence of a struggle. The cabin door was fastened with wire from the outside, and a heavy piece of iron, covered with blood and hair, was found nearby. Accused and P left Canada, saying they were going to the locality where the murder was committed; P having about $120 in his possesion, and wearing clothes similar to those found on the body. About 15 days before its discovery, accused and another, stated to resemble photographs of P, and wearing clothing like that found on the body, a watch chain and charm, and carrying a small box in a handkerchief, were seen together near the place where the body was found; and a witness testified that he directed them to the cabin in question. Defendant, when arrested, nine months after, was living under an assumed name, and had a watch chain resembling the one carried by the person alleged to be P the day before the supposed murder. The clothing found on the body and the watch chain were identified by P's brother as belonging to P, and by others as worn by the man resembling him; and the height of the body and color of the hair corresponded to P's. *Held*, that the evidence was sufficient to sustain a verdict of guilty.—Id.

84. Deceased, who had just been elected sheriff, was seen walking towards his home at night, and shortly thereafter defendant, who had been his opponent, was seen to follow him rapidly, and, on being accosted by a witness, who knew him, made no reply. Shortly there-

after groans and muffled sounds were heard coming from an alley, where deceased's body was found next morning; and, on search of defendant's house being made, a pair of dark pantaloons was found containing two handkerchiefs which were bloodstained. Previous to the killing defendant was heard to make threats that if the election resulted in deceased's favor, he would "fix him," and would get even with him. *Held*, that a verdict of murder was justified by the evidence.—State v. Hurst, 23 Mont. 484; 59 Pac. 911.

85. On a trial for murder, the identity of the person alleged to have been killed was proved by direct evidence of an accomplice, who was an eye witness, and assisted in disposing of the body by burning it and throwing the ashes in a river, corroborated by circumstantial evidence. The death of a human being was directly proved by the identification of certain teeth and charred bones found in a river near the point where the body was burned, and there was circumstantial evidence to prove the identity of the deceased. *Held*, that the evidence was sufficient to satisfy the requirements of Pen. Code, § 358, that the death of the person alleged to have been killed must be established by "direct proof," as an independent fact, and of Code Civ. Proc., § 3108, defining "direct proof" as that which proves the fact in dispute, without an inference or presumption.—State v. Calder, 23 Mont. 504; 59 Pac. 903.

86. In prosecutions for murder, proof of the corpus dilecti involves the establishment of the fact that a murder has been committed, but includes neither the identity of the person alleged to have been killed, nor the killing by the person accused.—Id.

87. Defendant, convicted of murder, became intimate, while in state's prison, with M, who was also a convict, and who, on the expiration of his term of imprisonment, killed defendant's father. There was evidence tending to show that defendant had told T, who, with P, was also convicted as a party to the same crime for which defendant was convicted, that he had hired M to kill his father in a manner that would appear to be suicide, leaving on the body a confession that the father and a son-in-law had committed the crime for which defendant was imprisoned; and the conversation was repeated by T to other persons before the father was murdered. An instrument drawn by M, and purporting to be a confession by the father of being guilty of the crime for which defendant was convicted, was found on the body of the father, and also a will forged by M, by which the father purported to leave his property to defendant. Defendant, before the murder of his father, told P to deny a confession made by the latter, and said that they would soon get out. After the murder of the father, but before the body was discovered, a letter from M was received by defendant, who destroyed it, and then stated that everything was working as he expected; and he thereafter told P that they would be out in a short time, and that M had followed defendant's instructions, and the latter had sacrificed his father to get his convicts and himself out of prison. *Held*, sufficient evidence that defendant advised and encouraged M to commit the murder to render defendant a principal, under Pen. Code, § 41, making any person who advises or encourages the commission of a crime guilty as a principal, though not present in person.—State v. Dotson, 26 Mont. 305; 67 Pac. 938.

VII. TRIAL, 88-134.

A. Conduct in General, 88-91.
B. Questions for Jury, 92.
C. Instructions, 93-132.
D. Verdict, 133-134.

A. CONDUCT IN GENERAL, 88-91.

88. On a trial for murder, a knife not clearly identified as the one claimed to have been in the hands of deceased when killed is not admissible.—State v. Cadotte, 17 Mont. 315; 42 Pac. 857.

89. Where, in a prosecution, the evidence relied on for conviction is circumstantial, it is error for the state to fail to call a witness who, though not an eyewitness of the killing, was near enough to hear the conversation between defendant and deceased preceding the killing, though the prosecuting attorney was under the belief that such witness was too drunk to understand what was going on.—State v. Metcalfe, 17 Mont. 417; 43 Pac. 182.

90. Pen. Code, § 2082, providing that, "upon a trial for murder or manslaughter it is not necessary for the state to call as witnesses all persons who were shown to have been present at the homicide, but the court may require all of such witnesses to be sworn and examined," does not make it imperative that all of such persons should always be introduced as witnesses by the state, but authorizes the court to require it in its discretion.—State v. Rolla, 21 Mont. 582; 55 Pac. 523.

91. Although a complaint filed by deceased against defendant's accessory is admissible to show a motive for the murder, it is error for the state's attorney to comment on the facts charged in such complaint as though they were true, although there has been incompetent testimony admitted tending to establish such facts.—State v. Geddes, 22 Mont. 92; 55 Pac. 927.

B. QUESTIONS FOR JURY, 92.

92. Evidence in a trial for homicide examined, and *held* not to show, as a matter of law, that it was justifiable.—State v. Felker, 27 Mont. 451; 71 Pac. 668.

C. INSTRUCTIONS, 93-132.

1. Province of Court and Jury in General, 93-94.
2. Intent, Malice, Deliberation, and Premeditation, 95-97.
3. Motive, Circumstances, and Cause of Death, 98-100.
4. Matters of Defense in General, 101-107.
5. Self-Defense, 108-111.
6. Grade or Degree of Offense, 112-132.

1. Province of court and jury in general, 93-94.

93. An instruction that threats and previous difficulties are evidence tending to prove malice does not invade the province of the jury and assume that threats and previous difficulties have been proved.—Territory v. Scott, 7 Mont. 407; 17 Pac. 627.

94. A requested instruction that dying declarations of deceased should be received with great caution is properly refused as being on the weight of the evidence.—State v. Gay, 18 Mont. 51; 44 Pac. 411.

2. Intent, malice, deliberation, and premeditation, 95-97.

95. An instruction that the jury may take into consideration any previous difficulties and quarrels between deceased and the prisoner as evidence of malice is not erroneous as stating a fact to the jury.—Territory v. Manton, 8 Mont. 95; 19 Pac. 387.

96. In a prosecution for homicide, an instruction that "preconceive" means to think of

before the execution of the act, and hence means premeditation, which is thought beforehand for any length of time, however short, and that "deliberation" does not mean brooded over or reflected on for a week, but means the intent to kill executed by one not under the influence of a violent and sudden passion, but in the furtherance of a formed design; that is, "it means in a state of cold blood, and is usually characterized by what are ordinarily termed 'cold blooded murders,' such as proceed from deep malignity of heart."—*held* not reversible error.—State v. Spotted Hawk, 22 Mont. 33; 55 Pac. 1026.

97. An instruction leaving the jury to determine the degree of homicide according as malice, essential to murder in the first degree, and passion, essential to manslaughter, predominated, is error, since, in law, both these elemental conditions could not co-exist.—State v. Sloan, 22 Mont. 293; 56 Pac. 364.

3. Motive, circumstances, and cause of death, 98-100.

98. An instruction that the defendant admits the shooting and killing "as charged in the indictment," when the admission in the record is that the shot he fired killed the deceased "at the time and place alleged in the indictment," is misleading and prejudicial in its character, and is error.—Territory v. Tunnell, 4 Mont. 148; 1 Pac. 742.

99. An instruction to consider deceased's drunkenness, on the question whether she was of so violent a disposition that defendant could not control her, is not erroneous, on the ground that the jury should have been told to consider it in determining whether she died from drunkenness or exposure, where the latter instruction was not asked for.—Territory v. Manton, 8 Mont. 95; 19 Pac. 387.

100. Where a complaint filed by deceased against accused is admitted in evidence, the court should charge that the evidence could be considered only as bearing on the question of motive.—State v. Geddes, 22 Mont. 68; 55 Pac. 919.

4. Matters of defense in general, 101-107.

101. An instruction that "the killing being proved, the burden of proving circumstances of mitigation," or justification or excuse, is on defendant, is not objectionable as leading the jury to believe that, as soon as death is proved or admitted, the burden is then on defendant.—Territory v. Manton, 8 Mont. 95; 19 Pac. 387.

102. A request to instruct that "in determining whether or not defendant acted upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, as defined to you by the court, and without malice or deliberation, you must take into consideration all the circumstances existing at and about the time of the shooting; whether or not deceased was making an attack upon defendant; the nature of the attack, if any; the relative size and strength of the parties; and the character of deceased for violence,"—was properly refused, as it assumes that the character of deceased for violence had been proved.—Territory v. Johnson, 9 Mont. 21; 22 Pac. 346.

103. On a trial for murder the jury were instructed that if they "believe from the evidence that defendant had been injured or received provocation from deceased, whatever that injury or provocation might be, yet if, after receiving such injury or provocation, there should have been an interval between the provocation given and the killing sufficient for the voice of reason to be heard, the killing shall be attributed to deliberate revenge, and shall be deemed murder in the first degree." *Held*, that the instruction was unnecessarily narrowed, as it failed to define provocation, and omitted all reference to time for the "passions to cool," as those words are used in the statute defining the degrees of murder.—State v. Baker, 13 Mont. 160; 32 Pac. 647.

104. On a trial for murder, it appeared that deceased had threatened to kill "any Missourian in the employ of V who undertook to move hay on High Tower ranch," and had made other threats against Missourians so employed, and that defendant was a Missourian, and employed on said ranch; but the evidence also showed that at the time defendant struck the fatal blow he was not in immediate danger, but that he went up to deceased, who was standing in a threatening attitude over a friend of defendant, who was not shown to be a Missourian, and who was on top of, and was fighting with, a friend of deceased. *Held*, that it was not error to refuse to instruct that the jury should take such threats into consideration in determining the nature of the attack made on defendant's friend, and what was the purpose of deceased and his friend in making such attack.—State v. Whitworth, 26 Mont. 107; 66 Pac. 748.

105. An instruction that, "if defendant was so far in possession of his mental faculties as to be capable of knowing that the act of killing was wrong, any mental defect which might cause him to more readily give way to passion than a man ordinarily reasonable could not be considered," is not prejudicial to defendant, who claimed to be insane.—State v. Brooks, 23 Mont. 146; 57 Pac. 1038.

106. It is not error to refuse to instruct, in a capital case, that defendant should be acquitted if a fair preponderance of evidence shows his insanity; the correct rule being that he is entitled to an acquittal where the evidence raises a reasonable doubt of his sanity when the crime was committed.—Id.

107. On a trial for murder, it is proper to charge "that, upon proof of the commission of the homicide by defendant, the burden of proving circumstances of mitigation or excuse devolves upon him unless the proof on the part of the prosecution tends to show that the crime only amounts to manslaughter, or that he was excusable," under Pen. Code, § 2081, regulating the burden of proof in such cases.—Id.

5. Self-defense, 108-111.

108. An instruction that "the right to take life is limited to the apparent actual and present necessities then suddenly precipitated by the assailant, under such circumstances as then appear to the slayer, as a reasonable man, to place the life or person of the slayer in such peril as to admit of no other reasonable alternative than the killing of the assailant," is erroneous, in that it ignores the right of accused to act on what appeared to him at the time, as a reasonable man, necessary to save his own life, or prevent his receiving great bodily harm, although he was in no actual danger.—State v. Rolla, 21 Mont. 582; 55 Pac. 563.

109. An instruction that it was the duty of accused to "exhaust all other reasonable means within his power consistent with his safety to prevent the homicide" before taking the life of deceased, is erroneous, where accused was murderously attacked by deceased and his brother near defendant's home.—Id.

110. Where, on a trial for murder, in which accused pleaded self-defense, it was shown that deceased had previously threatened accused, an instruction directing the jury to disregard such prior threats unless accused at the time of the killing was actually assailed, or believed he was in great bodily danger, was erroneous.—State v. Shadwell, 26 Mont. 52; 66 Pac. 508.

111. On a prosecution for murder, where defendant pleaded self-defense, the court instructed that threats by deceased against defendant could not be considered unless defendant was actually assailed, or believed he was in great bodily danger. This instruction was followed by another, authorizing the consideration of any threats deceased may have made against defendant, to enable the jury to determine defendant's acts or deceased's motives. *Held*, that the instructions were conflicting, and constituted reversible error.—Id.

6. Grade or degree of offense, 112-132.

112. An instruction that, "if the jury have a reasonable doubt, after considering the evidence, as to whether or not defendant is guilty of murder in the second degree, they should find him guilty of manslaughter," is equivalent to directing a verdict in the alternative, and is manifest error, requiring a new trial, notwithstanding the fact that the jury found a verdict of murder in the second degree.—Territory v. Manton, 7 Mont. 162; 14 Pac. 637.

113. An instruction that, if the jury find defendant killed deceased unlawfully, and with malice aforethought, they must find him guilty of murder, and then determine whether such murder is in the first or second degree, immediately followed by correct definitions of murder in the first and second degrees, is not erroneous as authorizing the jury to find defendant guilty of murder in the first degree on a definition of murder in the second degree.—Territory v. Scott, 7 Mont. 407; 17 Pac. 627.

114. On a trial for murder, the indictment also charging an assault with intent to commit murder, an instruction defining an assault in the language of the statute is not erroneous.—Territory v. Burgess, 8 Mont. 57; 19 Pac. 558.

115. Instructions defining manslaughter, voluntary and involuntary, in the words of the statute, are proper, and portions relating to "sudden heat of passion," and "the performance of a lawful act not felonious," or "without due care and caution," may be rejected as surplusage, and an instruction that "death resulting from the wilful omission of duty is murder," and if, beyond a reasonable doubt, deceased came to her death by reason of defendant's wilful neglect of duty towards her, he is guilty of murder, if all the other elements of the crime are proved,—is proper, and not objectionable because irreconcilable with those defining manslaughter.—Territory v. Manton, 8 Mont. 95; 19 Pac. 387.

116. Where an indictment for murder charges an intent to kill deceased, and an intent is shown to kill another person, an instruction that, if defendant was not guilty of murder in the first degree, but killed deceased wilfully, and with 'malice aforethought,' either express or implied, he was guilty of murder in the second degree, is correct.—Territory v. Rowand, 8 Mont. 432; 20 Pac. 688.

117. An instruction defining murder in the first and second degrees, in the words of Comp. Stat., p. 505, § 21, and concluding, "and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder in the first or second degree," is proper, when supplemented by a charge on manslaughter, and that the jury could not convict of a higher crime unless proved beyond a reasonable doubt, and that they must acquit unless satisfied of defendant's guilt beyond a reasonable doubt.—Territory v. Johnson, 9 Mont. 21; 22 Pac. 346.

118. After defining murder in the first degree, merely reciting the words of the statute that "all other kinds of murder shall be deemed murder in the second degree" is not a sufficient definition of the second degree.—State v. Baker, 13 Mont. 160; 32 Pac. 647.

119. An instruction, on a trial for murder in the first degree, that under an information charging murder in the first degree the defendant may be found guilty of murder in the second degree or manslaughter or not guilty, if not found guilty of murder in the first degree, is not objectionable as allowing a conviction of murder in the second degree or of manslaughter.—State v. Cadotte, 17 Mont. 315; 42 Pac. 857.

120. An instruction that "it is only necessary that the act of killing be preceded by a concurrence of will, deliberation and premeditation on the part of the slayer, and, if such is the case, the killing is murder in the first degree," is erroneous as a definition of murder in the first degree, since it omits the words "malice aforethought."—State v. Shafer, 22 Mont. 17; 55 Pac. 526.

121. An instruction that, if the killing was prompted by passion, it is manslaughter, is error, because it fails to distinguish between passion and heat of passion necessary to reduce homicide from murder to manslaughter.—State v. Sloan, 22 Mont. 293; 56 Pac. 364.

122. An instruction stated that "'heat of passion,' as used in defining 'manslaughter,' means a condition of quick anger or sudden injury engendered by some real or supposed injury suffered at the time, and amounting to a temporary dethronement of reason, which must be sufficient to arouse an irresistible and uncontrollable passion in a reasonable person." *Held*, that it was confusing and unintelligible.—Id.

123. An instruction, on a trial for murder, that if the act of killing was preceded by a concurrence of will, deliberation and premeditation of the slayer it was murder in the first degree, no matter how rapidly such acts of the mind may have succeeded each other, or how quickly they were followed by the act of killing, is misleading, in affording the jury an opportunity to accept it as a complete definition of murder.—State v. Shadwell, 22 Mont. 559; 57 Pac. 281.

124. Where the evidence proved murder in the first degree, an instruction that, to make the killing manslaughter, it must be done "upon the instant,—that is, at the time the provocation is given, and under the influence of it, before the blood has had time to cool, and before the mind has had time to consider the character and gravity of the act about to be done, and not from hatred or pre-existing revenge," is not prejudicial to defendant.—State v. Brooks, 23 Mont. 146; 57 Pac. 1038.

125. It is error to instruct the jury that the homicide would not be manslaughter, if committed in an unreasonable fit of passion.—Id.

126. Where the proof of defendant's guilt is wholly circumstantial, and the evidence warrants a conviction of murder in either the first or second degree, a refusal to charge as to murder in the second degree is reversible error.—State v. Fisher, 23 Mont. 546; 59 Pac. 919.

127. Where proper instructions were given distinguishing murder in the first and second degrees, and telling the jury to find the degree, and there was no proof from which manslaughter could be inferred, failure to instruct the jury specifically that they might find defendant guilty of either degree of murder or manslaughter was not error.—State v. Lucey, 24 Mont. 295; 61 Pac. 994.

128. Where the evidence would warrant a verdict of guilty of any grade of murder or of acquittal, it was error to leave the jury to draw the distinction between murder of the first and second degrees merely from the gen-

eral definitions, and from the words "all other kinds of murder are of the second degree," following the definition of murder in the first degree.—State v. Shafer, 26 Mont. 11; 66 Pac. 463.

129. Where there was evidence tending to show defendant guilty of murder in the first degree, of murder in the second degree, and of manslaughter, it is the duty of the court to instruct explicitly that a verdict for manslaughter may be returned, manslaughter not being a degree of murder.—State v. Shadwell, 26 Mont. 52; 66 Pac. 508.

130. The fact that accused endeavored to show that the killing was done in self-defense does not render an instruction authorizing a conviction of manslaughter unnecessary.—Id.

131. It is error for the court to merely give the statutory definition of murder in the first and second degrees, without giving an additional instruction distinguishing between the two degrees.—State v. Felker, 27 Mont. 451; 71 Pac. 668.

132. Where, in a prosecution for homicide, the court in a previous instruction had given correct definitions of murder in the first and second degrees, an instruction that, except as explained in previous instructions, the unlawful killing must be accompanied with a deliberate and clear intent to take life, in order to constitute murder in the first degree; that the intent to kill must be the result of deliberate premeditation, and must be formed on a preexisting reflection, and not on sudden heat of passion to preclude the idea of deliberation, was not error.—State v. Martin, 29 Mont. 273; 74 Pac. 715.

D. VERDICT, 133-134.

133. A verdict of the jury alone, without reference to the indictment, judge's charge or record of the evidence, must designate and express the degree of the offense, as well as the guilt. It is not enough to find one guilty "in manner and form as he stands charged in the indictment," though the indictment may clearly charge the offense in the first degree. The jury alone must find the degree of the offense from the evidence, and designate it in their verdict. A failure to do so viatiates the verdict and nullifies any judgment based thereon.—Territory v. Stearns, 2 Mont. 324.

134. Where the statute does not divide into degrees the crime of an assault with intent to commit murder, a verdict finding the defendant guilty, "as charged in the indictment," is sufficient.—Territory v. Perkins, 2 Mont. 467.

VIII. NEW TRIAL, 135-137.

135. A new trial will not be granted on the ground of newly discovered evidence, which consists of threats made by deceased against defendant, where the witness relied upon testified for the prosecution, and on cross examination alluded to the conversation set out in defendant's affidavits for new trial, and where other witnesses on trial testified to threats made by deceased against defendant.—Territory v. Clayton, 8 Mont. 1; 19 Pac. 293.

136. Newly discovered evidence in a murder trial that deceased was seen near the place where she was afterwards killed, with a man other than defendant, is no ground for new trial when, if defendant committed the murder, he did it some days after she was so seen.—Territory v. Bryson, 9 Mont. 32; 22 Pac. 147.

137. On a trial for murder of a member of a posse attempting to arrest defendant, a new trial, for newly discovered evidence, based on the affidavit of one of the posse that they were instructed by the sheriff to kill defendant on sight, was properly denied, where affiant, in a counter affidavit, stated that they were instructed not to shoot unless absolutely necessary, and the affidavits of the sheriff were to the same effect.—State v. Gay, 18 Mont. 51; 44 Pac. 411.

IX. APPEAL AND ERROR, 138-144.

138. Erroneous instructions, shown by the record not to be prejudicial, are not ground for reversal.—Territory v. McAndrews, 3 Mont. 158.

139. On a murder trial, a witness for the defense having testified that at the time of the shooting deceased jumped from a wagon with a gun in his hand, one of the grand jurors was allowed to testify that the witness gave no testimony before the grand jury as to whether or not deceased had a gun. *Held*, that the admission of the testimony, if error, was harmless.—Territory v. Clayton, 8 Mont. 1; 19 Pac. 293.

140. On trial for murder the court charged that if there was a struggle between deceased and defendant to gain possession of the J mine, each being determined to drive the other off, and defendant shot and killed deceased in furtherance of such struggle, he could not be justified on the ground of self-defense. The evidence showed that the contest was for the possession of the F mine, which adjoined the J mine. *Held*, that defendant was not prejudiced.—Territory v. Burgess, 8 Mont. 57; 19 Pac. 558.

141. The court refused to instruct that, if at the time deceased and his companions went to accused he was in possession of the F mine, deceased and the others had no right to approach accused in a threatening manner with weapons of a deadly character exhibited and in a condition to be used; and if the jury believed, or had no reasonable doubt but that accused was so approached by deceased and his companions, and fired from a reasonable apprehension that they were about to take his life, then they must acquit defendant. The court also refused to instruct that if on or before the shooting deceased made threats against the life of defendant, which threats were communicated to him on or before the shooting, and that on the day of the shooting defendant saw deceased and his companions coming towards him, making hostile demonstrations with deadly weapons, and defendant shot and killed deceased under the apprehension that deceased and his companions sought his life, or intended to inflict a great bodily harm, the killing was justifiable. *Held*, that the error in refusing this instruction was cured by instructions that where one without fault himself is attacked, having reasonable grounds for apprehending bodily harm, and reasonably believing that the danger is imminent, he may kill the assailant, if necessary, to avoid the apparent danger, and the killing will be justifiable, though there was, in fact, neither design to do him serious injury nor danger that it would be done; that if a person believes and has reasonable ground to believe that another has sought him out for the purpose of killing him or doing him great bodily harm, and is prepared therefor with deadly weapons, and the latter makes demonstrations manifesting an intention to commence an attack, then the person so threatened is not required to retreat, but may defend himself, and in so doing, if it is necessary, kill his antagonist.—Id.

142. The fact that the court, after defining murder in the first and second degrees, and manslaughter, and telling the jury that they might convict of either, failed to state the punishment for murder in the second degree and manslaughter, though stating that for murder

in the first degree, was immaterial, where the jury found defendant guilty of murder in the first degree.—State v. Gay, 18 Mont. 51; 44 Pac. 411.

143. A conviction for murder will not be disturbed where there is evidence to support it. —State v. Allen, 23 Mont. 118; 57 Pac. 725.

144. On a murder trial, where instructions upon the law of justifiable homicide were unnecessary, it is not error, that defendant can complain of, to give such instructions.—State v. Brooks, 23 Mont. 146; 57 Pac. 1038.

HUSBAND AND WIFE.

I. Mutual Rights and Liabilities, 1-3.
II. Disabilities and Privileges of Coverture, 4-9.
III. Wife's Separate Estate, 10-25.
A. What constitutes, 10-21.
B. Rights and liabilities of husband, 22-23.
C. Rights of husband's creditors, 24.
D. Conveyances, 25.
IV. Actions, 26-30.
V. Community Property, 31.
VI. Separation and Separate Maintenance, 32-37.

I. MUTUAL RIGHTS AND LIABILITIES, 1-3.

1. When a wife records in the register's office a list of her separate property it is notice to the world that she is the owner, and the person trusting or giving credit to her husband, upon the strength of such property remaining in his possession, does so at his peril.
Griswold v. Boley, 1 Mont. 545.
Boley v. Griswold, 2 Mont. 447.

2. Defendant wrote plaintiffs: "Please do not let my wife run any bills unless accompanied by my order. Do not tell her you are forbidden. Tell her you must have my order, or would prefer it." Thereafter defendant and his wife were in plaintiffs' store, where the wife bought a large bill of goods, not necessaries. They were both looking at the goods, and his wife called defendant's attention to some she was buying. About the same time he gave her a check which was paid on the bill. The goods were delivered at defendant's residence at C, where his wife lived, and he part of the time, and where he afterwards saw some of the goods. Defendant never objected to the purchase, nor offered to return anything. He was a man of some means, and his wife had no separate estate or business. *Held*, that he was estopped to deny her right to buy the goods.—Kreiger v. Smith, 13 Mont. 235; 33 Pac. 937.

3. Part of a tract pre-empted by a husband was sold, and one-half the proceeds, which had been deposited to the wife's credit, was afterwards turned over to the husband, with the understanding that he should improve the remaining portion of the land therewith, and convey to his wife when requested; but the record title remained in his name for nine years thereafter, during which period the improvements were made. *Held*, that a subsequent conveyance to the wife was subject to the debts incurred by the husband for materials which went into the improvements, and which were furnished on the strength of his apparent ownership.—Holter v. Wassweiler, 19 Mont. 169; 47 Pac. 806.

II. DISABILITIES AND PRIVILEGES OF COVERTURE, 4-9.

4. Under Rev. Stat., 1879, p. 589, the declaration of a married woman desiring to act as a sole trader, must state that she intends to do business "on her own account" as well as "in her own name." These terms are not synonomous, and both are material and essential to the validity of her declaration.—Manton v. Tyler, 4 Mont. 364; 1 Pac. 743.

5. A married woman may protect her separate property from attachment for her husband's debts by filing a list thereof as required by law in the county where she resides at the time of such filing, and the same will hold good until she acquires a residence in another county. While en route from one county to another, she may file such list in any county through which she passes, and such filing would be a protection from seizure in such county.—Herman v. Jeffries, 4 Mont. 513; 1 Pac. 11.

6. A declaration of a married woman which states that she intends to carry on the business, among other things, "of buying and selling property, real, personal and mixed, * * * and such other general business as will be advantageous," is sufficient to authorize the purchase and operation of a sawmill by her.—Shed v. Blakely, 6 Mont. 247; 11 Pac. 639.

7. Creditors of a husband, whose wife is carrying on business under the sole trader's act, can not seize the property belonging to such business in satisfaction of the husband's debts. —Id.

8. Comp. Stat., p. 1044, §§ 1434, 1435, providing that a married woman, after declaration as sole trader, shall be individually liable for all debts contracted in the business, that she may carry on her business in her own name, and shall be allowed all the privileges, and be liable to all the processes provided by law against debtors and creditors, do not enable her to execute a note in favor of her husband, and such note is void in the hands of a bona fide holder.—Herron v. Frost, 9 Mont. 308; 23 Pac. 469.

9. Where a married woman has complied with all the requirements of Comp. Stat., p. 1044, §§ 1433-1438, relating to married women doing business as sole traders, her property, as described in the schedule therein required, is exempt from seizure for her husband's debts, though she may not have filed the list of her separate property required by § 1432.—Barger v. Halford, 10 Mont. 57; 24 Pac. 699.

III. WIFE'S SEPARATE ESTATE, 10-25.

A. What Constitutes, 10-21.
B. Rights and Liabilities of Husband, 22-23.
C. Rights of Husband's Creditors, 24.
D. Conveyances, 25.

A. WHAT CONSTITUTES, 10-21.

10. A married woman who owns property in her own right is not estopped from asserting her rights thereto because she has remained silent when her husband has asserted his title thereto and received goods on the strength of such supposed ownership.—Griswold v. Boley, 1 Mont. 545.

11. The wife of G owned, as her separate property, a judgment which she recovered against B. *Held*, that the property descended to her kindred, and that G is not entitled to the same until her estate has been administered upon and settled.—Boley v. Griswold, 2 Mont. 447.

12. Length or permanency of residence are not necessary to give a woman a right to file a list of her separate property.—Herman v. Jeffries, 4 Mont. 513; 1 Pac. 11.

13. A conveyance of real estate to a wife, with no words of limitation, vests title in her, and the husband is only entitled to the rents and profits. The husband should be joined with the wife in an action to recover such estate.—Hopkins v. Noyes, 4 Mont. 550; 2 Pac. 280.

14. Rev. Stat., p. 588, § 806, providing for the recording by a married woman of a list of her separate property, in order to exempt the same from liability for her husband's debts, is substantially complied with if such list be recorded in the woman's maiden name, but contains notice of her approaching marriage and the name of her intended husband.—Palmer v. Murray, 6 Mont. 125; 9 Pac. 898.

15. Comp. Stat., p. 1044, § 1432, provides that the property of a married woman, whether acquired before or after marriage, shall be exempt from her husband's debts and liabilities, provided that the exemption shall "extend only to such property as shall be mentioned in a list of the property of such married woman on record in the office of the register of deeds of the county in which such married woman resides." *Held*, that a married woman who causes to be recorded in the proper office the deed to her separate property sufficiently complies with the act.—Montana Imp. Co. v. Colter, 7 Mont. 541; 19 Pac. 216.

16. After a list of a wife's property has been filed as required by law, to exempt it from liability for the husband's debts, the wife will not, as against her husband's mortgagee, be estopped from claiming it merely by allowing her husband to have possession and control of it, during which possession he executed the mortgage.—Palmer v. Murray, 8 Mont. 174; 19 Pac. 553.

17. Under the law exempting property of a married woman owned before or acquired during marriage from liability for her husband's debts, if a list is recorded in the county where she resides, such list, made on the day of the marriage, signed with the owner's maiden name, and containing a statement that she contemplated marriage with the man whom she actually married, is sufficient.—Id.

18. A description of the property in the list, as all the horses and colts on a certain ranch, being the same property described in a complaint filed in a designated action, is sufficient, as the law does not require a declaration, but only a list, of the property.—Id.

19. Comp. Stat., p. 1044, § 1432, which requires a married woman to place a list of her property on record in the office of the register of deeds, to enable her to hold it as exempt from her husband's debts, but which does not prescribe any particular form for the list, or provide for its recording in any particular way, is sufficiently complied with by filing in the office of the register of deeds a chattel mortgage executed by a married woman, and containing a list of the property covered thereby.—Kelley v. Jefferis, 13 Mont. 170; 32 Pac. 753.

20. Comp. Stat., p. 1045, § 1439, provides that a woman shall retain the same legal existence and legal personality after marriage as before, and shall receive the same protection of all her rights as a woman which her husband does as a man; and for any injury to her property she shall have the same right to appeal in her own name alone to the courts for redress that her husband has. *Held*, that this section so modifies § 1432 as to enable a married woman to hold her individual separate property, as against her husband's creditors, without having a list thereof on record, on showing the facts necessary to establish her individual title thereto.—Id.

21. Under Comp. Stat., p. 1045, § 1439, providing that women shall retain the same legal existence and legal personality after marriage as before, and shall receive the same protection of all her rights as a woman which her husband does as a man, and that for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to courts for redress as her husband has, a married woman may retain her separate property, as against her husband's creditors, without having first filed a list thereof as required by § 1432.—Lambrecht v. Patton, 15 Mont. 260; 38 Pac. 1063.

B. RIGHTS AND LIABILITIES OF HUSBAND, 22-23.

22. A married woman who has duly recorded her property can make her husband her agent and give him the control and possession of the same without affecting her rights or rendering the property liable for the debts of her husband.—Griswold v. Boley, 1 Mont. 545.

23. Certain persons entered into a written agreement for the conveyance of their interest in mining claims; and one who was employed as a trusted agent to assist the surveyor in matters precedent to securing title to the claims had notice of the contract rules, and agreed to post amended notices for the owners' benefit. *Held*, that such agent could not defeat the rights of such persons by posting notices in another's name; and the fact that the amended notices were posted in the name of the agent's wife was no defense to the fraud against his principals, as she could not claim that he acted as her agent and avail herself of his fraud.—Largey v. Bartlett, 18 Mont. 265; 44 Pac. 962.

C. RIGHTS OF HUSBAND'S CREDITORS, 24.

24. Where a married woman has filed a list of her separate property, as required by law, it is not liable to seizure on execution against her husband.—Vantilburgh v. Hamilton, 2 Mont. 413.

D. CONVEYANCES, 25.

25. Comp. Stat., p. 660, § 254, providing that a married woman may convey her real estate by conveyance executed and acknowledged by herself and her husband, is, insofar as it is repugnant thereto, repealed by § 1448, giving to married women the power to waive or relinquish any right or interest in real estate in the same manner and extent, and with like effect, as a married man may do; and a lease of property belonging to herself, given by a married woman, is not void by reason of the failure of the husband to join therein.—Kennelly v. Savage, 18 Mont. 119; 44 Pac. 400.

IV. ACTIONS, 26-30.

26. Husband and wife made a promissory note and executed a mortgage on the husband's real property to secure its payment. The wife did not receive any part of the consideration. In an action on the note and mortgage the only defense was a demurrer which was overruled, a personal judgment was rendered against them, and, after the sheriff's return on the sale, a deficiency judgment was also rendered against them. *Held*, that while the judgments were erroneous as to the wife, they were valid until reversed or annulled.—Vantilburg v. Black, 3 Mont. 459.

27. Under Rev. Stat., p. 42, § 7, a married woman may maintain an action in her own name for the conversion of her separate property.—Palmer v. Murray, 6 Mont. 125; 9 Pac. 898.

28. A married woman who has been deserted by her husband may sue and be sued as a femme sole.—Palmer v. McMasters, 6 Mont. 169; 9 Pac. 898.

29. Though a married woman has not complied with the statute in respect to married women becoming sole traders, nor filed a separate property list, she may sue for a recovery of the money due for board furnished by her and for offices rented by her husband, he having assigned the claim to her, and testified in support of her right to collect it and the money due for board, and there being no claim asserted by creditors of her husband.—Strayer v. Leonard, 13 Mont. 435; 34 Pac. 880.

30. In an action by a married woman for personal injuries she is entitled to recover damages for any impairment of her capacity, as a previously healthy woman, to earn money, when so injured as to cause great pain and suffering in and about the womb and back, the damages thereby resulting through impairment of her capacity to work need not be specially pleaded, but may be recovered under a general averment.—Hamilton v. Railroad Co., 17 Mont. 334; 42 Pac. 860. 43 Pac. 713.

V. COMMUNITY PROPERTY, 31.

31. A widow to whom the husband devised over one-half of his realty is not entitled to a further share thereof on the ground that it was community property, under Comp. Stat., p. 399, § 551, providing that on death of the husband one-half of the community property goes to the widow, and the other half is subject to disposition by will of the husband, or goes to his descendents.—Chadwick v. Tatem, 9 Mont. 354; 23 Pac. 729.

VI. SEPARATION AND SEPARATE MAINTENANCE, 32-37.

32. Comp. Stat., p. 920, §§ 1000, 1004, 1006, declaring that divorces may be decreed on certain grounds, and that when decreed alimony and maintenance may also be decreed, do not mean that the obligation of maintenance can be enforced only upon condition of a divorce first obtained, but merely declare that the obligation shall continue after that time; and the jurisdiction, therefore, which courts have, to enforce the obligation where the wife has been deserted and left destitute without cause, is not disturbed.—Edgerton v. Edgerton, 12 Mont. 122; 29 Pac. 966.

33. An agreement for separation, if in contemplation of and to facilitate a divorce, is void; but its being merely incidental to a divorce obtained without collusion does not vitiate it.—Stebbins v. Morris, 19 Mont. 115; 47 Pac. 642.

34. Intervention of a trustee is not necessary to the validity of an agreement for separation.—Id.

35. A provision in a separation agreement for division of the property is not void because the provisions for the division can not be fully executed at the time of the agreement.—Id.

36. While an agreement between husband and wife for immediate separation, immediately followed by separation, is not void at common law, the relations between them at the time it is entered into must be of such a character as to render the separation reasonably necessary for the health or happiness of one or the other; and that there was a moving cause for it in addition to the mere volition of the parties must be shown by the plaintiff in an action to enforce provisions therein for division of the property.—Id.

37. An agreement is not invalid because it provides for the custody of the children.—State v. Giroux, 19 Mont. 149; 47 Pac. 798.

INCEST.

1. An incestuous marriage is a marriage between persons related within certain degrees of consanguinity, within which marriage is forbidden by law.—Territory v. Corbett, 3 Mont. 51.

2. An incestuous cohabitation or sexual intercourse is a cohabitation or sexual intercourse between persons related within the degrees of consanguinity within which marriage is prohibited.—Id.

3. Under Cr. Pr. Act, § 146, a marriage between a woman and her half-brother is incestuous, as being between persons who are "nearer of kin than second cousins, computing by the rules of the civil law, whether by the half or whole blood."—Id.

INDEMNITY.

1. Plaintiff entered into an agreement with defendants to deposit a sum of money to indemnify them in respect of a bond for a like amount, on which they were to become sureties for a third party held to bail by an order of the probate court, to answer an indictment to be preferred against him in the district court "for obtaining money under false pretenses." Defendants entered into a bond for his appearance to answer to the indictment for obtaining money under false pretenses, or "any indictment which might be by the grand jury of the county preferred against him." The accused was indicted for grand larceny, and failed to appear, the bond was forfeited, and his bondsmen obtained and paid the indemnity deposited. *Held*, in an action to recover the amount of the indemnity from them, that the bond given by defendants was not the bond against which plaintiff had agreed to indemnify them, and that plaintiff was entitled to recover.—Barry v. Larabie, 7 Mont. 179; 14 Pac. 699.

2. Under Civ. Code, § 3586, the burden is on the indemnifying person in a suit on a contract of indemnity to rebut the presumption raised, and whether the evidence he presents for that purpose is sufficient is a question of fact, so that a peremptory instruction in his favor is error.—Butte v. Cook, 29 Mont. 88; 74 Pac. 67.

3. In a suit by a city against a sewer contractor to recover indemnity for liability for a defect in a street, the judgment roll in the case, in which the city's liability was determined, showed that plaintiff therein had located the excavation into which she fell. The record showed that the contractor had made an affidavit in that case that he was the contractor for putting in a sewer at that location during that year, and in this case he testified that he was the contractor constructing the sewer, and remembered the night of the accident to the plaintiff in the former case. *Held*, that it sufficiently appeared that the excavation which caused the original injury was made by the contractor.—Id.

4. Where a mine worked by lessees of a claim had its apex in an adjoining claim, the lessor was under no obligation to protect them against a suit of the adjoining owner for pos-

session of the mine, and his promise to do so is not binding, unless supported by some other consideration than the covenants of the lease.—McMillan v. Frank, 30 Mont. 61; 75 Pac. 685.

5. In an action against the lessor of a mining claim on an alleged agreement to indemnify the lessees for their expense in working a mine thereon in case an adjoining owner's claim to it should be compromised, or the mining claim sold, where the answer denied the allegations of the complaint, and alleged that the adjoining owner claimed the mine, and that the lessor had not asserted that it belonged to his claim, and had no information on that point, except from the lessees, it was proper to permit an amendment to the answer, at the close of the evidence offered by the lessees, alleging that any contract relating to the mine was on condition that it had its apex in the lessor's claim, and stating on information and belief that its apex was in the adjoining owner's claim.—Id.

6. In an action by the lessees of a mining claim on an alleged agreement to pay them $8,000 to indemnify them for expenses incurred in case the lessor should compromise an adjoining owner's suit for possession of a mine, or should sell the mining claim, the lessor's testimony that he sold the claim, together with other mining property, for $2,500, was admissible.—Id.

7. Where the lessees of a mining claim showed that a suit against the lessor for possession of a mine in the claim was ordered dismissed as settled, the lessor's testimony that he knew nothing about a compromise of the suit, and did not know it was dismissed as settled, was admissible.—Id.

8. In an action against the lessor of a mining claim on an alleged agreement to indemnify the lessees for expenses in working a mine thereon in case an adjoining owner's suit for possession of the mine should be compromised, or the claim sold, where the witnesses for the lessees, in the examination in chief, purported to give the entire conversation on which their claim of a contract was based, testimony in rebuttal as to whether the promises to indemnify the lessees were made dependant on finding that the apex of the mine was in the lessor's claim, was properly excluded.—Id.

INDIANS.

I. Status and Disabilities of Indians, 1-7.
II. Indian Lands, 8.
III. Jurisdiction and Government of Indian Country and Reservations, 9-16.

I. STATUS AND DISABILITY OF INDIANS, 1-7.

1. The treaty between the United States and the Blackfeet Indians provides that the Indians shall send their young children to school and that the agent shall see that this stipulation is carried into effect, but no penalty is provided for its violation, and the United States is given no authority over the children, and can not reclaim them by writ of habeas corpus from a person who has taken them from the agency, possibly with the consent of the parents.—United States v. Imoda, 4 Mont. 38; 1 Pac. 721.

2. The United States recognizes the authority of the Indian tribes to make contracts and treaties, and asserts no authority over them except with their consent.—Id.

3. The fact that a man is permitted by the United States authorities to reside on an Indian reservation with his Indian wife does not raise a presumption that the government intended that he should acquire the status of a tribal Indian.—Stiff v. McLaughlin, 19 Mont. 300; 48 Pac. 232.

4. One not an Indian acquires no tribal relation by marriage with an Indian woman and residence on a reservation.—Id.

5. The provision of art. 2 of the treaty of 1855 with the Flathead Indians, that there might be placed on their reservation "other friendly bands of Indians of the territory of Washington," who might agree to be consolidated with the Flathead nation, does not authorize the adoption into the tribe of a quarter-blood Chippeway, who is married to a Flathead woman.—Id.

6. State courts have jurisdiction of crimes committed against whites, outside of an Indian reservation, by Indians maintaining tribal relations on a reservation within the state, in charge of the federal government.—State v. Spotted Hawk, 22 Mont. 33; 55 Pac. 1026.

7. Since a district court has general jurisdiction of all felonies committed within the limits of the county where it sits, an indictment against an Indian for murdering a white man in a certain county need not show that the crime was not committed within the limits of any Indian reservation.—Id.

II. INDIAN LANDS, 8.

8. The Organic Act creating the Territory of Montana gave permission to people to come to the territory and bring the necessaries and comforts of life, and thereby repealed that part of the law of the United States which gives agents of the Indian department the power to expel persons from the Indian country, and prevent citizens from bringing within the territory the necessaries of life; but such law is not repealed with reference to those portions of the territory which are still Indian country in the fullest acceptance of the term.—United States v. 196 Buffalo Robes, 1 Mont. 486.

III. JURISDICTION AND GOVERNMENT OF INDIAN COUNTRY AND RESERVATIONS, 9-16.

9. Under the treaty of 1855 (11 Stat. 657), between the United States and the Blackfoot tribe of Indians, that portion of Montana in which Camp Crook is situated is Indian country.—United States v. 196 Buffalo Robes, 1 Mont. 489.

10. A license to trade with Indians is of no validity without the approval of the Indian commissioner.—Id.

11. A license to trade with the Indians gives a personal privilege to those named therein, which can not be transferred to others.—Id.

12. Citizens of the United States, or those who have declared their intention to become such, have the right to carry spirituous liquors through the Indian country for the purpose of lawfully selling the same in other places.—United States v. Carr, 2 Mont. 234.

13. Comp. Stat., p. 544, § 160, which provides that "if any person shall, directly or indirectly, sell intoxicating liquor, whether fermented, vinous of spirituous * * * to any Indian of half breed Indian," he shall be guilty of a felony, etc., does not conflict with U. S. R. S., § 2139, providing that "every person (except an Indian in the Indian country) who sells * * * any spirituous liquors or wine to any Indian under the charge of any Indian agent, shall be punished," etc., nor with subd. 3, § 8, art. 1, of the Federal

Constitution, which provides that congress shall have power to regulate commerce with the Indian tribes, but is merely an exercise of police power, and is constitutional.—Territory v. Guyott, 9 Mont. 46; 22 Pac. 134.

14. Proof under an indictment for selling whiskey "to a certain Indian," that the Indian belonged to the tribe living on the Flathead reservation in charge of an agent, brings the case within the purview of Comp. Stat., p. 544, § 160, and U. S. R. S., § 2139.—Id.

15. Entry on Indian lands by an officer to levy an execution issued by a state court on property of one not an Indian, but residing on the Indian lands by consent of the tribe, is not interdicted by the provision of the Enabling Act that all Indian lands in the state "shall remain under the absolute jurisdiction and control of the congress of the United States."—Stiff v. McLaughlin, 19 Mont. 300; 48 Pac. 232.

16. State courts have jurisdiction of crimes committed against whites outside of an Indian reservation by Indians maintaining tribal relations on a reservation within the state, in charge of the federal government.—State v. Little Whirlwind, 22 Mont. 425; 56 Pac. 820.

INDICTMENT AND INFORMATION.

I. Necessity of Indictment or Presentment, 1-4.
II. Finding and Filing of Indictment or Presentment, 5-8.
III. Formal Requisites of Indictment, 9-10.
IV. Finding and Formal Requisites of Information or Complaint, 11-24.
V. Requisites and Sufficiency of Accusation, 25-39.
VI. Joinder of Parties, Offenses, and Counts, Duplicity, and Election, 40-45.
VII. Motion to Quash or Dismiss, and Demurrer, 46-49.
VIII. Amendment, 50.
IX. Issues, Proof, and Variance, 51-52.
X. Conviction of Offense Included in Charge, 53-53a.
XI. Waiver of Defects and Objections, and Aider by Verdict, 54-58.

I. NECESSITY OF INDICTMENT OR PRESENTMENT, 1-4.

1. A commercial traveller offering to sell goods by sample without a license, as required by the act of July 22, 1879, does not commit a felony or otherwise infamous crime, but merely a misdemeanor. Such misdemeanor does not come within U. S. Const., amend. 5, and need not be prosecuted by presentment or indictment by a grand jury. (See 129 U. S. 104.)—Territory v. Farnsworth, 5 Mont. 303; 5 Pac. 869.

2. Const. art. 3, § 8, providing that all criminal actions in the district court, except those on appeal, may be prosecuted by information, etc., can not become operative until the enactment by the legislature of laws defining the details which affect the exercise of the jurisdiction and limitations of the procedure, and the rights and pleadings of the state and the accused, so that the courts may be enabled to carry the provisions into effect.—State v. Ah Jim, 9 Mont. 167; 23 Pac. 76.

3. Procedure by information having been unknown in the criminal practice of the territory, and the Constitution having provided that "all criminal actions shall be procured by information after examination and commitment by a magistrate, or after leave granted by the court, or by indictment," the provision for proceeding by information is not self- executing, and, in the absence of a statute authorizing it, a conviction for a felony on a prosecution by information is void, and the accused will be discharged on habeas corpus.—In re Durbon, 10 Mont. 147; 25 Pac. 442.

4. Org. Act, art. 5, provided that "no person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury." Const., art. 3, § 8, provides that "all criminal actions in the district court * * * shall be prosecuted by information after examination and commitment." *Held*, that one charged with grand larceny, committed before the state constitution took effect, could not be convicted under an information.—State v. Kingsley, 10 Mont. 537; 26 Pac. 1066.

II. FINDNG AND FILING OF INDICTMENT OR PRESENTATION, 5-8.

5. Under Rev. Stat., p. 308, §§ 150-152, providing that no indictment can be found except on the concurrence of at least 12 members of the grand jury, and requiring a bill so found to be endorsed by the foreman, "A true bill," such endorsement is merely prima facie evidence of such concurrence, and the accused, on motion to vacate the indictment, has the right to ask the individual members of the grand jury as to whether or not 12 of their number had voted for the finding of the indictment.—Territory v. Hart, 7 Mont. 42; 14 Pac. 768.

6. It is not error for the court to direct that members of the grand jury be interrogated as to whether or not 12 of their number concurred in finding an indictment which the accused has moved to vacate because 12 did not concur in finding it, after the accused has given an opportunity to interrogate them, and declined.—Territory v. Hart, 7 Mont. 489; 17 Pac. 718.

7. When grand jurors are brought into court to testify as to whether 12 of their number, as required by statute, concurred in finding an indictment, they do not come in their official character, but as individuals, and it is no objection that some are absent.—Id.

8. Comp. Stat., p. 431, § 145, directs that, in the investigation of any charge for the purpose of finding an indictment, the grand jury shall receive none but legal evidence. *Held*, that it was not the intention of the legislature that an indictment should be set aside on the ground that the grand jury had received illegal evidence, as that is not one of the grounds enumerated in § 206, and it is proper to refuse to allow a question to a grand juror, on motion to set aside an indictment, as to whether he knows what legal evidence is.—Territory v. Pendry, 9 Mont. 67; 22 Pac. 760.

III. FORMAL REQUISITES OF INDICTMENT, 9-10.

9. A caption describing the indictment as found in "the United States district court of the territory of Montana for the second judicial district," is irregular, for that is not the proper title of any court; but the error does not vitiate the indictment when the record shows that the court in which the indictment was found had jurisdiction of the offense.—United States v. Upham, 2 Mont. 170.

10. An indictment against two persons, upon

which is endorsed the name of only one, is not bad under Comp. Stat., p. 432, § 150, requiring certain endorsements on the indictment, but not providing that the title of the case shall be endorsed in full.—State v. Marion, 14 Mont. 458; 36 Pac. 1044.

IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT, 11-24.

11. Comp. Stat., p. 442, § 206, provides that an indictment may be set aside "when * * * not presented as prescribed by this act." Sec. 208 provides that if a motion to set aside an indictment "is not made before the defendant demurs or pleads, the grounds of objection to the indictment which might be made in such manner shall be deemed waived." Laws 1891, p. 250, § 4, provides that the law regulating prosecutions by indictment shall apply "in the same manner, and to the same extent and effect, to proceedings by information." *Held*, that it was not error to deny a motion in arrest of judgment on the gronud that the information on which defendant was tried was not filed at the proper time.—State v. Smith, 12 Mont. 378; 30 Pac. 679.

12. Under Laws 1891, pp. 248, 249, providing that "when the defendant has been examined or committed, or admitted to bail, as provided by law, or upon leave of court, the county attorney must, within 30 days after delivery of the complaint * * * to the proper district court, or after such leave, file in such court an information," and that all criminal actions, except those on appeal, shall be prosecuted by information, after examination and commitment by a magistrate, or after leave granted by the court, the information can be filed, at any time within 30 days after the granting of leave therefor, independently of the time when the examination took place.—Id.

13. Const., art. 3, § 7, declares that no warrant to seize any person shall issue without probable cause, supported by oath or affirmation, reduced to writing. Art. 8, § 11, authorizes the filing of an information for certain offenses. Pen. Code, § 1372, provides that an information is an accusation in writing similar to an indictment charging a public offense, presented and signed by the county attorney, and filed by the clerk of the court. There is no requirement under the statute for a verification of an information. *Held*, that the verification of an information is not essential to the jurisdiction of the court, and may be waived.—State v. Brantly, 20 Mont. 173; 50 Pac. 410.

14. An order granting leave to file an information need not be in writing or entered at the time of its making.—State v. Bowser, 21 Mont. 133; 53 Pac. 179.

15. Const., art. 3, § 8, as supplemented by Pen. Code, § 1382, providing that prosecutions in the district court must be by information filed after examination and commitment by a magistrate, or on leave of court, and § 1910, providing that the information shall be set aside if filed otherwise, prescribes two methods of procedure, either one of which may be followed, independently of the other.—Id.

16. An information filed with leave of court will not be set aside because prior thereto accused had been arrested before a magistrate, and thereafter the proceedings against him before the magistrate had been abandoned.—State v. Spotted Hawk, 22 Mont. 33; 55 Pac. 1026.

17. An information need not show on its face that it was filed with leave of court.—Id.

18. Under Const., art. 3, § 8, providing that prosecutions in the district court must be by information filed after the examination and commitment before a magistrate, or on leave of court, an information may be filed with leave of court, without a previous commitment of accused by a magistrate.—Id.

19. Pen. Code, § 1852, providing that no other facts need be alleged in an indictment against an accessory than are required in an indictment against a principal, does not violate Const., art. 3, § 16, guarantying to an accused the right to demand the nature and cause of the accusation.—State v. Geddes, 22 Mont. 68; 55 Pac. 919.

20. Under Const., art. 3, § 7, prohibiting the issuance of a warrant to seize any person without "probable cause," reduced to writing, and supported by oath or affirmation; and under Laws 1891, p. 249, § 3, requiring the county attorney to verify the information, a warrant may issue on an information filed by the county attorney by leave of court on a motion in writing not verified, and the information verified only on information and belief.—State v. Shafer, 26 Mont. 11; 66 Pac. 463.

21. An application for leave to file an information against accused, without a previous examination before a commiting magistrate need not set forth the facts, it being sufficient that reasons satisfactory to the district court were presented, without regard to the manner of the presentation.—State v. Martin, 29 Mont. 273; 74 Pac. 715.

22. Leave to file an information for murder, without a previous examination before a commiting magistrate, should not be granted as of course, but rests in the sound discretion of the district judge on a proper showing.—Id.

23. That the concluding phrase of the counts of an information, "against the peace and dignity of the state of Montana," etc., modifies only the last sentence preceding such words in each count, does not render the counts insufficient.—State v. Stickney, 29 Mont. 523; 75 Pac. 201.

24. Under Pen. Code, § 1830, providing that the rules by which the sufficiency of pleadings in criminal actions is to be determined are those prescribed by that Code, an information is sufficient where it conforms substantially to the form laid down in § 1833, and to the rules prescribed in § 1841, and there is no imperfection in matter or form thereof tending to the prejudice of a substantial right of the defendant on its merits. (§ 1842.)—Id.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION, 25-39.

25. An indictment against a party for taking illegal fees, as a justice of the peace, must allege that he was such officer.—Territory v. McElroy, 1 Mont. 86.

26. Under Crim. Pr. Act an indictment is sufficient which alleges, clearly, a crime and notifies the accused of the act which is complained of; and the highest degree of certainty is not required.—Territory v. Ashby, 2 Mont. 89.

27. An indictment contains a sufficient description of a public alley which alleges that there was, in Helena, an ancient highway, known as ——— alley, in a certain block, leading from thence to Rodney street, and that the accused erected a fence across said alley, near the west end of said Rodney street.—Id.

28. An indictment which alleges that a party obstructed a public alley by the erection of a fence upon a certain date, and continued to maintain the same thereafter, thereby charging a continuance of the offense beyond the life of the statute under which the indictment was brought, is not invalidated by such statement of a continuance.—Id.

29. An indictment for a statutory offense which substantially states the offense is sufficient, even if the exact words of the statute are not used.—Territory v. Corbett, 3 Mont. 51.

30. Where the statute makes it a misdemeanor for persons to conspire "to cheat or defraud any person of any property by any means which, if executed, would amount to a cheat, * * * or to cheat or defraud any person of any property by any means which are themselves criminal," the indictment thereunder must state the means by which the conspiracy was to be accomplished, as otherwise the defendant would not know of which of the offenses named in the statute he was accused.—Territory v. Carland, 6 Mont. 14; 9 Pac. 578.

31. An indictment for rape, charging that the offense was committed "on or about" a certain day, sufficiently alleges the time, under Comp. Stat., p. 435, § 166, providing that "the precise time of the commission of an offense need not be stated in the indictment, but it is sufficient if it is shown to have been before the finding of the indictment, and within the statute of limitations, except where time is an indispensable ingredient of the offense.—State v. Thompson, 10 Mont. 549; 27 Pac. 349.

32. An information charging murder, which describes the act done, and the killing, and alleges that such acts were done feloniously, unlawfully, premeditately, and with malice aforethought, is not vitiated because the conclusion simply states that defendant committed murder, and did not state the acts which he did or that he committed them with malice aforethought, since Comp. Stat., p. 436, § 171, provides that no indictment shall be quashed for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged, or for any defect which does not tend to prejudice the substantial rights of defendant on the merits.—State v. Northrup, 13 Mont. 522; 35 Pac. 228.

33. Allegations in an indictment in the participial form, such as "he being an officer," are sufficient as to matters not constituting the main charge.—State v. Bloor, 20 Mont. 574; 52 Pac. 611.

34. An indictment under Pen. Code, § 230, for secreting a public record, alleged that defendant, being an officer and having in his custody a certain public record, and which said record came into and was in his hands, and was by him feloniously secreted. Defendant contended that the charging part was an unfinished sentence, and that the allegation respecting the secretion was merely descriptive of the record. *Held*, that the offense was charged with "such a degree of certainty" that judgment might be pronounced according to the right of the case, as required by § 1841.—Id.

35. An information for forging a certificate of deposit for the payment of "sixty ..... 100 dollars" need not allege that it was a certificate for $60, where the figures "$60.00" appear on a corner of the certificate.—State v. Patch, 21 Mont. 534; 55 Pac. 108.

36. An information charging the commission of an offense in a county in which there is a United States military reservation need not show that the crime was not committed on such reservation, because, if the court be without jurisdiction, the question may be raised at the trial.—State v. Spotted Hawk, 22 Mont. 33; 55 Pac. 1026.

37. Averments concluding an information for murder, "and so the said (defendant) did kill and murder the said (deceased)," are merely conclusions of the pleader, and do not cure or aid a defective allegation of the cause of death.—State v. Keerl, 29 Mont. 508; 75 Pac. 362.

38. Where an information was against one as George Howard, alias James Howard, alias Joe Kirby, a contention that the information did not conform to the requirements of Pen. Code, § 1832, 1834, was without merit; the information having charged his prior conviction, and the different names being for the purpose of identifying him as the person previously convicted.—State v. Howard, 30 Mont. 518; 77 Pac. 50.

39. An information stating generally that a crime was committed in M county, but containing no other allegation as to venue, is sufficient, under Pen. Code, § 1833, 1841, and Const., art. 3, § 16; it not being necessary that it should allege that the crime was not committed on the M military reservation, which is situated within that county.—State v. Tully, 31 Mont. 365; 78 Pac. 760.

VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION, 40-45.

40. Under Cod. Stat., p. 218, § 188, providing that an indictment must charge but one offense, an indictment charging burglary and larceny is bad.—Territory v. Fox, 3 Mont. 440.

41. Under the statute declaring that forgery may be committed by falsely uttering and publishing, as well as by falsely making and forging, an indictment charging the crime in separate counts—the first by falsely making and forging; the second by falsely uttering and publishing—is bad for duplicity, when there is nothing in the second count to show that the instrument there set out is the same as the one declared on in the first count.—Territory v. Poulier, 8 Mont. 146; 19 Pac. 394.

42. Under Comp. Stat., p. 437, § 176, providing that "any person who counsels, aids or abets in the commission of any offense may be charged, tried and convicted in the same manner as if he were a principal," one person may be charged with murder, and another with being an aider and abettor, in the same indictment.—State v. King, 9 Mont. 445; 24 Pac. 265.

43. An indictment under Comp. Stat., p. 578, § 261, prohibiting the sale of liquors in any place where women are employed or allowed to assemble for the purpose of business therein carried on, which charges the sale of liquor where women are both employed and allowed to assemble, is not void as charging two offenses.—State v. Marion, 14 Mont. 458; 36 Pac. 1044.

44. Three persons placed at the same time individual sums, less than $50, on the table of an agent, who by one act collected them, placed them in his pocket, and afterwards appropriated them to his own use. *Held* to constitute a single offense of grand larceny, so that an information, under Pen. Code, § 880, et seq., charging that he, as the agent of such three persons, had money in his possesion in the aggregate of the sums belonging to each, the specific ownership being alleged, and appropriated it to his own use, was not bad for duplicity.—State v. Mjelde, 29 Mont. 490; 75 Pac. 87.

45. An information on a prosecution for robbery which charged that the property was taken by means of force and putting in fear, and that it was taken from the person and possession and from the immediate presence of a specified person, did not charge more than one offense.—State v. Howard, 30 Mont. 518; 77 Pac. 50.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER, 46-49.

46. Where from any cause accused is de-

prived of the right of challenge to the grand jury, without its being waived expressly or by implication, it is good cause for setting aside an indictment.—Territory v. Ingersoll, 3 Mont. 454.

47. Since Comp. Stat., p. 442, § 206, provides that an indictment shall be set aside, upon defendant's motion, when not presented as prescribed by the act, the fact that the information was filed before defendant was examined and commited should be taken advantage of by motion to quash.—State v. McCaffery, 16 Mont. 33; 40 Pac. 63.

48. Under Comp. Stat., p. 442, § 208, providing that, if the motion to set aside the indictment is not made before the defendant demurs or pleads, the grounds of objection which might have been made in such matter are waived, where a defendant, upon the second trial of a case, did not ask to withdraw a plea of not guilty interposed at the first trial, his right to move to quash the indictment was lost.—Id.

49. A district court has power to dismiss an information filed by the county attorney against a member of the board of county commissioners, charging him with extortion, where it is brought to the knowledge of the court that the grand jury, on investigation of the acts of the commissioners, found that defendant had been illegally paid certain sums, but presented no indictment.—State v. Cain, 16 Mont. 561; 41 Pac. 709.

VIII. AMENDMENT, 50.

50. Leave to amend an information at the conclusion of the evidence for the state, by changing the name of the person from whose possession the money was taken, was properly allowed under Pen. Code, § 1859.—State v. Oliver, 20 Mont. 318; 50 Pac. 1018.

IX. ISSUES, PROOF, AND VARIANCE, 51-52.

51. Where the name of the prosecutrix in a rape case was so differently pronounced by the witnesses that the judge could not determine whether the name was idem sonans with that alleged in the indictment, the question was properly submitted to the jury.—State v. Thompson, 10 Mont. 549; 27 Pac. 349.

52. Under Pen. Code, § 1852, an indictment for murder, charging defendant as principal, is sustained by proof that he was guilty of advising and encouraging the crime.—State v. Geddes, 22 Mont. 68; 55 Pac. 919.

X. CONVICTION OF OFFENSE INCLUDED IN CHARGE, 53-53a.

53. An indictment bad for the main offense charged will not be good to support the charge or conviction for a lessor offense which might be necessarily included.—Territory v. Dooley, 4 Mont. 295; 1 Pac. 747.

53a. Under an indictment charging an assault with intent to commit murder, a defendant can not be convicted of a simple assault and battery.—Id.

XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AIDER BY VERDICT, 54-58.

54. The right to object to the verification of an indictment is waived by pleading to the merits.—State v. McCaffery, 16 Mont. 33; 40 Pac. 63.

55. An objection that the petition for leave to file an information for homicide stated the wrong Christian name of deceased is waived when not raised in the trial court.—State v. Little Whirlwind, 22 Mont. 425; 56 Pac. 820.

56. Defects in the information are waived if the objections are not urged at the proper time.—State v. Shadwell, 22 Mont. 559; 57 Pac. 281.

57. Pen. Code, § 450, defines "rape" as sexual intercourse with a female under 16, or with one whose resistance is overcome by force. Sec. 1922 makes charging more than one offense in an indictment a ground of demurrer; and §§ 1930, 2200, 2320, provide that a failure to demur shall waive demurrable defects appearing on the face of the indictment. Defendant was charged with criminally knowing a female of the age of 15, violently and against her will. *Held*, that the objection that the indictment charged two offenses was waived by a failure to demur.—State v. Mahoney, 24 Mont. 281; 61 Pac. 647.

58. Pen. Code, § 1730, provides that, when a defendant has been examined and committed, the county attorney must, within 30 days after the delivery of the complaint, warrant, and testimony to the district court, file an information charging defendant with the offense for which he is held to answer, and that, in case the county attorney fails to file the information within the time required, he may be prosecuted for contempt. *Held*, that where the county attorney fails to comply with the statute, any advantage thereof must be taken by defendant by motion to set aside the information, which must be done before demurrer or plea, and failure to so take advantage of the irregularity waives it.—State v. Lagoni, 30 Mont. 472; 76 Pac. 1044.

INFANTS.

1. Where a minor sold land, and on arriving at majority brought ejectment to recover it, and defendant has made some improvements on the land during plaintiff's minority, and there has been no fraud or concealment on the part of plaintiff, the former can not recover from plaintiff therefor, but must look to the father.—Clark v. Tate, 7 Mont. 171; 14 Pac. 761.

2. In an action of ejectment, brought in respect of land which plaintiff had contracted, when a minor, to deed to defendant, no notice of disaffirmance is required to be given before commencing the action.—Id.

3. In an action of ejectment, defendant answered that he had purchased the land from plaintiff while the latter was a minor, and had paid him the price agreed upon, and had taken a written obligation from him to make a deed when he came of age, and had also taken a written obligation from plaintiff's father, for a valuable consideration, binding him to have a deed made by his son when the latter came of age. No other consideration passed on either agreement than the price paid for the lot. *Held*, that under these peculiar facts, plaintiff was not obliged, in order to maintain the action, to allege a return of the consideration, or inability to return it.—Id.

4. The emancipation of a minor by his parents does not render him capable of suing without a guardian.—Hoskins v. White, 13 Mont. 70; 32 Pac. 163.

5. Comp. Stat., p. 61, § 9, provides that "when an infant is a party, he shall appear by guardian, who may be appointed by the court in which the action is prosecuted," etc. Sec. 116 provides for amending pleadings by inserting the name of a party. *Held*, where the com-

plaint showed plaintiff to be a minor, that it is not subject to demurrer because of plaintiff's want of capacity to sue, but a guardian should be appointed, and his name inserted.—Id.

6. Comp. Stat., p. 363, § 358, provides that, before the appointment of a guardian for a minor takes effect, the person appointed shall give bond with sufficient sureties. Sec. 351 authorizes parents to select guardians for their children, but § 362 requires persons so selected to qualify the same as other guardians. *Held*, that where a father assumed to act as guardian for his minor child without having qualified, and appeared for him in an action concerning property devised to the minor by his mother, the minor, though legally served, was not bound by the proceedings.—Power v. Lenoir, 22 Mont. 169; 56 Pac. 106.

7. Where a father appeared as guardian for his minor child before having qualified as his guardian, and defended an action against him with reference to his property, a nunc pro tunc order appointing him guardian ad litem before judgment rendered against him was unauthorized, and the minor was not bound by the judgment so rendered.—Id.

INJUNCTION.

I. Nature and Grounds in General, 1-5.
II. Subjects of Protection and Relief, 6-17.
III. Actions for Injunction, 18-26.
IV. Preliminary and Interlocutory Injunctions, 27-56.
A. Grounds and proceedings to procure, 27-45.
B. Continuing, modifying, vacating, or dissolving, 46-56.
V. Violation and Punishment, 57-64.
VI. Liabilities on Bonds and Undertakings, 68-85.

I. NATURE AND GROUNDS IN GENERAL, 1-5.

1. Injunction will not lie when there is an adequate remedy by an action for damages.—Atchison v. Peterson, 1 Mont. 561.

2. Courts require a very strong case for the granting of an injunction which will cause more injury than it will remedy.—Id.

3. It was an abuse of discretion to grant a temporary injunction in a mining suit, where defendant was working veins within its own ground, and there was a mere chance that their apices were within plaintiff's ground.—M. O. P. Co. v. Mining Co., 22 Mont. 159; 56 Pac. 120.

4. Where a county clerk was about to print an unauthorized ticket on an official ballot, the proper remedy to restrain such officer from exceeding his authority was by injunction, and not by mandamus, since a ministerial officer could not be restrained from such excess by mandamus.—State v. Moran, 24 Mont. 433; 63 Pac. 390.

5. An owner of a mining claim secured a decree adjudging to it extralateral rights, and enjoining trespasses thereon by an adjoining owner. Afterwards, with a co-plaintiff, it sued the same defendant to quiet title to, and enjoin trespasses on, lodes alleged to fall within the purview of the former decree, and on this allegation of res judicata plaintiffs secured a temporary injunction. *Held*, error, plaintiffs' remedy being to enforce the original decree.—M. O. P. Co. v. Mining Co., 27 Mont. 410; 71 Pac. 403.

II. SUBJECTS OF PROTECTION AND RELIEF, 6-17.

6. Where one railroad company has built its road bed, and obtained its right of way through a canyon, the court will grant an injunction in its favor, restraining another railroad company, authorized to build to the same point, from going upon or interfering with the track or right of way of the company first in possession, until an adjustment can be made, under Rev. Stat., p. 469, § 309, authorizing railroad crossings.—Montana Central v. Railroad Co., 6 Mont. 417; 12 Pac. 916.

7. Defendant commenced the erection of a fence on plaintiff's land, the effect of which would be to close the windows of her house, excluding both light and air. *Held*, that equity would enjoin the threatened trespass, on the ground that the damage caused thereby would be irreparable.—Sanky v. St. Marys, 8 Mont. 265; 21 Pac. 23.

8. An injunction will not issue to restrain a purchaser from removing trees from a limestone mining claim, upon the owner's averment that he intended to work it, and that the trees are necessary for fuel, and that fuel is very scarce and difficult to obtain by reason of remoteness from the railroad, when the trespasser is solvent and able to respond in damages; since such removal will not destroy or materially alter the character of the premises, but will only increase the cost of fuel.—Heaney v. Copper Co., 10 Mont. 590; 27 Pac. 379.

9. Plaintiff, having made a valid contract with a city to curb and pave a street, and being liable for penalties for its nonperformance, is entitled to an injunction against trespassers who prevent him from doing the work, as he has no adequate remedy at law, and the injunction will avoid a multiplicity of suits.—Palmer v. Israel, 13 Mont. 209; 33 Pac. 134.

10. An injunction will lie to enjoin a water company from breaking its contract to supply water to a brewery, where turning off the water would stop the brewing, destroy a large quantity of malt, and injure the brewer's trade.—Horsky v. Water Co., 13 Mont. 229; 3 Pac. 689.

11. Where defendant has been guilty of repeated trespasses on plaintiff's land, in spite of warnings from the latter, and has protracted a hopeless litigation for the land, and has interfered with plaintiff's attempt to cultivate the land, an injunction will issue to restrain further trespass; it appearing that defendant is insolvent, that he has threatened to remove plaintiff's crop, and that, unless he is restrained, plaintiff will suffer irreparable injury.—Lee v. Watson, 15 Mont. 228; 38 Pac. 1077.

12. Before final decision on appeal from a decree finding plaintiff was not the owner of alleged interests in mining property, he could not obtain an injunction pendente lite against the original defendants' successor in interest in a subsequent action, wherein his claim of title was identical with that of the original suit.—Wetstein v. Mining Co., 25 Mont. 85; 63 Pac. 799.

13. Where, on an appeal involving title to a mine, it appeared that appellant had no means of ascertaining with certainty from day to day the value of the ores taken out by appellee, who was in exclusive possession; that whatever redress he might obtain would depend upon the testimony of witnesses and the integrity of accounts kept exclusively by appellee; and that the appeal could not be heard in its proper order for at least two years,—an injunction would be granted in aid of the appeal restraining the operation of the mine, and requiring it to be preserved in statu quo pending the appeal.—Finlen

v. Heinze, 27 Mont. 107; 69 Pac. 829; 70 Pac. 517.

14. The sinking of a mining shaft by trespassers upon a 40-acre tract of ground used for manufacturing brick, and the throwing of the debris therefrom upon the surface of the ground is not such an irreparable injury, nor waste of the estate, as to authorize injunction. King v. Mullins, 27 Mont. 364; 71 Pac. 155.

15. The fact that a mining prospector, with his assistants, has entered upon another's property, held under application for a patent as a mining claim, and is sinking three shafts, the debris being deposited about their openings, and has carried away an assay sample, will not warrant an injunction to restrain the trespass; it not appearing that the prospector is insolvent, and his operations not tending to destroy or materially injure the substance of the estate.—Harley v. M. O. P. Co., 27 Mont. 388; 71 Pac. 407.

16. Where, in an action to determine the ownership of certain ore bodies lying east of a particular line, it was undisputed that plaintiffs were the owners of the surface of that portion of the claim lying east of the line and were, therefore, prima facie owners of all ore bodies within the planes of its boundaries, defendant was not entitled to an injunction pending appeal from a judgment in favor of plaintiffs to restrain them from working the veins on proof that the amount removed amounted to about 160 tons, valued at $16,000, which was controverted by plaintiffs' verified answer and affidavits, in which it appeared that only a small quantity of ore had been taken out, valued at $190, and the only work done was development and exploration work necessary for plaintiffs to prepare for trial of another case.—Maloney v. King, 27 Mont. 428; 71 Pac. 469.

17. Plaintiffs sued for damages because of trespass on an ore vein, for an injunction restraining defendants from operating the vein, and for the quieting of plaintiffs' title to the vein, the issue being whether the apex of the vein was within the boundaries of plaintiffs' or defendants' location. An injunction was granted, and subsequently defendants commenced various suits against plaintiffs for trespass, etc., on the vein, the question in all the actions being the location of the apex of the vein. *Held*, that plaintiffs were properly awarded in their original suit an injunction restraining defendants from bringing any action or interfering with the removal of ores from the vein until the final determination of plaintiffs' suit.—Maloney v. King, 30 Mont. 414; 76 Pac. 939.

III. ACTIONS FOR INJUNCTION, 18-26.

18. In an action for damages and for an injunction restraining defendants from diverting water the verdict was, "We, the jury, do find the plaintiff entitled to 150 inches of the water in Washington Gulch." *Held*, that such verdict was a finding upon a material issue in the case, and that the injunction prayed for should follow.—Harris v. Shontz, 1 Mont. 212.

19. In an action to enjoin county commissioners from issuing bonds sold to pay warrants issued for an illegal indebtedness, it is not necessary to join as parties defendant the persons to whom the warrants were issued, nor the purchasers of the bonds.—Hoffman v. Gallatin, 18 Mont. 224; 44 Pac. 973.

20. In an action to enjoin a public officer from performing an official act affecting the people generally, the applicant need not show any special interest in the result.—Buck v. Fitzgerald, 21 Mont. 482; 54 Pac. 942.

21. Where a complaint assailing the acts of persons acting as county commissioners alleged that they assumed to do acts complained of without legal or just claim to act, or attempted to act in that capacity, and that other persons were county commissioners, and had duly qualified, and assumed their duties, it alleges, in effect, that they are usurpers, and that their acts were the acts of persons neither de jure nor de facto commissioners.—Id.

22. A restraining order should not be granted on a complaint by a corporation verified only on information and belief, under Code Civ. Proc., § 731, 872.—Butte & B. C. M. Co. v. M. O. P. Co., 24 Mont. 125; 60 Pac. 1039.

23. Where, on the trial of an action to restrain defendants from destroying plaintiff's telegraph poles and wires, there is no allegation in the complaint that defendants were threatening to do any injury to plaintiff, or that it feared or believed there was an existing danger, or that defendants were insolvent, defendants' objection to any evidence, on the ground that the complaint fails to state any cause of action against them, should be sustained.—Haupt v. Telegraph Co., 25 Mont. 122; 63 Pac. 1033.

24. Where, in an action to restrain defendants from destroying plaintiff's telegraph poles and wires, the proposed amended complaint does not show that plaintiff has poles and wires of any material value, or sufficient for business, it is not an abuse of discretion for the court to refuse to permit such amended complaint to be filed, since such complaint does not show that plaintiff may be irreparably injured, and hence does not state a cause of action for injunction.—Id.

25. In 1884 complainant and L became the owners of an interest in a mining claim, the deed to the interest of both being taken in L's name. In 1884 the mine was supposed to be worth about $24,000. In 1887 defendants went into possession of the claim, and developed and improved it, until between June, 1901, and March, 1902, over $1,500,000 worth of ore was taken therefrom. In 1893 L refused to convey plaintiff's portion to him. *Held*, that a suit brought by plaintiff in 1902 to restrain defendant from operating the mine and for an accounting was barred by laches.—Mantle v. Mining Co., 27 Mont. 473; 71 Pac. 665.

26. Evidence sufficient to authorize a preliminary injunction or its refusal is not necessarily sufficient to maintain a like decision upon the final trial on the merits.—Colusa Parrot Co. v. Barnard, 28 Mont. 11; 72 Pac. 45.

IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS, 27-56.

A. GROUNDS AND PROCEEDINGS TO PROCURE, 27-45.

B. CONTINUING, MODIFYING, VACATING, OR DISSOLVING, 46-56.

A. GROUNDS AND PROCEEDINGS TO PROCURE, 27-45.

27. Under Civ. Pr. Act, §§ 223, 227 and 581, the district court has power to appoint a referee to take testimony and report the facts on the application of a party for a temporary injunction.—Fabian v. Collins, 2 Mont. 510.

28. Const., art. 8, § 12, does not of itself confer authority to grant an injunction in chambers on a judge who is holding court in a district other than his own.—Wallace v. Helena, 10 Mont. 24; 24 Pac. 626; 25 Pac. 278.

29. Where a district judge is holding court for another, as allowed by Const., art. 8, § 12, and adjourns the trial of a case from Saturday until Monday, when he proceeds with it,

he is not in the meantime a judge of the court in that district, within the meaning of Comp. Stat., p. 100, § 172, which provides that an injunction may be granted "by the court in which the action is brought or by the judge thereof," and hence he can not grant an injunction in chambers.—Id.

30. Const., art. 8, § 12, confers no authority on a judge holding court in a district other than his own to issue an order of injunction in chambers, and such order is therefore void.—Id.

31. The fact that sureties on an injunction bond failed to make affidavit that they were worth the sum specified in the bond, as provided by Comp. Stat., p. 202, § 540, does not render the bond void, in the absence of a request that the sureties be required to make such affidavit.—Lee v. Watson, 15 Mont. 228; 38 Pac. 1077.

32. The granting of a temporary injunction is not a matter of discretion, and is a reversible error, when it appears from the nature of the case and all the facts that the plaintiff is not entitled thereto.—Schilling v. Reagan, 19 Mont. 508; 48 Pac. 1109.

33. An injunction pendente lite to restrain majority stockholders of a corporation from ratifying an illegal transfer of the corporate property, made by the officers and directors, will not be refused because the corporation offers a bond; since a stockholder is entitled to restrain the illegal transfer of the corporate assets as of right.—Forrester v. Mining Co., 21 Mont. 544; 55 Pac. 229; 353.

34. It is not an abuse of discretion to deny an application for an injunction pendente lite, where it does not appear that the grievances complained of will work irreparable injury pending the litigation.—Boston & M. C. C. & S. M. Co. v. M. O. P. Co., 23 Mont. 557; 59 Pac. 919.

35. On a hearing to show cause why defendants should not be enjoined pendente lite from working a certain vein of ore, there was substantial evidence to show that the vein belonged to plaintiff's claim, though the statements of witnesses both as to matters of fact gained from actual observation of the workings of the claims and in matters of expert opinion based on these facts were in conflict. *Held*, that it was not an abuse of discretion to grant the injunction.—Parrot S. & C. Co. v. Heinze, 24 Mont. 485; 62 Pac. 818.

36. Where a temporary restraining order, pending the hearing of an order to show cause why an injunction should not issue, was against a mining company, and suspended the operation of valuable property, it was an abuse of discretion to stay the hearing on the order to show cause six weeks from the issuance of the temporary restraining order, as it was unreasonable to suspend the operation of the mine for so long a period—Wetstein v. Mining Co., 25 Mont. 135; 63 Pac. 1043.

37. Where, in an action to restrain defendants from removing ore from a certain vein, on a motion for injunction pendente lite, it is shown that in a prior action between the parties judgment is entered that defendants are owners of a vein of ore, the court may consider such judgment in determining such motion, though the time for appeal has not elapsed, and plaintiff intends to appeal therefrom.—Boston, etc. Mining Co. v. M. O. P. Co., 26 Mont. 146; 66 Pac. 752.

38. On the hearing of an order to show cause why an injunction pendente lite should not issue, for which application was made by complainant on the filing of his complaint, the proposed answer of defendant to another suit concerning the same mine, the complaint in which had been made a part of the present complaint, were properly rejected, where the verifications of the same were on information and belief, positive verifications being required.—Wetzstein v. Mining Co., 26 Mont. 193; 66 Pac. 943.

39. Where, on the hearing of an order to show cause why an injunction should not issue, restraining defendant from operating a certain mine pending a suit for an interest therein, it appeared that several suits between the same parties had been brought concerning this same mine, in one of which an appeal was pending, the affidavits of defendant's attorney, made on his knowledge as to the history of the litigation, were admissible, as tending to make clear the identification of the parties and the subject matter in the several suits.—Id.

40. On the hearing of an order to show cause why an injunction should not issue to restrain defendant from operating a certain mine pending a suit for an interest therein, it was error to reject, as irrelevant and immaterial, the pleadings, judgment and findings of a prior action which adjudicated the ultimate rights of the parties in the subject matter of the controversy.—Id.

41. On the hearing of an order to show cause why an injunction should not issue to restrain defendant from operating a certain mine pending a suit for an interest therein, the record of a prior action wherein it appeared that an injunction had been denied on the same facts and issues as were involved in the present suit was admissible as barring a second application for injunction on the same facts, where the court was doubtful of the good faith of the application, and of the merits, and of plaintiff's laches.—Id.

42. On the hearing of an order to show cause why an injunction should not issue to restrain defendant from operating a certain mine pending a suit begun in 1901 for an interest therein, the record of a prior action between the same parties in regard to the same mine, wherein it appeared that the deed alleged in the present suit to be fraudulent and to have been executed by mistake was in existence in 1885, and that ores had been removed from the mine for at least three years before this application was made, was improperly rejected; the same being material, together with other facts, on the question of plaintiff's laches in making the application.—Id.

43. It was error, under Code Civ. Proc., § 2179, on the hearing of an order to show cause why an injunction should not issue, to reject defendant's evidence and issue the injunction because defendant was in contempt for violating a restraining order.—Harley v. M. O. P. Co., 27 Mont. 388; 71 Pac. 407.

44. Where, in a suit for an injunction restraining the operation of an ore vein, the injunction was denied, complainants might not, after dismissing the suit, institute another on the same ground, and again apply for an injunction for the same purpose.—Mahoney v. King, 30 Mont. 414; 76 Pac. 939.

45. The granting of an injunction pendente lite is within the discretion of the trial court, and, in the absence of a clear abuse of it, this court will not interfere.—Heinze v. Mining Co., 30 Mont. 484; 77 Pac. 421.

B. CONTINUING, MODIFYING, VACATING, OR DISSOLVING, 46-56.

46. An order dissolving an injunction before the case has been finally determined, is only prima facie evidence that the injunction was improperly granted.—Stewart v. Miller, 1 Mont. 301.

47. Where a referee has been appointed to take testimony and report the facts in an

action for an injunction, a motion to dissolve a temporary restraining order, made before the referee's report, is irregular.—Fabian v. Collins, 2 Mont. 510.

48. Where, after the granting of a temporary restraining order, defendant is ordered to show cause before a referee appointed to take the testimony and report the facts, and the referee finds that the testimony supports the material allegations of the complaint, it is error for the court to dissolve the restraining order, since such report has the effect of a special verdict, and so long as it is not set aside the judge is bound to base his order thereon.—Id.

49. Plaintiff filed his complaint for an accounting and for a temporary injunction. One of defendants filed an answer denying all the allegations of the complaint, and alleged that plaintiff had no interest in the property involved. The other defendants demurred. Plaintiff filed no replication to the new matter set up in the answer. The motion to dissolve the temporary injunction was heard upon the complaint and answer, which were both verified. *Held*, that an order dissolving the temporary injunction was within the discretion of the court.—Cotter v. Cotter, 16 Mont. 63; 40 Pac. 63.

50. The continuance or dissolution of an injunction rests in the discretion of the court.—Klein v. Davis, 11 Mont. 155; 27 Pac. 511.

51. The admission or rejection of evidence on a hearing to dissolve a temporary injunction is not a discretionary matter, and hence, where competent evidence was excluded, this court must reverse an order dissolving a temporary injunction.—Bennett v. Congdon, 20 Mont. 208; 50 Pac. 556.

52. Code Civ. Proc., §§ 875, 877, 878, permitting a plaintiff to oppose an application to dissolve an injunction either by affidavits or oral testimony, do not require him to use only one of such kinds of evidence.—Butte & B. C. M. Co. v. M. O. P. Co., 21 Mont. 539; 55 Pac. 112.

53. It was improper, under Code Civ. Proc., §§ 2172, 2173, 2178, 2179, to refuse to allow relator to move to dissolve a temporary injunction, or to be heard in opposition to the motion to continue it, on the ground that he was in contempt for violating the injunction by posting notices on the property on which he was forbidden to go, when no contempt proceedings had been instituted against him, and no opportunity was given him to defend himself in the matter.—State v. Clancy, 24 Mont. 359; 61 Pac. 987.

54. An order granting an interlocutory injunction made on due notice and after full hearing is regular, though it may be erroneous; and hence is not subject to motion to modify on the same facts.—Butte C. M. Co. v. Frank, 24 Mont. 506; 62 Pac. 922.

55. An allowance to defendant, on the refusal of a motion for an injunction pendente lite, of "all costs," was erroneous, under Code Civ. Proc., §§ 880, 1851, 1853, 1861.—Colusa Parrot Co. v. Barnard, 28 Mont. 11; 72 Pac. 45.

56. Under Code Civ. Proc., § 878, providing that if an application to dissolve a temporary injunction be made on affidavits on defendant's part, but not otherwise, plaintiff may oppose the same by affidavits, plaintiff, on such application made on the complaint alone, has no right to file an affidavit in support of his pleading.—Campbell v. Flannery, 29 Mont. 246; 74 Pac. 439.

V. VIOLATION AND PUNISHMENT, 57-64.

57. Defendant, recognizing the owner's title to certain land, agreed to cut the hay for him, but soon thereafter purported to sell the grass to L, and agreed to cut it for him. Afterwards, when an injunction against interfering with the grass was served on him, defendant said the grass was his own, and he was going to have it. He accompanied L to consult "their lawyer," and on their return he advised the latter to cut the grass. *Held*, that defendant was guilty of contempt in procuring the violation of the injunction.—State v. District Court, 13 Mont. 347; 34 Pac. 39.

58. An insignificant technical violation of an injunction will not be punished as a contempt, where the violation was not with any intention to disobey the injunction.—Boston & M. C. C. & S. M. Co. v. M. O. P. Co., 24 Mont. 117; 60 Pac. 807.

59. Where defendant's foreman is instructed to run a drift in a westerly direction, and, through misunderstanding his orders, by mistake runs it in an easterly direction, on plaintiff's mining claim, and extracts ore therefrom, in violation of an injunction restraining defendant from mining and extracting ore from plaintiff's mines, defendant is in contempt of court.—Id.

60. Proceedings in contempt for violating an injunction will be dismissed, where plaintiff's affidavits charge argumentatively that defendant is guilty by stating that the acts complained of were not committed by plaintiff, nor by another named in the affidavits; leaving defendant's guilt to be established by inference.—Id.

61. The entry on another's mining claim for the mere purpose of posting notices of a discovery of quartz lodes, with the intention of locating them, is not a violation of a restraining order issued to prevent the continuation of a trespass consisting of the sinking of shafts, etc.—Harley v. M. O. P. Co., 27 Mont. 388; 71 Pac. 407.

62. Contempt proceedings for violation of an injunction restraining trespasses on mining property can not be resorted to for the purpose of determining the title to veins, the ownership of which was not determined in the injunction suit.—State v. District Court, 30 Mont. 96; 75 Pac. 956.

63. Plaintiff in an action for an injunction to restrain trespass on a mining claim alleged that another cause of action, which was stricken from the complaint, was for damages for trespasses on veins lying south of the vein with reference to which injunction was sought, and the court found all the issues for plaintiff. On a subsequent proceeding to punish defendants for violation of the injunction the evidence showed that the veins with reference to which the injunction was alleged to have been disobeyed, were the only ones south of the vein involved in the injunction suit. *Held*, that the title to these veins was not determined by the injunction suit.—Id.

64. In a proceeding to punish for contempt in violating an injunction restraining defendants from working mining properties decreed to be the property of plaintiff, much of the evidence to show that the properties on which defendants worked belonged to plaintiff was speculative, and based on projections made on conclusions of facts observed in workings remote from the points in controversy. *Held*, not sufficient to sustain a conviction.—Id.

VI. LIAILITIES ON BONDS AND UNDERTAKINGS, 65-85.

65. In an action upon an injunction bond appellants offered in evidence on the trial the record of proceedings had in the action in which the bond was given, for the purpose of showing that the action was dismissed and the in-

junction dissolved, and that the court upon such dismissal and dissolution permitted the complaint filed in a later suit between the same parties and involving the same subject matter, to stand as an affidavit for an injunction in the original action, and the summons to be regarded as notice to defendants of such application. The trial court committed error in excluding such evidence from the jury.—Stewart v. Miller, 1 Mont. 301.

66. Where an injunction bond is executed jointly it is necessary, for the complete determination of the rights of the parties, that all should be brought into court.—Id.

67. In a suit upon an injunction bond, if attorney's fees are paid for all the services rendered in the action, including those performed in procuring the dissolution of the injunction, the party claiming damages must prove the amount of such fees that was so paid for procuring the dissolution of the injunction. A jury can not apportion the fees paid in the action, and find the value of certain services without evidence of the same.—Campbell v. Metcalf, 1 Mont. 378.

68. In a suit on an undertaking given to procure a temporary injunction, the merits of which were never tried, no recovery could be had for attorney's fees expended in the main suit.—Allport v. Kelley, 2 Mont. 343.

69. In an action on an injunction bond an allegation of general damages only in the complaint will not authorize proof of any special damages, which must be alleged before they can be proven.—Parker v. Bond, 5 Mont. 1; 1 Pac. 209.

70. The undertaking for an injunction does not cover counsel fees paid for the trial of the main issue, but only such fees as are paid for procuring the dissolution of an injunction improperly issued.—Id.

71. In an action on an injunction bond plaintiff is entitled to recover, as an element of his damages, a reasonable attorney's fee paid by him in procuring the dissolution of such order and in resisting the application for a final injunction.—Miles v. Edwards, 6 Mont. 180; 9 Pac. 814.

72. In an action on an injunction bond to recover attorney's fee paid by plaintiff (defendant in the injunction suit) for services therein, it appeared that no other relief was asked in such suit than the injunction, and that the temporary injunction was dissolved on the trial, and not on a separate motion. Plaintiff testified that she employed the attorney "to dissolve the temporary injunction, and to resist the perpetual injunction." *Held*, that plaintiff need not show how much attorney's fee was paid to "dissolve the temporary injunction," and how much "to resist the permanent injunction," as the right to the injunction was the only cause of action.—Creek v. McManus, 13 Mont. 152; 32 Pac. 675.

73. On dissolution of an injunction, attorney's fees paid in the injunction suit by defendant therein are recoverable as damages in an action on the injunction bond.—Id.

74. Evidence that defendant in an injunction suit employed an attorney, who rendered the services which procured the injunction to be dissolved, shows that such defendant became liable for his reasonable fees.—Cook v. Greenough, 14 Mont. 352; 36 Pac. 357.

75. A verdict for expenses in procuring a dissolution of an injunction, in excess of what were actually proved, is improper, and should be remitted to the amount warranted by the evidence, or a new trial granted.—Id.

76. The city, as the real party in interest, may sue on the bond on the dissolution of an injunction restraining the treasurer from collecting a tax.—Helena v. Brule, 15 Mont. 429; 39 Pac. 456.

77. Evidence that damages claimed did not result from an injunction is admissible.—Creek v. McManus, 17 Mont. 445; 43 Pac. 497.

78. In a suit for damages on an injunction bond, plaintiff sought to recover, as one item of damages, fees paid to an attorney who resisted the injunction, and also tried the case on its merits. *Held*, that since the attorney was employed generally, fees could not be recovered as damages.—Id.

79. An injunction bond given in an action in a federal court may be sued on in a state court. (See 171 U. S. 650.)—Montana Mining Co. v. Milling Co., 19 Mont. 313; 48 Pac. 305.

80. All the joint obligees in an injunction bond must be made parties plaintiff or defendant to an action on the bond, though some of them sustained no damage by the injunction; the "interest" required to make a party necessary under the Civil Code being interest in the bond, not in the recovery.—Id.

81. An injunction bond to pay "to the said defendants" such damages as they may sustain by reason of the injunction, runs to the obligees jointly, though their damages are several.—Id.

82. In an action in a state court on an injunction bond given in a federal court, conditioned to pay damages "if the court should finally determine that plaintiff was not entitled thereto," the complaint alleged a final determination of the injunction suit by a judgment dismissing the cause. The answer alleged, by way of avoidance, that the suit was pending in the federal court, involving the title to the property in controversy, but it did not allege that plaintiffs or defendants were interested therein. It also alleged that a suit by plaintiffs in the state court to determine the right to the property was also pending, but it did not allege that defendants had any interest in said suit. *Held*, that the answer did not show that the action was prematurely brought.—Montana Mining Co. v. Mining Co., 23 Mont. 311; 58 Pac. 870.

83. An atorney's fee, expended in procuring a dissolution of a restraining order is contemplated by the bond given on the issuing of the injunction.—Montgomery v. Gilbert, 24 Mont. 121; 60 Pac. 1038.

84. The complaint on an injunction bond, conditioned for the payment of damages suffered by reason of the injuncion, if it be decided there was no right thereto, must allege a failure to pay.—Van Horn v. Holt, 30 Mont. 69; 75 Pac. 680.

85. A complaint on an injunction bond which fails to allege that the damages claimed have not been paid is insufficient.—Beebe v. Jackson, 32 Mont. 217; 79 Pac. 1051.

INSANE PERSONS.

1. Under Rev. Stat., p. 557, § 711, where, on a hearing upon the return to a writ of habeas corpus for the discharge of a person adjudged to be insane, it appears that the jury who examined the relator failed to certify under oath that the charge was correct, and that only two jurors, qualified to do so, signed the verdict, he must be discharged from custody.—Territory v. Sheriff, 6 Mont. 297; 12 Pac. 662.

2. Rev. Stat., p. 557, § 711, providing for the examination and confmitment and custody of persons charged and found insane, though imperfect in its protective requirements, is not unconstitutional; but in cases of such summary proceedings the law is mandatory, and every step provided must be strictly pursued.—Id.

3. An order adjudging a person insane and appointing a guardian is appealable, and the right is not affected by the pendency of a proceeding under Comp. Stat., p. 365, § 366, which provides that an insane person may apply to the court by petition "to have the fact of his restoration to capacity judicially determined".—In re Kane's Estate, 12 Mont. 197; 29 Pac. 424.

4. A person who is adjudged insane, and of whose person and estate a guardian has been appointed, is a "party aggrieved" by the order, and may appeal therefrom in his own name.—Id.

5. The fact that the venire for the jury in proceedings for the commitment of one as insane did not expressly direct that one of the jurors to be summoned should be a practicing physician, (Comp. Stat., p. 985, § 1215) is not ground for reversal of the commitment on certiorari, where a jury with the proper qualifications was in fact summoned.— State v District Court, 17 Mont. 411; 43 Pac. 385.

6. An order commiting a person as insane will not be disturbed on certiorari because the record fails to show that an order was made fixing the time and place for the examination (Comp. Stat., p. 985, § 1215), where the record shows that a jury and witnesses were summoned for a certain time, and that relator was brought before the jury and examined at that time as to the question of his sanity, especially where the judge, in his return, certifies that the order was made.—Id.

7. Where, in proceedings for the commitment of a person as insane, the jury, acting under oath, give their verdict declaring the person insane, it is equivalent to their certifying under oath that the charge of insanity is correct (Comp. Stat., p. 985, § 1215).—Id.

8. Under Code Civ. Proc., § 2810, et seq., providing for the allowance and payment of claims against the estate of an incompetent by his guardian, a guardian appointed for an incompetent, who was indebted to his attorney for fees at the time of such appointment, could not pay such attorney the fees claimed to be due out of the funds of the incompetent's estate until such claim has been allowed by the court.—State v. District Court, 30 Mont. 8; 75 Pac. 516.

9. Under Code Civ. Proc., § 399, an incompetent's guardian was absolutely entitled to have a different attorney substituted to represent him, for the firm which had represented the incompetent prior to the guardian's appointment, notwithstanding the fees due such substituted attorneys have not been paid.—Id.

10. That a party becomes insane while indebted to an attorney who was representing him at the time with respect to his property interests does not give such attorney the right per se to appear as attorney for the party's guardian, who by reason of such appointment, as provided by Civ. Code, § 3151, becomes responsible for the estate and the proper conduct of the incompetent's affairs.—Id.

11. The authority of a guardian of an incompetent over the person or estate of the ward is not extended by Code Civ. Proc., § 2972, to the time when he is "legally discharged" by an order of the court, but such guardianship is, under § 2973, terminated, ipso facto, by the judicial determination that the ward is of sound mind, and the adjudication of his restoration to capacity.—In re Scheuer's Estate, 31 Mont. 606; 79 Pac. 244.

INSOLVENCY.

1. The fact that the persons composing a firm had no property at the time of commencing business with which to buy an interest in the firm does not constitute them insolvents.—Teitig v. Boesman, 12 Mont. 404; 31 Pac. 371.

2. "Insolvency" has two meanings. In its proper sense, it signifies that conditon of a person whose entire assets are insufficient to pay his debts in full; in a restricted sense, however, the term is used to express the present inability of one to pay his current obligations as they mature, in the usual course of business. Stadler v. Bank, 22 Mont. 190; 56 Pac. 111.

INSURANCE.

I. Control and Regulation in General, 1-4.
II. The Contract in General, 5.
III. Premiums, 6.
IV. Cancellation of Policy, 7.
V. Avoidance of Policy, 8-9.
VI. Forfeiture, 10-11.
VII. Estoppel, Waiver, or Agreements Affecting Avoidance or Forfeiture, 12-15.
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IX. Notice and Proof of Loss, 17-19.
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XI. Payment and Subrogation, 22-23.
XII. Actions on Policies, 24-37.
XIII. Mutual Benefit Insurance, 38-41.

I. CONTROL AND REGULATION IN GENERAL, 1-4.

1. Act May 8, 1873, provides that "there shall be levied and collected a license tax for each and every insurance company agent or agencies, transacting business in this territory, the sum of $150 per year." *Held*, that the agent and not the company, is liable for the license, and that the amount of such license is not affected by the number of companies an agent may represent.—Taylor v. Ashby, 3 Mont. 248.

2. Civ. Code, § 1030, requires a foreign corporation to file a copy of its charter with the secretary of state; and § 1035 provides that the act shall be applicable to foreign lite insurance companies not conducted on the assessment plan. *Held*, that since such insurance companies are not regulated by any other statute, their mention operates as an exclusion of all other foreign corporations which are specially regulated by the other statutes.—State v. Rotwitt, 17 Mont. 41; 41 Pac. 1004.

3. The conditions precedent to the doing of business by foreign fire insurance companies being regulated by Civ. Code, § 650, et seq., providing, among other things, that they shall file a copy of their charter with the state auditor, such companies are not affected by Civ. Code, § 1030, relating to foreign corporations generally, and requiring them to file such charter with the secretary of state.—Id.

4. Foreign fire insurance companies need not file with the secretary of state and the county clerk the papers designated in Comp. Stat., p. 720, § 24, and in Laws 1893, p. 91, as a condition precedent to doing business in Montana.—Palatine Ins. Co. v. Crittenden, 18 Mont. 413; 45 Pac. 555.

II. THE CONTRACT IN GENERAL, 5.

5. Where different classes of property are insured for separate and distinct amounts, the contract of insurance is severable.—Wright v. Fire Ins. Co., 12 Mont. 474; 31 Pac. 87.

III. PREMIUMS.

6. The local agent and manager of a life insurance company has no power to agree that the premiums on a policy issued by him shall be credited on accounts due by him to the policy holder for offices rented for the company and rooms rented for himself.—Sullivan v. Germania, 15 Mont. 522; 39 Pac. 742.

IV. CANCELLATION OF POLICY, 7.

7. A notice to the holder of a policy, declaring the effect of the holder's failure to pay the premium, and directing "attention" merely to the cancellation conditions of the policy, is not such a notice of cancellation as is demanded by the policy.—Savage v. Insurance Co., 12 Mont. 458; 31 Pac. 66.

V. AVOIDANCE OF POLICY, 8-9.

8. A policy valid upon its face, and in the hands of the insured at the time of the loss, which is not null and void, but merely voidable at the option of the company because a subsequent policy from another insurer was taken without the consent of the first insurer, is to be treated as "other insurance," within the meaning of a clause in the latter policy, providing that the insurer's liability on the policy shall be only in proportion to the whole amount of insurance.—Saville v. Aetna, 8 Mont. 419; 20 Pac. 646.

9. Where the insured warranted that he was not in any way connected with the manufacture or sale of liquors, the word "connected" must be presumed to have been used in its popular sense, as provided by Civ. Code, § 2209, so that proof that insured occasionally waited on customers of a saloon keeper for his accommodation merely, and without consideration—insured having no financial or other interest in the saloon—did not establish a breach of warranty of a life policy.—Collins v. Insurance Co., 32 Mont. 329; 80 Pac. 609; 80 Pac. 1092.

VI. FORFEITURE, 10-11.

10. Where an insurance policy places specific amounts of insurance on separate kinds of property, and inserts a prohibition against mortgage as to one kind alone, a violation of that provision will not affect the validity of the policy as to the other kinds of property.—Wright v. Insurance Co., 12 Mont. 474; 31 Pac. 87.

11. Since a policy insuring "articles usually kept for sale in retail drug stores," covers gasoline, benzine and ether, the keeping of such articles in reasonable quantities on the insured premises is permitted, and will not void the policy, though the printed condition therein declares in effect that, unless otherwise provided by agreement endorsed thereon or added thereto, the policy shall be void if there be kept benzine, ether or gasoline, notwithstanding any custom or usage of trade may permit them to be kept.—Ackley v. Insurance Co., 25 Mont. 272; 64 Pac. 665.

VII. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING AVOIDANCE OF FORFEITURE, 12-15.

12. An insurance policy provided that the policy should be void if the property insured be or become mortgaged without the written consent of the company endorsed on the policy; but it appeared that the company issued the policy on mortgaged property without inquiring whether such property was incumbered, which policy was accepted, and the premium thereon paid, in ignorance of the provision making it void. *Held*, that the company, by its action, consented to take the risk under mortgage as effectually as if such consent had been endorsed on the policy.—Wright v. Insurance Co., 12 Mont. 474; 31 Pac. 87.

13. After a policy of insurance, containing a clause denying authority to agents to waive forfeitures, had been by the company declared forfeited for non-payment of premiums, the insured tendered the vice president and manager the balance due on such premiums, which he refused, referring the insured to the agent who issued the policy, stating that whatever the latter might do would be accepted by the company. The agent promised to "fix it up" in accordance with the contract between himself and the insured, made when the policy was issued, whereby the premiums were to be offset by the rents due the insured from the agent. *Held*, that such acts and statements by the company did not constitute an affirmance of the contract as to rents, nor a waiver of the forfeiture.—Sullivan v. Germania, 15 Mont. 522; 39 Pac. 742.

14. Where a policy provided that any forfeiture for non-payment of premium could be waived only by writing signed by an officer of the insurer, an agreement between assured and insurer's local agent that quarterly premiums due on the 6th of certain months could be paid as late as the 22nd of such months was not within the apparent scope of his authority, and therefore not binding on the insurer.—Collins v. Insurance Co., 32 Mont. 329; 80 Pac. 609; 80 Pac. 1092.

15. Where premiums on a policy were payable quarterly, on the 6th days of August, November, February and May, and the policy provided that it should be void on insured's failure to pay premiums as provided, and that no forfeiture could be waived or premiums in arrears received except by agreement in writing signed by an officer of the company, the fact that the company waived a forfeiture caused by insured's payment of one quarter's premium two days after it was due did not estop it to subsequently insist on a forfeitnre for non-payment of a quarterly premium until 16 days after maturity, when insured was in extremis.—Id.

VIII. EXTENT OF LOSS AND LIABILITY OF INSURER, 16.

16. In an action upon a fire policy the measure of damages is the value of the property at the time of the loss, and evidence of the cost of such a building at the time of the trial is admissible as one of the factors in determining such value.—Holter Lumber Co. v. Firemens Fund, 18 Mont. 82; 45 Pac. 207.

IX. NOTICE AND PROOF OF LOSS, 17-19.

17. The retention by the company of proofs of loss containing a statement that the loss was estimated by persons selected by agreement between the agent and the assured would in no way prejudice the company's rights, whether the statements were true or false, and hence such proofs were sufficient notwithstanding the objectionable statement.—Randall v. Insurance Co., 10 Mont. 340; 25 Pac. 953.

18. Want of and defects in the notice of loss are waived by the insurer's denying liability on other grounds.—Savage v. Insurance Co., 12 Mont. 458; 31 Pac. 66.

19. Soon after a fire an insurance adjusting agent took from insured a statement, sworn and subscribed to by her, of the property destroyed, and its value. The agent referred to the statement as "proofs of loss," and told insured that nothing more was required, and

afterwards offered to settle for a portion of the loss. *Held*, that the company had waived formal proofs of loss.—Wright v. Insurance Co., 12 Mont. 474; 31 Pac. 87.

X. ADJUSTMENT OF LOSS, 20-21.

20. An action brought, not upon insurance policies, but upon an adjustment under accepted proofs or loss as a basis, can not be sustained where defendant has paid the amount agreed on in the adjustment and received a surrender of the policies and a receipt in full, merely because of an alleged error in the setlement, caused by a mistake of both parties in supposing that another insurer was liable for a porton of the loss. Plaintiff having made the adjustment a basis for his suit, can not avoid the effect of a defense arising therefrom, by alleging error in the settlement.—Saville v. Aetna, 8 Mont. 419; 20 Pac. 646.

21. Though a fire policy stipulates that in case of a failure to agree upon the amount of damage it shall be ascertained by appraisers, and that until the required proofs are produced and appraisals are permitted the loss shall not be payable, the assured, having offered proofs of loss that are rejected by the company, which does not demand an appraisal nor dispute the amount of damage as shown in the proofs, may sue for the loss without himself first offering to have the property appraised, or requesting the appointment of appraisers.—Randall v. Insurance Co., 10 Mont. 340; 25 Pac. 953.

XI. PAYMENT AND SUBROGATION, 22-23.

22. Where by its terms a policy is payable 60 days after proof of loss, the insured, who has delivered proofs of loss that are rejected by the company because they contain a clause stating that the estimate or the value was made by persons agreed upon, can recover interest from the date of the deliverv of the proofs.—Randall v. Insurance Co., 10 Mont. 340; 25 Pac. 953.

23. The right to recover damages for the negligent destruction of property by fire, together with the right to have the jury assess interest in its discretion, as they are authorzed to do by Code Civ. Proc., § 4281, in actions for the breach of obligations not arising from contract, is assignable, and passes by subrogation to an insurance company to the extent of the proportion of the loss paid by it to the property of the owner.—Caledonia Ins. Co. v. Northern Pacific, 32 Mont. 46; 79 Pac. 544.

XII. ACTIONS ON POLICIES, 24-37.

24. The complaint alleged substantially that defendant was a corporation; that plaintiff was the owner of a certain bulding and goods therein of the value of $20,000; that defendant, for a valuable consideration, insured plaintiff against loss by fire, and issued its policy, a copy of which is set forth in the complaint; that the building and goods were totally destroyed by fire; that plaintiff furnished defendant with a statement and proof of his loss, and that plaintiff performed all of the conditions of the policy, upon his part. Plaintiff prayed for $5,000, the amount named in the policy. *Held*, that the complaint stated facts sufficient to constitute a cause of action.—Daniels v. Insurance Co., 2 Mont. 78.

25. The answer denied ownership, loss, consideration, proof of loss and that plaintiff performed the conditions of the policy upon his part. *Held*, to state facts sufficient to constitute a defense and to be sufficiently specific to put plaintiff to proof of the conditions of the contract on his part.—Id.

26. Where the policy provides that it is agreed that an award by arbitrators shall be a condition precedent to the right to sue for the loss, the assured may recover on a petition alleging both an award and also a proof of loss without an award, as the two averments are not inconsistent, since, if the conditions rendering arbitration necessary did not arise, there may be recovery of the loss though it was not ascertained by an award.—Randall v. Phœnix, 10 Mont. 362; 25 Pac. 960.

27. Though a fire policy provides for arbitration in case of disagreement as to the loss, and that no action shall be sustained until an award shall have been obtained, the insured, who has furnished proofs of loss which are rejected by the company, not because there is a disagreement as to the amount of loss, but simply because the proofs contain a statement that the loss was estimated by persons selected by agreement between the assured and the company,—a fact that the company denies—can sue for the loss without first requesting the appointment of arbitrators.—Id.

28. The fact that the amount of loss under an insurance policy has not been submitted to arbitration, as required by the policy, before suit, can not avail as a defense, where the assured, in seeking an adjustment of the loss soon after it occured, had been met by a denial of any liability whatever, and the assertion that the policy was not in force.—Savage v. Insurance Co. 12 Mont. 458; 31 Pac. 66.

29. The defense, in an action on a policy was that the premium had never been paid. Plaintiff's husband testified to having given their son a sum of money to pay the premium, and afterwards, the premium having been raised, a further sum, and that no other premiums were owing by the family at that time. The son testified to having paid said sums to defendant's agent, and the policy sent to plaintiff had endorsed thereon an acknowledgement of the latter sum. *Held*, that the payment was established.—Id.

30. In an action upon a fire policy the measure of damages is the value of the property at the time of the loss, and evidence as to the cost of such a building at the time of the trial is admissible as one of the factors in determining such value.—Holter Lumber Co. v. Firemens Fund, 18 Mont. 282; 45 Pac. 207.

31. In an action upon a fire policy, in which the property insured was described as a frame building and additions used as a dwelling house and a greenhouse, it appeared that the building destroyed was used exclusively as a dwelling, the greenhouse proper not being attached thereto, but that it was the intention of the owner and of the agent who issued the policy to insure that particular building. *Held*, that the question whether the property destroyed was covered by the policy was for the jury.—Id.

32. Where contributory negligence on the part of the insured has been pleaded as a defense, the burden of proof is on defendant, though plaintiff has alleged that his intestate was "using due diligence for his personal safety".—Mulville v Pacific Mutual, 19 Mont. 95; 47 Pac. 650.

33. Where assured was killed by a train, and it is shown, on the issue of contributory negligence, that he was found between the rails of the track, the space between the cars and the track may be shown, in rebuttal, to establish that he could not have been between the cars and the track without being more crushed.—Id.

34. Where assured was killed by a railway train, it could not be shown, on the issue of contributory negligence, that deceased was wont to jump on the train while it was in motion.—Id.

35. Under Code Civ. Proc. § 746, declaring that in pleading performance of conditions pre-

cedent in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all conditions on his part, a complaint in an action on a fire policy sufficiently alleges performance of a condition precedent in the policy, requiring loss to be ascertained by arbitrators in case of disagreement, when it alleges generally that plaintiff has duly performed all the conditions of the policy on his part.—Ackley v. Insurance Co., 25 Mont. 272; 64 Pac. 665.

36. A verdict allowing a recovery on a fire policy, without any deduction on account of a prior loss for which proof has been made, was not erroneous, where there was no evidence of the amount of the prior loss or that it had been adjusted and paid.—Id.

37. Where insurer claimed a breach of warranty that insured was not connected with the sale of liquors, evidence that insured received no consideration for an occasional service rendered to a saloon keeper was material, as tending to show the exact relation of assured to the saloon keeper's business.—Collins v. Insurance Co., 32 Mont. 329; 80 Pac. 609; 80 Pac. 1092.

XIII. MUTUAL BENEFIT INSURANCE, 38-41.

38. A by-law of a voluntary mutual benefit society, requiring disputed benefit claims against the society to be submitted to a tribunal of arbitration, and an appeal, from an unsatisfactory decision, to the state organization, and thence to the national organization, as a condition precedent to the right of suing on the claim, is valid.—Cotter v. Grand Lodge, 23 Mont. 82; 57 Pac. 650.

39. The constitution and by-laws of a mutual benefit society are binding on the beneficiary of a deceased member.—Id.

40. The by-laws of a mutual benefit society provided that, on the rejection of a benefit claim by the chief officer and finance committee of the society, the claim should, as a condition to the right of suing upon it, be submitted to a board of arbitration provided by the society, and the chief officer was to sign all warrants drawn in payment of claims. *Held*, that the holder of a benefit claim was required to submit it to arbitration on its rejection by either the finance committee or the chief officer alone.—Id.

41. The finance committee of the state lodge of a mutual benefit society reported, in writing, on a claim submitted to it, that the records showed a prior suspension of the member in question, and there was no report from the subordinate lodge as to his standing since then, and therefore there was nothing before the committee on which to act. The committee then orally rejected the claim, and the written report of the committee, together with the fact that it had rejected the claim, was communicated to the subordinate lodge which had presented the claim to the state organization. *Held*, a rejection of the claim, within the by-laws of the society requiring such claim, on its rejection, to be submitted to arbitration.—Id.

INTEREST.

I. Rights and Liabilities in General, 1-9.

II. Rate, 10-15.

III. Time and Computation, 16-22.

I. RIGHTS AND LIABILITIES IN GENERAL, 1-9.

1. Courts of equity will not allow interest upon interest where the contract to pay the same was made at the time of the original contract, and before any interest had become due, where the payee seeks to enforce such a contract, although a stipulation to that effect would not vitiate the original contract.—Wilson v. Davis, 1 Mont. 183.

2. The statute of this territory which establishes the rate of interest, relates to simple interest, and does not authorize contracts for compound interest.—Id.

3. A party who agrees to sell real and personal property upon the payment of a note, which stipulates that the interest shall be compounded monthly if it is not paid, is required to convey the property on the payment of the principal of the note and simple interest upon the same.—Id.

4. One who agrees to sell real and personal property, upon the payment of a note which stipulates that the interest shall be compounded monthly, if it is not paid, is required to convey the property on payment of the principal of the note and simple interest.—Id.

5. Since interest is a creature of the statute, allowing its payment can not be enforced unless it is averred and proved that there has been unreasonable and vexatious delay in the payment of the principal.—Isaacs v. McAndrews, 1 Mont. 427.

6. A judgment for services does not bear interest unless there has been unreasonable and vexatious delay.—Ruff v. Rader, 2 Mont. 211.

7. Where a new note is given to take up former notes on which compound interest has been computed and included, such new note is void only to the extent of such compounded interest included.—Curtis v. Vailton, 3 Mont. 153.

8. Interest will not be allowed on unliquidated damages before judgment. (See 111 U. S. 775.)—Randall v. Greenhood, 3 Mont. 506.

9. In an action to reform a contractor's bond, and for judgment thereon, on appeal this court reversed a judgment of nonsuit on the ground that the bond was valid without reformation. *Held*, that under Comp. Stat., p. 991, § 1237, allowing interest on a settlement of accounts only after the balance due has been ascertained, plaintiff was not entitled to recover, on the second trial, interest from the date of the judgment at the former trial.—Priest v. Eide, 19 Mont. 53; 47 Pac. 206.

II. RATE, 10-15.

10. It is error to allow more than the legal rate of interest on a judgment. (18 Wall. 657.)—Griffith v. Herschfield, 1 Mont. 66.

11. In an action to recover for services performed in Montana, under a contract made in New York, which does not fix the rate of interest, if the payment for services is refused after a demand therefor in New York, the rate of interest will be that prescribed by the laws of Montana.—Isaacs v. McAndrews, 1 Mont. 427.

12. Laws 1865, p. 535, provides that creditors shall be allowed to collect and receive interest on any note or other writing, in the absence of agreement as to rate, at the rate of 10% per annum after the debt becomes due *Held*, that such section has reference only to debts which are due, and not to contracts to pay any interest on debts which may become due in the future; and where a note provided for interest after maturity at a rate greater than 10%, the rate stipulated for may be allowed as damages for the detention of the money, though the agreement to pay that rate is not a sufficient compliance with the statute to take it out of its provisions, where the agreement applies to an indebtedness due at the time

the contract was made.—Davis v. Hendrie, 1 Mont. 499.

13. A contract to pay a sum of money on or before a certain day, "with interest at the rate of 3% per month until paid," draws interest at the legal rate after maturity.—Collier v. Field, 1 Mont. 612.

14. Interest on a note after it becomes due must be computed at the statutory rate, unless the note contains a special provision that a higher rate shall be paid.—Gillette v. Hibbard, 3 Mont. 412.

15. A judgment rendered prior to the date when Laws 1899, p. 125, amending Civ. Code, § 2588 went into effect, bore 10% interest until that date, and only 8% thereafter.—Stanford v. Coram, 28 Mont. 288; 72 Pac. 655.

III. TIME AND COMPUTATION, 16-22.

16. The old common law rule, which did not allow compound interest, has not been overruled in the United States.—Wilson v. Davis, 1 Mont. 183.

17. Comp. Stat., p. 991, § 1237, authorizing interest on judgments "from the day of entering," allows interest on a judgment entered nunc pro tunc, from the day on which the judgment is to be considered as entered.—Barber v. Briscoe, 9 Mont. 341; 23 Pac. 726.

18. Under the statutory provision allowing interest on money due on the settlement of accounts, from the day of such settlement, a wage worker to whom an assignor is indebted is entitled to interest from the time he demands his money from the assignee for the benefit of creditors; the assignee having accepted the notice of his claim, and acknowledged its correctness.—Knatz v. Wise, 16 Mont. 555; 41 Pac. 710.

19. Civ. Code, § 2587, providing that parties may contract in writing that unpaid interest shall become a part of the principal and draw interest, does not affect notes or agreements made before its adoption in 1895.—Stanford v. Coram, 26 Mont. 285; 67 Pac. 1005.

20. The institution of suit on an open account for goods sold is a demand for its payment.—Hefferlin v. Karlman, 29 Mont. 139; 74 Pac. 201.

21. Civ. Code, § 4280, authorizes a recovery of interest on an open account from demand.—Id.

22. Under Civ. Code, § 4280, where plaintiff gave defendant an option to buy a mine, but, before the payments became due, denied the existence of the contract, and sued to recover the mine, he is not entitled, on specific performance being decreed against him, to interest on the purchase money because of the delay in payment occasioned by him.—Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

INTERPLEADER.

1. R recovered a judgment against P. Certain creditors of R sued P on the day following the entry of such judgment and served a writ of attachment on him and notified him not to pay the judgment to R. Afterward R caused an execution to be issued and levied upon the property of P to satisfy his judgment. The said creditors subsequently obtained judgment against R and were seeking to enforce their attachments upon said judgment against P, when P filed a bill of interpleader against R and the creditors. *Held*, that the creditors of R could not attach his judgment against P, and that P could not maintain his action of interpleader.—Perkins v. Guy, 2 Mont. 15.

INTOXICATING LIQUORS.

1. A social club, not organized for the purpose of evading the liquor laws, but which furnishes its members with liquors and refreshments, without profit to itself, is not engaged in the sale of intoxicating liquors by retail, within the meaning of Laws 15th Ext. Sess., p. 74, which imposes a license tax on all persons who deal in, sell, or dispose of intoxicating liquors by retail.—Barden v. Montana Club, 10 Mont. 330; 25 Pac. 1042.

2. Comp. Stat., p. 578, § 261, prohibiting the sale of liquors in any place where women or minors are employed, is a valid exercise of the police power, and is constitutional.—State v. Reynolds, 14 Mont. 383; 36 Pac. 449.

3. Under Pol. Code, § 4049, property in possession of a retail liquor dealer is subject to the prior lien of a license tax, though there was a duly recorded chattel mortgage thereon.—Burfiend v. Hamilton, 20 Mont. 343; 51 Pac. 161.

4. The local option liquor law (Pol. Code, §§ 3180-3188) providing for a petition to the county commissioners for an election, for notice of the election, for the form, supply, and method of marking ballots, for an election and notice of its result, for a definite date when the law shall become operative, and for a penalty for its violation, is complete in its provisions, though it takes effect in each county only on a vote favorable to its provisions.—In re O'Brien, 29 Mont. 530; 75 Pac. 196.

5. Such law applies to sales of liquor in an incorporated town in a county which has voted against the sale, notwithstanding Pol. Code, § 4800, as amended by Laws 1897, p. 203, giving towns power to license saloons, and § 5162, providing that, if the provisions of one title conflict with those of another, those of each title must prevail as to matters arising out of the subject matter of the title.—Id.

JUDGES.

I. Special or Substitute Judges, 1-2.

II. Rights, Powers, Duties, and Liabilities, 3-15.

III. Disqualification to Act, 16-28.

I. SPECIAL OR SUBSTITUTE JUDGES, 1-2.

1. Code Civ. Proc., § 36, giving the judge of one district, when holding court for the judge of another district, "the same power, either in court or in chambers, as a judge thereof," does not enlarge the authority given by Const., art. 8, § 12, providing that one judge "may hold court" for another, and hence it does not violate the constitution.—Farleigh v. Kelly, 24 Mont. 369; 62 Pac. 495, 685.

2. Under such sections a judge who has returned to his own county after trying a case in another county, in the place of the judge thereof, who was disqualified, has power to make an order extending the time to prepare and serve the "statement of the case" on a motion for new trial, as provided by § 1173, giving the "court" or "the judge thereof" power to make such orders.—Id.

II. RIGHTS, POWERS, DUTIES, AND LIABILITIES, 3-15.

3. Under the Act conferring on a probate judge the power to enter public lands for townsites and award town lots to the citizens, he is entitled to receive compensation for making application for the entry of town lots and taking the affidavits to them at the request of his employer.—Ming v. Truett, 1 Mont. 322.

4. The successor of the judge who tried the case may settle the statement on appeal.—Edwards v. Tracy, 2 Mont. 22.

5. A judge can not act as an attorney in a case pending before him.—Smith v. Lovell, 2 Mont. 332.

6. Where a probate judge fails to make a proper order on the final report of an administrator, or orders said administrator to pay over the moneys belonging to the estate into the hands of the probate judge, it is such a breach of the condition of the official bond, guaranteeing the faithful performance of official duties, as to sustain an action on the bond.—Id.

7. The act giving to clerks of the district court a salary, and repealing the act regulating their fees, abolishes the act as to the clerks only, and it is still in force as to probate judges.—Hedges v. Commissioners, 4 Mont. 280; 1 Pac. 748.

8. Rev. Stat., p. 537, § 602, providing "that, whenever a court is appointed by the supreme court to be held in any county, it shall be the duty of the board of county commissioners of such county to pay to the chief justice or associate justice mileage at the rate of 20 cents a mile in going to, and returning from, the place where the court is held, as his expenses incurred for and on account of travel incurred for the benefit of said county," is not affected by Laws 1885, p. 71, providing that "county officers, jurors, witnesses, and all other parties that may be entitled to mileage from the several counties in the territory, shall be entitled to collect mileage at the fate of 15 cents per mile and no more."—Power v. Commissioners, 7 Mont. 82; 14 Pac. 658.

9. In an action against a probate judge and his sureties for fees unlawfully withheld by him from the county, brought under the Salary Law (Comp. Stat., p. 891), providing that probate judges should pay into the county treasuries all the fees received by them; that any judge failing to do so should, upon conviction upon indictment, be removed from office, forfeit all his compensation, and be fined; and that for the payment of such forfeiture and fees, as well as any amounts otherwise due from him in his official capacity, his sureties should also be liable on their bond,—it is not necessary to allege in the complaint that the judge had been convicted of a violation of the statute, indictment and conviction not being conditions precedent to the sureties' liability.—Territory v. Carson, 7 Mont. 417; 16 Pac. 569.

10. Where a district judge is holding court for another, as allowed by Const., art. 8, § 12, and adjourns the trial of a case from Saturday until Monday, when he proceeds with it, he is not in the meantime a judge of the court, within the meaning of Comp. Stat., p. 100, § 172, which provides that an injunction may be granted "by the court in which the action is brought or by the judge thereof," and hence he can not grant an injunction in chambers.—Wallace v. Helena, 10 Mont. 24; 24 Pac. 626; 25 Pac. 278.

11. Const., art. 8, § 12, which provides that "any judge of the district court may hold court for any other district judge," confers no authority on a judge so holding court in a district other than his own to issue an order of injunction in chambers, and such order is therefore void.—Id.

12. Const., art. 8, § 12, provides that "the state shall be divided into judicial districts, in each of which there shall be elected by the electors thereof one judge of the district court. * * * Any judge of the district court may hold court for any other district judge, and shall do so when required by law." *Held*, that this section does not of itself confer authority to grant an injunction in chambers on a judge who is holding court in a district other than his own.—Id.

13. Const., art. 8, § 14, declares that the legislative assembly may increase or decrease the number of judges in any judicial district. Laws 1891, p. 212, § 1, provides that the district judges, whose offices may be established by the legislature, shall receive the same compensation as is now, or may hereafter be, provided by law for judges of the district courts. Const., art. 8, § 29, provides that district judges shall be paid quarterly a certain salary, and § 34 provides that all judges who have been elected or appointed are governed by the same provisions of the Constitution. *Held*, that the Constitution appropriates money for the salary of a judge appointed to fill an office subsequently created, and he is entitled to be paid, in preference to appropriations made for other purposes before his appointment.—State v. Hickman, 10 Mont. 497; 26 Pac. 386.

14. Any justice of the supreme court in vacation has authority to order an alternative writ of mandate to issue.—State v. Choteau, 13 Mont. 23; 31 Pac. 879.

15. Substitute for Senate Bill 71, Eighth Session, provides that the supreme court shall order a substitution of one district judge for another on a petition, signed by the district judge properly presiding, and stating that petitioner can not have an impartial trial without such substitution. *Held*, that the bill contravenes Const., art. 8, § 12, providing that any district judge may hold court for any other district judge, and shall do so when required by law.—In re Weston, 28 Mont. 207; 72 Pac. 512.

III. DISQUALIFICATION TO ACT, 16-28.

16. A judge who is disqualified to hear a cause for any reason is nevertheless authorized to order a special venire to issue where the regular panel has been discharged.—Littrell v. Wilcox, 11 Mont. 77; 27 Pac. 394.

17. Const., art. 8, § 12, provides that, where a district judge is disqualified to hear a case, a judge of another district may sit in his place. *Held*, that in the absence of other constitutional or statutory provisions, the judge who is disqualified to hear the case is the proper officer to procure the attendance of another judge.—Granite M. M. Co. v. Durfee, 11 Mont. 222; 27 Pac. 919.

18. Comp. Stat., p. 203, § 547, providing that the judge shall not sit in a case in which he was attorney for either party, does not preclude a judge from trying an action for the removal of an administratrix of an estate for whom he had acted as attorney in the execution of her trust.—State v. Woody, 14 Mont. 455; 36 Pac. 1043.

19. A district court is not ousted from jurisdiction to appoint a receiver in a pending suit by the fact that the judge does not like an attorney for one of the litigants, and is on friendly terms with the other, and has decided several cases against the former.—State v. District Court, 22 Mont. 220; 56 Pac. 219.

20. Act Dec. 10, 1903, amending Code Civ. Proc., § 180, providing for the disqualification of district judges on the filing of an affidavit of prejudice, is not in violation of Const., art. 8, § 11, conferring on district courts original jurisdiction in "all" cases in law and equity, by reason of the fact that the filing of the affidavit, without a determination of the question of prejudice, deprives the judge of jurisdiction, since it is the imputation of prejudice, and not prejudice in fact, that constitutes the disqualification, which imputation is not subject to judicial determination.—State v. Clancy, 30 Mont. 529; 77 Pac. 312.

21. Act Dec. 10, 1903, amending Code Civ. Proc., § 180, so as to provide for the disqualification of district judges on the filing of an affidavit of prejudice, thereupon disqualifying him to further act in the case except to arrange his calendar, notify another judge to try the case, or, if he fails to do so within 30 days, to change the place of trial, etc., and amending § 615 so that, if another judge is called in within such time, the change of venue shall not be granted, does not contravene, but is in harmony with, Const., art. 8, § 12, providing that any judge of the district court may hold court for any other district judge, and shall do so when required by law, since under the statute, both before and after its amendment, a judge can only be secured to proceed for another on the invitation of a resident judge.—Id.

22. Code Civ. Proc., §§ 180, 615, as amended by Act Dec. 10, 1903, providing for the disqualification of district judges on the filing of an affidavit of prejudice, and declaring that a change of venue shall not be granted for that reason if, within 30 days after the filing of the affidavit, another judge shall be called in to try the case, etc., does not authorize the disqualifying affidavit to be filed after the trial of the case has been begun, after which period no change of venue can be granted.—Id.

23. Act Dec. 10, 1903, amending Code Civ. Proc., § 180, so as to provide for the disqualification of a district judge by the mere filing of an affidavit of prejudice, is not in violation of Const., art. 8, § 16, providing the disqualification of district judges; such disqualifications being limited to qualities necessary to render the person eligible to the office, without application to the qualifications to try particular causes.—Id.

24. Code Civ. Proc., § 180, as amended by Act Dec. 10, 1903, provides that any justice, judge, or justice of the peace must not sit or act in any action or proceeding when either party makes and files an affidavit that he has reason to believe and does believe that he can not have a fair trial before a district judge by reason of the bias or prejudice of such judge. *Held*, that though such section as amended was defective in declaring that "justices" of the supreme court or a justice of the peace should not act as such in any case in the district court, it would be assumed that the word "judge" in the first sentence referred to district judge, and the words "justice and "justice of the peace" would be disregarded.—Id.

25. Code Civ. Proc., § 180, as amended by Act Dec. 10, 1903, making the alleged prejudice of a district judge a ground of disqualification, is not unconstitutional.—State v. District Court, 30 Mont. 547; 77 Pac. 318.

26. Code Civ. Proc., § 180, as amended by Act Dec. 10, 1903, provides that alleged prejudice of a district judge shall constitute a ground of disqualification, and declares that on the filing of an affidavit of prejudice the judge as to whom the disqualification is averred shall be without authority to act further in the action or proceeding, with certain specified exceptions. *Held*, that § 180, as amended, was rendered available by the filing of an affidavit of prejudice, and that a motion for a change of judge on that ground was not permissible.—Id.

27. Code Civ. Proc., pt. 3, tit. 12, art. 9, § 2530, as amended by Laws 1897, p. 244, declares, in relation to probate matters, that no will shall be admitted to probate or letters testamentary granted before any judge who is interested, as next of kin to the decedent, etc., or in any other way interested or disqualified; and § 2920 of the same title declares that, except as otherwise provided in such title, the provisions of pt. 2 of such Code constitute the rules of practice in the proceedings mentioned in such title. Sec. 180, as amended by Laws 1903, p. 61 (in pt. 1, Code Civ. Proc.), provides that no judge shall act in any proceeding where he is disqualified by reason of bias and prejudice in the matter. Pol. Code, § 5161, declares that the provisions of the four Codes are to be construed as if passed at the same moment. *Held*, that construing the provisions together, § 180 is applicable to probate proceedings; § 2920, by mentioning pt. 2 of the Code, not having thereby excluded pt. 1.—State v. Donlan, 32 Mont. 256; 80 Pac. 244.

28. Under Code Civ. Proc., § 180, an affidavit is not effective to interrupt a hearing, filed after the arrival of the day fixed for that purpose, whether it be a final hearing or trial, or merely a step taken in the case, involving a decision of some controverted matter.—Id.

JUDGMENT.

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I. NATURE AND ESSENTIALS IN GENERAL, 1-3.

1. Where a court exceeds its jurisdiction in rendering a judgment, such judgment is void. —Creighton v. Hershfield, 1 Mont. 639.

2. The confirmance of a judgment by this court is void for want of jurisdiction, if plaintiff obtains the same by mistake or fraud, and perfects the appeal without the knowledge of defendant, who has abandoned his appeal after filing the notice and undertaking therefor in the court below.—Harvey v. Whitlatch, 2 Mont. 55.

3. Service of summons by publication on a non-resident defendant, under Code Civ. Proc., § 638, will not warrant a judgment in personam against defendant who appears specially to challenge the jurisdiction of the court.—Silver Camp Mining Co. v. Dickert, 31 Mont. 488; 78 Pac. 967.

II. ON CONSENT, 4-5.

4. In an action on a promissory note, where certain defendants appear, but fail to answer, and default is entered against them by consent, but the co-defendants answer, alleging that they are accommodation makers only, to which answer a replication is filed by plaintiff traversing it, a trial of the issue so formed is waived by such defendants, who also consent to a default being entered, the court commits no error in entering judgment for the amount claimed against all the defendants.—Second Nat'l Bank v. Kleinschmidt, 7 Mont. 146; 14 Pac. 667.

5. Judgment entered on the stipulation of the parties is in effect a judgment by consent. —Corby v. Abbott, 28 Mont. 523; 73 Pac. 120.

III. BY DEFAULT, 6-40.

A. Requisites and Validity, 6-12.

B. Opening or Setting Aside Default, 13-40.

A. REQUISITES AND VALIDITY, 6-12.

6. After appearance of a defendant in an action default can not be entered against him, but judgment can be rendered by nil dicit, or for want of answer. (See 12 Wall. 259; 20 Wall. 689.)—Mason v. Germaine, 1 Mont. 263.

7. Plaintiff moved to strike part of the answer, and the court overruled the motion and ordered plaintiff to reply to the new matter in the answer. Plaintiff refused to reply or to offer any evidence when the case was called for trial. *Held*, that the entering of judgment for costs against plaintiff was in the discretion of the court, and that such discretion was properly exercised, when the entry of such judgment did not injure plaintiff.—Townsley v. Hornbuckle, 2 Mont. 580.

8. The act authorizing clerks of courts in vacation to render judgments by default never having been disapproved by congress, is valid under the Organic Act, which leaves such matters of practice to the legislature.—Sperling v. Calfee, 7 Mont. 514; 19 Pac. 204.

9. In the absence of the memorandum on the complaint required by Comp. Stat., p. 139, § 306, showing the entry of judgment by default, there being nothing to show that it was not entered before the expiration of the time for answering, the judgment is a nullity.—Palmer v. McMaster, 8 Mont. 186; 19 Pac. 585.

10. Plaintiff, having sued H. garnished a public board, who answered that they had moneys in their hands belonging to H's firm, but did not know which member or members were entitled to them. Plaintiff took judgment against H. and brought suit against him, two of his partners, and the board. The board did not answer, but the others joined issues, on which it appeared that H had no interest in the moneys due. *Held*, that plaintiff could not take judgment against the board, not having, by its failure to appear and answer, admitted the debt to H.—First Nat'l Bank v. Neill, 13 Mont. 377; 34 Pac. 180.

11. Where plaintiff amended his complaint after answer filed, and it appeared from the court journal that defendant, being represented by counsel, was, in open court, granted certain time in which to plead to said complaint, having failed to do so within the time allowed, he can not assert that the original answer was a sufficient answer to the amended complaint, so as to prevent a default.—Gettings v. Buchanan, 17 Mont. 581; 44 Pac. 77.

12. Under Code Civ. Proc., § 1020, a special appearance for the purpose of moving to quash the service of summons did not extend the time for a general appearance and answering to the merits.—Mantle v. Casey, 31 Mont. 408; 78 Pac. 591.

B. OPENING OR SETTING ASIDE DEFAULT, 13-40.

1. Right to Relief, 13-13a.
2. Authority and Discretion of Court, 14-19.
3. Excuses for Default, 19a-34.
4. Application, and Stay of Proceedings, 35-37.
5. Affidavits on Application, 38.
6. Counter Affidavits, 39.
7. Conditions on Granting Application, 40.

1. Right to relief, 13-13a.

13. It is not error for the court to sustain a motion to vacate a judgment and set aside a default, where the service of a summons is defective.—Brown v. Mining Co., 1 Mont. 57.

13a. The court was justified in refusing to set aside a default where, though appellant was not served with summons, her son-in-law and agent employed attorneys to appear for her, and, through said agent made affidavit that he employed said attorneys without her consent, appellant on appeal, urged that the demurrer interposed by the other defendants should have

been sustained, and it did not appear when appellant first had knowledge of such appearance or default, nor that on discovering said default she immediately moved to set it aside.—Blaine v. Briscoe, 16 Mont. 582; 41 Pac. 1002.

2. Authority and discretion of court, 14-19.

14. It is within the discretion of the court to set aside a default entered in vacation, with leave to answer upon payment of costs.—Loeb v. Schmith, 1 Mont. 87.

14a. Plaintiff's case was set for trial on the 9th of the month. On the 5th or 6th his attorneys notified him, through the post office, that unless he called before the day of the trial and settled his account with them, they would withdraw from the case. He testified that this letter did not reach him until the 10th. The case was called on the 12th, and, no one appearing for plaintiff, defendant obtained judgment on a counterclaim. Plaintiff made no attempt, between the 10th and 12th, to come to an understanding with his attorneys, nor to employ others, as there was time to do. *Held*, that the court did not abuse its discretion in refusing to set aside the judgment.—Briscoe v. McCaffery, 8 Mont. 336; 20 Pac. 691.

15. Where defendant miscalculated the time for appearance, owing to his forgetting that there were 29 days in February of that year, and for the last week of the time allowed he was busily engaged as witness and advisory counsel in a case in another county, and he arranged for appearance within the proper time as he had calculated it, it was not an abuse of discretion to vacate a judgment against him by default on the ground of excusable neglect.—Jensen v. Barbour, 12 Mont. 566; 31 Pac. 592.

16. On motion for leave to open a judgment by default, where there is a conflict of statement between the respective attorneys for the parties as to whether or not there was a verbal stipulation out of court for extra time to answer, the court abuses its discretion in opening the default, in disregard of one of its rules requiring stipulations not entered into in open court to be in writing.—Martin v. De Loge, 15 Mont. 343; 39 Pac. 312.

17. Where two contests against the probate of a will are brought by different heirs, and involved substantially the same issue, and the contestants were represented by the same counsel, and a trial of one contest lasted over a month, and resulted in a disagreement, and the case was again set for trial, and the parties in the second contest, relying on the second trial lasting for some time, and ignorant of an agreement for a continuance, were not ready for trial when the case was called, but were in New York, where they lived, with their attorneys, it constituted such excusable neglect that the refusal of the lower court to open a default was an abuse of discretion.—In re Davis' Estate, 15 Mont. 347; 39 Pac. 292.

18. On motion to set aside a default, it appeared that plaintiff had commenced, in different departments of the same court, two suits against defendant. Defendant's counsel found the suit filed in one department, in which he appeared, but failed to search for the suit filed in the other department, in which default was entered. *Held*, that it was not an abuse of discretion to vacate the judgment.—Mantle v. Largey, 17 Mont. 479; 43 Pac. 633.

19. Code Civ. Proc., § 2087, provides that, in actions of forcible entry and detainer, the summons is returnable at a date designated therein, which shall not be less than 4 nor more than 12 days from its date, and that the complaint need not be served. *Held*, where defendant in an action of forcible entry and unlawful detainer was served with summons and complaint, and handed them to his attorney, who thought, as the complaint was served, that it was an action in ejectment, with 20 days in which to answer, and neglected to answer within the time specified in the summons, and defendant had a meritorious defense, that the order setting aside the default and judgment was within the discretion of the court, and will not be disturbed.—Eakins v. Kemper, 21 Mont. 160; 53 Pac. 310.

3. Excuses for default, 19a-34.

19a. Where the service has been irregular, a default judgment will be set aside only on an affidavit of the merits and of excusable neglect in permitting the default.—Lamb v. Gaston, etc. M. Co. 1 Mont. 64.

20. Defendant's attorney, who lived at a distance from the place where suit was brought, sent a demurrer by an express agent three days before the expiration of defendant's time to plead, and but one day was necessary to travel the distance. *Held*, that the default occasioned by the agent's neglect to deliver the answer within three days, was properly set aside.—Loeb v. Schmith, 1 Mont. 87.

20a. After a case had been set for trial the parties entered into a stipulation for settlement upon certain conditions, with which defendant failed to comply, and plaintiff, in the absence of defendant, proceeded with the trial and defendant was defaulted. *Held*, that such judgment would not be set aside on the ground of surprise.—Donnelly v. Clark, 6 Mont. 135; 9 Pac. 887.

21. Defendant applied in vacation for relief from a judgment against him, and showed that he had a meritorious defense, and had employed counsel to represent him, but through a misunderstanding between counsel a judgment was taken against him by default, of which he had no knowledge until after the adjournment of the court for the term. *Held*, that the order of the court in vacating the judgment would not be disturbed on appeal.—Whiteside v. Logan, 7 Mont. 373; 17 Pac. 34.

22. Comp. Stat., p. 88, § 116, provides that the court may, on proper terms, set aside a judgment taken by default through the mistake, inadvertence or excusable neglect of defendant. A sheriff was sued in his official capacity, and judgment was rendered by default for want of an answer. The affidavit to set the default aside, filed the day default was entered, alleged a good defense, and that defendant, the day after service of summons, was injured while performing his official duties, and by reason thereof inadvertently neglected to employ counsel. *Held*, that the default should be set aside and defendant allowed to answer.—Benedict v. Spendiff, 9 Mont. 85; 22 Pac. 500.

23. On motion to set aside a default judgment, defendant showed that, when served with summons, he was living with his family in a tent 50 miles from the county seat, and, being unwilling to leave them, engaged a business friend to attend to the matter; that the latter employed an attorney to prepare an answer, but, owing to business troubles, forgot to call at the attorney's office to verify it until the last day allowed for filing; that the answer was immediately mailed, but did not reach the clerk of the court until two days later. The allegations of this answer constitute a complete defense to the action. *Held*, that the delay was excusable, and plaintiff is entitled to have the default set aside.—Heardt v. McAllister, 9 Mont. 405; 24 Pac. 263.

24. Where defendant's counsel was present within the bar of the court when demurrer to the complaint and motion to strike out portions thereof were overruled, and 10 days granted within which to file answer, a motion to set aside judgment by default, by defendant's coun-

sel, on affidavits that after filing such motion he had no further notice of the proceedings in the case, nor knew of the court's action in overruling the motion, nor any other action of the court in the case, till a month after judgment rendered, was properly overruled.—Haggin v. Lorentz, 13 Mont. 406; 34 Pac. 607.

25. Though a defendant may have a meritorious defense to an action, the mere neglect of his counsel to file an answer in time, which neglect is neither explained nor excused, is not a ground upon whch a default judgment may be vacated under Comp. Stat., p. 88, § 116, providing that a party may be relieved from a judgment taken by mistake, inadvertence, surprise or excusable neglect.—Thomas v. Chambers, 14 Mont. 423; 36 Pac. 814.

26. The fact that defendant's attorney was not advised when his demurrer to the complaint would be submitted is not ground for setting aside a default judgment ordered on the demurrer being overruled.—Helena v. Brule, 15 Mont. 429; 39 Pac. 456.

27. Where defendant's attorney, relying on information received from the clerk that no business would be transacted by the court until after a certain date, gave no further attention to his demurrer then pending until such date, and it was overruled and default entered, defendant's negligence was excusable, and the default properly opened.—Anaconda M. Co. v. Saile, 16 Mont. 8; 39 Pac. 909.

28. Where default against a city was entered more than five years after the time for filing an answer, and no attempt was made to set it aside until 15 months thereafter, an affidavit by one who was city attorney at the time the application to open the default was made, in which affiant stated that he had "received the impression from some source" that the matter had been disposed of, and that he was "unable to state why the city was allowed to be in default," was insufficient to show excuse for defendant's neglect.—Chambers v. Butte, 16 Mont. 90; 40 Pac. 71.

29. A refusal to set aside a judgment by default on the ground of excusable neglect, in that counsel for defendant was distracted by sickness in his family, and defendant was called away by illness of his mother, will not be disturbed.—Herbst Imp. Co. v. Hogan, 16 Mont. 384; 41 Pac. 135.

30. A default judgment against one of two defendants should be opened, he having believed, and had a right to believe, that counsel had been employed by his co-defendant to attend to the case for both defendants to the end of the litigation; and plaintiff having, on the filing of an answer by the other defendant containing an absolute defense for both defendants, dismissed the action as to him, and taken judgment against the one in default; and defendant in default having, as soon as he learned that counsel employed in the case had withdrawn, as far as he was concerned, taken immediate steps to have the default set aside, tendering with his motion an answer pleading the facts set up in his co-defendant's answer.—Morse v. Callantine, 19 Mont. 87; 47 Pac. 635.

31. A default judgment, entered June 18, on an order made March 23, denying a motion by defendant, and allowing 10 days to answer, will not be set aside on an affidavit of one of defendant's attorneys that he was a member of the legislature, which was in session when the motion was submitted; that he does not remember having had any notice of the submission thereof, and did not know it had been submitted until after the default was entered; and that, on his return from the legislature, he supposed the motion was pending, but made no effort to have it submitted, because he expected a settlement of the case.—Butte Butchering Co. v. Clarke, 19 Mont. 306; 48 Pac. 303.

32. Code Civ. Proc., § 774, provides that the court may, in its discretion, in furtherance of justice, and upon terms, relieve a party from a judgment taken against him through his excusable neglect. District court rule 31 provides that the clerk shall, immediately after the setting of a case for trial, notify the attorneys interested, unless they are present at the time of the call, of the setting of such case for trial. A case which was at issue was placed upon the trial calendar used by the court, but did not appear in the printed calendar furnished as a matter of courtesy by the clerk to attorneys. The attorney of record for defendant was not present at the call of the calendar, but his partner, though not an attorney in the case, was present to set other cases of defendant's attorney. The partner did not know about the case, and it was set for trial without the knowledge of either of them, and on the day set was tried without defendant being represented. The attorney for defendant, because of the non-appearance of said case in the printed calendar furnished by the clerk, believed that such case was not for trial at that term. The clerk did not notify defendant's attorney of the setting of the case, and on the day of trial he was absent, although his partner was present and did not object. The defendant next day presented an affidavit of merits, and moved to set aside the judgment. *Held*, that the defendant is entitled to have the judgment vacated upon payment of costs.—Collier v. Fitzpatrick, 22 Mont. 553; 57 Pac. 181.

33. The failure of defendant's counsel to know that a special appearance to move to quash the service of summons did not extend the time for a general appearance and answer, is not such surprise or excusable neglect as is contemplated by Code Civ. Proc., § 774, as a reason for setting aside a default.—Mantle v. Casey, 31 Mont. 408; 78 Pac. 591.

34. After remittitur from the supreme court had been filed, plaintiff filed an amended complaint, which was served on the stenographer of defendant's attorneys during their absence, and, defendant having failed to answer the same, judgment was rendered by default. Immediately on defendant's acquiring knowledge thereof, it applied to open the same and for leave to plead, alleging that by mistake of such stenographer the amended complaint had been lost, and had never been called to the attention of its attorneys. One of defendant's attorneys had requested the clerk of the district court to inform him of the filing of the remittitur, but the clerk had failed to do so, and, though such attorney met plaintiff's attorney nearly every day, he had never referred to the filing of such amended complaint. *Held*, that the facts, with the proposed answer stating a defense, entitled defendant to a vacation of the default judgment, under Code Civ. Proc., § 774.—Greene v. Brewing Co., 32 Mont. 102; 79 Pac. 693.

4. Application, and stay of proceedings, 35-37.

35. Where plaintiff is notified of the renewal of a motion to set aside a judgment by default, and is heard thereon, he can not complain that he was not notified that defendant would ask leave to renew the motion.—Jensen v. Barbour, 12 Mont. 566; 31 Pac. 592.

36. Leave to withdraw a motion to set aside a judgment by default may be granted without previous notice to the adverse party.—Id.

37. Defendant miscalculated the time for appearance, owing to his forgetting that February of that year had 29 days. He was absent in another county as a witness and advisory

counsel in another case, when he heard default had been rendered, and was so busily engaged that he had but a few minutes for communication with counsel, whom he directed to obtain a vacation of the default. The motion for that purpose had to be prepared immediately, in order to go on the calendar of the next motion day, and he directed it to be made on the grounds of defects in the summons. He did not discover till the next day his mistake in calculating the time for appearance. The motion was denied in the absence of his attorney, so that he could not ask that the denial be without prejudice to his right to renew it. *Held*, that it was not an abuse of discretion to allow defendant to renew the motion on the ground of excusable negligence.—Id.

5. Affidavits on application, 38.

38. Affidavits contradicting the matters set up to excuse the negligence of the moving party may be read on a motion to open the default. —Butte Butchering Co. v. Clarke, 19 Mont. 306; 48 Pac. 303.

6. Counter affidavits, 39.

39. An affidavit by defendant's counsel, accompanying a motion to set aside a default judgment, alleged that prior to, and for months subsequent to, the rendition of judgment, affiant was sick and unable to attend to business, and had an understanding with members of the bar that none of his causes should be set for trial without notice to him, or until other counsel could be employed, and that affiant "believed" plaintiff's attorney was included in such understanding. Plaintiff's attorney made affidavit positively denying that any such stipulation had been sought or made with him. *Held*, that the trial court properly disregarded the alleged stipulation in passing on the motion.—Haggin v. Lorentz, 13 Mont. 406; 34 Pac. 607.

7. Conditions on granting application, 40.

40. In opening a default against a defendant upon the ground that his negligence was excusable, it was not error to refuse plaintiff's request that, as a condition of opening the default, defendant be denied the right to plead the statute of limitations.—Anaconda M. Co. v. Saile, 16 Mont. 8; 39 Pac. 909.

IV. ON TRIAL OF ISSUES, 41-50.

A. Form and Contents in General, 41-42.
B. Parties, 43-44.
C. Conformity to Process, Pleadings, Proof, and Verdict or Findings, 45-50.

A. FORM AND CONTENTS IN GENERAL, 41-42.

41. In an action on a note payable in gold coin or its equivalent in legal tender notes, the judgment must fix the amount to be paid in gold coin or its equivalent in legal tender notes.—Knox v. Gerhauser, 3 Mont. 267.

42. Where interest is allowable, the judgment may be entered for the amount of the principal and interest accruing before date of entry.—Palmer v. Murray, 8 Mont. 312; 21 Pac. 126.

B. PARTIES, 43-44.

43. Judgment may be entered against defendants individually who are named and described in the complaint as a certain company, although they are not members of it, if the jury find that they are liable individually.—Comanche M. Co. v. Rumley, 1 Mont. 201.

44. Under Comp. Stat., p. 118, §§ 239, 240, allowing judgment against one of several defendants, plaintiff having sued several persons as assignees for the benefit of creditors, and alleged that they were partners as W & G, and that the assignment was to said W & G, judgment may be had against G; it appearing that the assignment was not to the firm, but to him individually.—Knatz v. Wise, 16 Mont. 555; 41 Pac. 710.

C. CONFORMITY TO PROCESS, PLEADINGS, PROOF, AND VERDICT OR FINDINGS, 45-50.

45. The amount of damages claimed in a complaint, is not a material averment. The plaintiff may recover the damages he proves. —Loeb v. Kamak, 1 Mont. 152.

46. Where the jury find a specific amount due it is error to render a judgment for that amount, with interest prior to the date of trial. —Gillett v. Clark, 6 Mont. 190; 9 Pac. 823.

47. Where plaintiff has had judgment for a sum equal to that to which the various items of his claim amount when properly summed up, though by an apparent error in calculation a larger sum is claimed, he has recovered all he is entitled to, and the judgment will not be disturbed on his appeal.—Becker v. Yellowstone, 10 Mont. 87; 24 Pac. 700.

48. Findings of fact not within the issues can not support a judgment.—Harris v. Lloyd, 11 Mont. 390; 28 Pac. 736.

49. A judgment in claim and delivery, which, while conforming to the verdict and complaint as to some items of property sued for, adjudges a recovery of "five cows branded E-6 on right ribs and E-6 on left hip," though the verdict describes them as "five cows branded WA on right ribs and E-6 on left hip," while the complaint seeks to recover "five cows branded WA on the right ribs and E-6 on the left ribs," will be reversed.—Conley v. Dunn, 28 Mont. 295; 72 Pac. 654.

50. Where a verdict as directed by the court was returned for defendant for costs, the court had no power to render judgment for defendant for costs, and for damages claimed in an untried counterclaim.—Duane v. Molinak, 31 Mont. 343; 78 Pac. 588.

V. ENTRY, RECORD, AND DOCKETING, 51-59.

51. It is not error for the court to enter judgment after rendition of the verdict, when the court, on plaintiff's motion, ordered the case to be reserved for further consideration. (See 18 Wall. 657.)—Griffith v. Herschfield, 1 Mont. 66.

52. Judgment can be rendered on a verdict at a term of the court succeeding that in which it was found by the jury, if the clerk has failed to enter the same.—Comanche M. Co. v. Rumley, 1 Mont. 201.

53. The court can, after the term has expired, correct an error appearing on the judgment roll or from the face of the papers, when it is a clerical error, or one arising from the neglect of an officer of the court.—Id.

54. Where the clerk fails to enter a judgment upon the verdict at the proper term, the court may enter judgment nunc pro tunc at any succeeding term, if the rights of third parties are not affected.—Harvey v. Whitlatch, 1 Mont. 713.

55. Where judgments are required to be entered by the clerk in a record of the court to be called the "judgment book," the entry of a judgment in a book designated as the "journal of proceedings," though irregular, does not impair or invalidate the judgment as between the

parties to the action.—Work v. Northern Pacific, 11 Mont. 513; 29 Pac. 280.

56. Where judgment was entered by the territorial court when sitting as a federal court, and after statehood the records pertaining to the case, except the book containing the judgment, were, pursuant to the enabling act, transferred to the state court, it was proper for the latter court to enter judgment nunc pro tunc on the verdict.—Id.

57. It is error to refuse a motion that the clerk enter a judgment nunc pro tunc as of the day of its rendition, if the record clearly shows that the judgment was in fact rendered.—Parrott v. McDevitt, 14 Mont. 203; 36 Pac. 193.

58. The fact that the clerk enters a judgment in his book labelled "Minute Book," instead of in that labelled "Judgments by the Court," does not render the judgment void, so as to require the dismissal of an appeal therefrom.—Wolf v. Great Falls W. P. & T. Co., 15 Mont. 49; 38 Pac. 115.

59. Code Civ. Proc., § 1196, particularly specifying what papers shall constitute the judgment roll, does not include the register of actions as a part thereof.—Haupt v. Simington, 27 Mont. 480; 71 Pac. 672.

VI. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT, 60-66.

60. A district court has power, on motion, to amend a judgment for a specified quantity of water, "miner's measurement," so as to relieve it of the uncertainty of the term "miner's measurement," if the amendment is based on all the testimony in the case, made a part of the motion papers, and in no way contradicted.—Keene v. Welsh, 8 Mont. 305; 21 Pac. 25.

61. The trial court may amend a judgment entered at a former term so as to correct the name of plaintiff.—Barber v. Briscoe, 9 Mont. 341; 23 Pac. 726.

62. Where it is proper to amend a judgment of a former term, so as to correct the name of plaintiff, such amendment may be made nunc pro tunc.—Id.

63. In an action to restrain defendant from interfering with plaintiff's water right, where the court finds that defendant has a prior right to 250 inches of water, and the complaint admits his right to only 200 inches, a judgment restraining defendant from interfering with said water right to the extent mentioned in the complaint will be corrected.—Quigley v. Birdseye, 11 Mont. 439; 28 Pac. 741.

64. Comp. Stat., p. 265, §§ 794, 799, provide that on a verdict by a jury the justice shall "immediately" render judgment, and that when the prevailing party is entitled to costs the justice shall add their amount to the verdict. *Held*, that where, in an action on a note, in which the only contention was as to costs, a justice rendered judgment in favor of plaintiff for the amount of the note and interest, and in favor of defendant for costs, in accordance with the verdict of a jury, he had no jurisdiction, eight days afterwards, on plaintiff's motion, to change the judgment, as to costs, and tax them against defendant.—State v. Case, 14 Mont. 520; 37 Pac. 95.

65. The error of a clerk in omitting from a judgment, granting a stay of execution, the object for which it is granted, may be corrected after the expiration of the period for which the stay was granted.—Kendall v. O'Neal, 16 Mont. 303; 40 Pac. 599.

66. Where, in an action to recover an interest in a mining claim, a court entered a decree granting specific performance of an alleged agreement to convey plaintiff's interest to one of the defendants, it had no jurisdiction to subsequently modify such decree by adding a paragraph retaining jurisdiction with reference to the granting of an injunction restraining the operation of the mine.—Finlen v. Heinze, 28 Mont. 548; 73 Pac. 123.

VII. OPENING OR VACATING, 67-73.

67. A judgment void on account of fraud or mistake can be set aside by this court upon a motion made at a term subsequent to that in which it has been entered.—Harvey v. Whitlatch, 2 Mont. 55.

68. A judgment, valid by the record, will not be set aside, after an execution sale under such judgment.—Foster v. Hauswirth, 5 Mont. 566; 6 Pac. 19.

69. Defendant's attorney wrote to his opponent requesting a continuance, and immediately left his place of residence, his whereabouts being unknown to the attorney for plaintiff, who was therefore unable to inform him that he could not consent to such continuance. *Held*, that the judgment could not be set aside on the ground of surprise, mistake or excusable neglect.—Lowell v. Ames, 6 Mont. 187; 9 Pac. 826.

70. Under Comp. Stat., p. 88, § 116, providing that a party desiring to set aside a judgment on the ground of mistake, etc., may make application within a reasonable time, not exceeding five months, after the close of the term at which the judgment was rendered, on showing cause satisfactory that he was unable to apply during the term, the question as to satisfactory cause is in the discretion of the trial court.—Whiteside v. Logan, 7 Mont. 373; 17 Pac. 34.

71. In a suit to quiet title to mining claims in the grantee, the grantor's refusal to file an answer, his consent to enter his appearance, his waiver of trial by jury, and consent that the cause might proceed without any defense on his part, are sufficient evidence of collusion to transfer to plaintiff all interest in the claims to justify a vacation of the decree rendered therein.—Largey v. Bartlett, 18 Mont. 265; 44 Pac. 962.

72. A judgment may be directly attacked for fraud and collusion by one having an interest in the subject matter thereof, who had no knowledge of the suit in which the judgment was rendered.—Id.

73. Under Const. art. 8, § 17, and Code Civ. Proc., § 38, abolishing terms of court in counties comprising judicial districts, and §§ 1720, 1722, 1723, providing a method for review of judgments by motion for new trial, and by appeal from an order denying or granting the same, or from final judgment, and not otherwise, a court in such districts, having regularly made an appealable order, has no power to set it aside on its own motion; it not having been made inadvertently or improvidently.—Whitbeck v. Montana Central, 21 Mont. 102; 52 Pac. 1098.

VIII. EQUITABLE RELIEF, 74-81.

74. Where a party failed to appeal from an erroneous judgment until after the proper time for such an appeal had expired, such failure to use proper diligence in seeking her legal remedy and exercising her statutory rights of appeal, barred her from maintaining an action for equitable relief.—Vantilburg v. Black, 3 Mont. 459.

75. A defendant against whom judgment was rendered by default under service of summons made on Sunday, when the sheriff's return states that service was made on Saturday, may maintain a suit in equity to have such judgment set

aside.—Hanswirth v. Sullivan, 6 Mont. 203; 9 Pac. 798.

76. The requirement of courts of equity that a defense must be shown before a judgment will be opened, is done away with when plaintiff tenders the full payment of the judgment.—Id.

77. In an action to vacate a judgment and enjoin its enforcement against plaintiff, in defendant's favor, on the ground of an alleged settlement pending the suit, the jury found, in answer to interrogatories, that no such settlement or agreement had ever been made. *Held*, that a judgment for plaintiff should be reversed. —Daly v. Milen, 14 Mont. 20; 35 Pac. 227.

78. When the question of the alleged inability of a corporation to maintain an action by reason of its failure to comply with Comp. Stat., p. 720, c. 24, regulating the right of foreign corporations to contract and sue upon contracts, could have been made use of as a ground to set aside a judgment in a justice's court in favor of the corporation, or on a trial de novo on appeal, the question can not be raised in an action to annul the judgment.—Schilling v. Reagan, 19 Mont. 508; 48 Pac. 1109.

79. In an action to restrain defendant from collecting a certain judgment on the ground that, though standing in the name of defendant, an alleged agent of plaintiff, it was in fact the property of plaintiff, the insolvency of defendant was immaterial.—Bennett v. Condon, 20 Mont. 208; 50 Pac. 556.

80. Where, after a judgment for the rescission of a contract on plaintiff's surrender of property received thereunder, it appears that she was unable to make such surrender, defendant is entitled to restrain the enforcement of the judgment.—O'Rourke v. Schultz, 23 Mont. 285; 58 Pac. 712.

81. Where, in an action on a contract, it appeared that plaintiff's interest had been assigned to another pendente lite, and defendant made no objection to such assignment in that action, he can not subsequently object thereto in a proceeding to restrain the enforcement of the judgment recovered.—Id.

IX. COLLATERAL ATTACK, 82-91.

82. Where the court rendering a decree has jurisdiction of the person and of the subject matter, the judgment is not void, however erroneous it may be, and is not subject to attack collaterally.—Vantilburgh v. Black, 2 Mont. 371.

83. A judgment of a court of general jurisdiction, valid on its face, can not be collaterally attacked by facts aliunde the record, showing that it was not fairly obtained, although such facts might be sufficient to impeach it if brought to bear in a proper proceeding.—Edgerton v. Edgerton, 12 Mont. 122; 29 Pac. 966.

84. A claim that too much interest was included in a judgment ascertaining the amount of a guardian's indebtedness, can not be inquired into in an action on his bond.—Botkin v. Kleinschmidt, 21 Mont. 1; 52 Pac. 563.

85. A judgment of the district court, having jurisdiction of the subject matter of the action, unless void on its face or on inspection of the judgment roll, is not open to collateral attack. —Burke v. Loan Ass'n, 25 Mont. 315; 64 Pac. 879.

86. Service of summons by one who was not of the age required by statute, though defective, would not make void or subject to collateral attack a judgment rendered by a court having jurisdiction of the subject matter and parties, and keeping within the limits of its power.—Id.

87. An affidavit of service of summons omitted the statement that the person serving the same was over 18 years of age, as required by Comp. Stat., p. 75, §§ 71, 78, 80, providing by whom and how service shall be made, what proof thereof shall be sufficient, and that from the time of service of summons the court is deemed to have acquired jurisdiction, and to have control over subsequent proceedings. *Held*, that a judgment rendered thereon was not void on its face, so as to be subject to collateral attack; the judgment roll showing no want of jurisdiction, but merely irregularity in obtaining it.—Id.

88. Where a complaint alleged "that said note is now long past due and unpaid, the payment of same has been frequently demanded, and that plaintiff is now the holder and owner thereof," a judgment thereon by default, not appealed from, is admissible in a collateral action, though the complaint failed to allege nonpayment.—Id.

89. A judgment foreclosing a mechanic's lien against the real estate belonging to a wife in a suit against her husband is not invalid for the reason that the judgment declared to be a lien is against the husband personally, and therefore the wife can not enjoin execution sale of the property, but can only have the judgment corrected, if erroneous, by motion for new trial or on appeal.—Alexander v. Fransham, 26 Mont. 496; 68 Pac. 945.

90. The presumption that the court rendering a judgment had jurisdiction over the person of defendant is conclusive on collateral attack, unless on the face of the judgment roll a lack of jurisdiction affirmatively appears.—Haupt v. Simington, 27 Mont. 480; 71 Pac. 672.

91. An attack on a judgment as void, made by way of defense to a suit to revive it, is a collateral attack.—Id.

X. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES, 92-97.

92. Dismissal of an action is a final judgment against plaintiff, though he may bring a new action for the same subject matter.—Dahler v. Steele, 1 Mont. 206.

93. A judgment which has been rendered in an action that has been tried upon the merits is a bar to another suit between the same parties, or their privies, for the same cause. (See 9 Otto, 261.)—Campbell v. Rankin, 2 Mont. 363.

94. The operation of a judgment and decree is not suspended by an appeal to the supreme court of the United States, where there is no supersedeas, so that it may be set up as a bar to a retrial of the same issues between the same parties.—Curtis v. Donnell, 3 Mont. 211.

95. An appeal to this court does not suspend the operation of a judgment, so that it may not be pleaded as a bar in another case pending between the same parties concerning the same subject matter.—Fredericks v. Clark, 3 Mont. 258.

96. The denial of a motion to set aside a default is not res judicata, and the motion may be renewed by leave first obtained on good cause shown.—Jensen v. Barbour, 12 Mont. 566; 31 Pac. 592.

97. An action to foreclose a lien for the contract price of removal of buildings is not barred, as a violation of the inhibition against "splitting demands," where the laborers have previously foreclosed a lien for the amount due them on account of work done for the contractor.—Boucher v. Powers, 29 Mont. 342; 74 Pac. 942.

XI. CONCLUSIVENESS OF ADJUDICATION, 98-11.

98. Where defendant appeals from a judgment overruling his demurrer to the complaint, and determining, on the merits, that neither plaintiff nor defendant had established title to a mining claim, the judgment of the appellate court, that the complaint does not state a cause of action, reverses the judgment of the trial court entirely, so that no portion thereof can be pleaded as res judicata.—Mattingly v. Lewisohn, 13 Mont. 508; 35 Pac. 111.

99. A judgment of conviction for assault, before a justice, is not admissible, in an action for damages by the person assaulted against defendant, to show the fact of assault.—Doyle v. Gore, 15 Mont. 212; 38 Pac. 939.

100. Where, pending a motion for new trial, bond is given to procure a stay of execution, conditioned on payment of the judgment, the taxation of costs, the new trial being denied, if unappealed from, is, in an action on the bond, res judicata.—Nelson v. Donovan, 16 Mont. 85; 40 Pac. 72.

101. A firm of contractors brought suit on a building contract to recover the amount due thereon, and made a bank a party defendant, alleging that they had assigned the moneys to become due under the contract to the bank, as collateral security for a loan. The bank did not appear in that action, nor were its rights adjudicated therein. *Held*, that the bank was not a necessary or proper party to that action, and was therefore not prejudiced from asserting its lien in a subsequent action to determine the rights of the contractors' creditors in the fund recovered.—School District v. Whalen, 17 Mont. 1; 41 Pac. 849.

102. In foreclosure, defendant pleaded that the action was prematurely brought, and other equitable defenses. The jury found that the action was prematurely brought, and returned a general verdict for defendant, without passing on other issues. *Held*, that as to the equitable issues, the judgment was not res judicata.—Gassert v. Black, 18 Mont. 35; 44 Pac. 401.

103. In an action to reform a bond, and for judgment thereon, a decision on appeal that the bond is valid without reformation is conclusive in a second trial to recover the amount due.—Priest v. Eide, 19 Mont. 53; 47 Pac. 206.

104. The sureties on a guardian's bond are bound by a judgment against their principal determining the amount of his indebtedness to the estate, though not parties to such suit.—Botkin v. Kleinschmidt, 21 Mont. 1; 52 Pac. 563.

105. In a creditor's suit to set aside a sale as fraudulent, the judgment roll in another suit is not admissible to show that the title to the property was undetermined, where such record does not disclose that it concerns any party to the present action.—Finch v. Kent, 24 Mont. 268; 61 Pac. 653.

106. In a creditor's suit to set aside a sale of property made on Jan. 3, 1893, as in fraud of a judgment obtained by the creditors against defendant on Feb. 17, 1894, evidence of defendant that he did not owe the amount of the judgment is properly excluded, since the judgment was conclusive evidence of his liability, in the absence of evidence on his behalf tending to show fraud, accident, mistake or satisfaction.—Id.

107. Where a judgment for the ownership of the property was rendered for plaintiff in an action of forcible entry and detainer, and an appeal taken, that judgment was not admissible to show plaintiff's ownership in a subsequent action against the defendant pending the appeal in the former action.—Boucher v. Barsalou, 27 Mont. 99; 69 Pac. 555.

108. Where an action was tried to determine the right of plaintiff's landlord to an interest in an irrigating ditch, to establish his right to use the ditch, and to enjoin defendant from interfering with plaintiff's use thereof, in which defendant denied the landlord's right to the ditch, but it was subsequently determined that he was a tenant in common thereof, and an order previously issued, restraining defendant from deflecting the flow, was modified so as to allow 50 inches of water to flow to the landlord's premises, such judgment was not conclusive, in a subsequent action by the tenant for damages to crops by reason of defendant's alleged previous diversion, that defendant had deprived plaintiff of all the water which should have been permitted to flow on her land.—Flannery v. Campbell, 30 Mont. 172; 75 Pac. 1109.

109. Where, in a suit to quiet title to a vein of ore and for damages for a trespass on the vein, defendants did not seek an injunction restraining plaintiffs from operating the vein, they were not entitled to such an injunction in a subsequent suit by them, proceedings for such relief having been open to them in the former suit.—Maloney v. King, 30 Mont. 414; 76 Pac. 939.

110. Where a sub-contractor did the painting of a building for the contractor who had undertaken the construction of the entire building, a judgment in favor of the sub-contractor, in a suit by him against the principal contractor to recover on account of the work done, is not res judicata as to the owner, so as to bar litigation of the question, between the owner and the principal contractor, whether the painting was done in accordance with the principal contract.—Wagner v. Hospital, 32 Mont. 206; 79 Pac. 1054.

111. Under U. S. R. S., § 2326, relative to the determination of adverse claims for patents, and which requires the adverse claimant to commence and prosecute proceedings to determine the question of the right of possession, and provides that the party adjudged to be entitled to the possession of the claim may file a certified copy of the judgment roll with the register of the land office, together with certain other papers, on which a patent shall be issued, the government is not a party to a suit to determine an adverse claim, except in so far as it has agreed to accept the judgment therein rendered as conclusive of the right of possession as between the contending claimants; and such judgment is not conclusive on a subsequent patentee from the government of land embraced therein, who was not a party, or privy to a party, to the suit in which the judgment was rendered.—Butte L. & I. Co. v. Merriman, 32 Mont. 402; 80 Pac. 675.

XII. LIEN, 112-117.

112. A judgment lien is not a specific lien upon the real estate of the judgment debtor, so as to constitute a property in the land itself to the exclusion of a prior equitable title in a third person, but is a general lien, securing a right to levy, or the preference over interests subsequently acquired, and is subject to all prior liens, whether legal or equitable.—Vaughn v. Schmalsle, 10 Mont. 186; 25 Pac. 102.

113. Comp. Stat., p. 139, § 307, provided that after filing a judgment roll the clerk should make the proper entries of the judgment in the docket, "and from the time the judgment is docketed it shall become a lien." *Held*, that a judgment was not a lien until docketed, regardless of when it was rendered.—Sklower v. Abbott, 19 Mont. 228; 47 Pac. 901.

114. Though one is aware of a judgment which, because not yet docketed, is not a lien

on the debtor's property, he may obtain priority by attaching the property.—Id.

115. Where an attachment issued by the court in one county was levied on real estate in another county it was not essential to the establishment of a lien to file a transcript of the judgment in the other county, as provided by Code Civ. Proc., § 1200.—Holter v. Mining Co., 24 Mont. 184; 61 Pac. 3.

116. An unpatented mining claim being real estate, a judgment lien attaches to it, under Code Civ. Proc., § 1197, declaring that from the time a judgment is docketed it becomes a lien on all real property of the judgment debtor. —Butte Hardware Co. v. Frank, 25 Mont. 344; 65 Pac. 1.

117. A judgment lien on an unpatented mining claim is not lost by the transfer of the claim by the judgment debtor, on the ground that such transfer is an abandonment thereof, since the transfer of an unpatented claim does not amount to an abandonment.—Id.

XIII. FOREIGN JUDGMENTS, 118.

118. A judgment recovered against an administrator in one state is no evidence of the debt, in a subsequent suit on the same demand by the same plaintiff in another state, against his administrator there appointed.—Braithwaite v. Harvey, 14 Mont. 208; 36 Pac. 38.

XIV. SUSPENSION, ENFORCEMENT, AND REVIVAL, 119-123.

119. Code 1872, § 42, allows judgment in an action against joint debtors, one only of whom is served, to be entered against all as to the joint property and as to the separate property of the one served. Rev. Stat., 1871-2, § 420, and Laws 1879, § 446, provide that where judgment is so rendered, those not served may be summoned to show cause why they should not be bound thereby. *Held*, that where the judgment is rendered in a probate court, which has jurisdiction only within the county, it can only be reached by filing a transcript in the proper district court and bringing in by scire facias the defendants not served to show cause why they should not be made parties to the judgment, and this can not be done until plaintiff has issued execution on the judgment, or shown good cause for not doing so.—Kleinschmidt v. Freeman, 4 Mont. 400; 2 Pac. 275.

120. A judgment rendered in favor of E C & Co., can not, after the lapse of five years, be revived in favor of two persons who make affidavit that they are the surviving partners of E C & Co., there being no suggestion in the record of E C's death or of the appointment of an administrator. This would be a change in the judgment, which can not be made after the term at which it was rendered.—Boyd v. Platner, 5 Mont. 226; 2 Pac. 346.

121. The assignee of a judgment may sue to recover it, under the law requiring suits to be brought in the name of the real party in interest.—Haupt v. Burton, 21 Mont. 572; 55 Pac. 110.

122. Under Comp. Stat., p. 74, § 66, providing that civil actions are commenced by filing a complaint, a complaint to review a judgment filed within six years, confers jurisdiction, though the summons is not served within that time, notwithstanding, by § 80, the court is deemed to have jurisdiction in a civil action from the service of summons.—Id.

123. A judgment for possession of land may be revived the same as a judgment in a personal action, and the judgment as revived should be that plaintiff have execution, and be given possession as against defendants and their successors.—Id.

XV. PAYMENT, SATISFACTION, MERGER, AND DISCHARGE, 124-130.

124. A written release for a valuable consideration of one of the joint and several makers of a promissory note from all liability on the judgment entered in the district court thereon, and the mortgage securing the payment of the note, satisfies the judgment and releases all the judgment debtors and mortgagors, notwithstanding the release provides that the other judgment debtors shall not be affected by the release.—Collier v. Field, 1 Mont. 612.

125. C obtained judgment against W for damages in an action for personal injuries. W afterward recovered judgment against C upon a promissory note. W paid part of the judgment against himself and brought an action to have his judgment set off against the balance still due. C assigned the unpaid balance on said judgment to M in payment of a pre-existing indebtedness. M had notice of W's demand and that C was insolvent. *Held*, that M was not a bona fide purchaser of the judgment against W and that he held the same subject to the right of set-off by W.—Wells v. Clarkson, 2 Mont. 230.

126. A judgment debtor is entitled to set off a judgment in his favor, against a judgment in favor of his judgment creditor, although such creditor has assigned his judgment, and the assignee, at the time of the assignment, had no notice of the subsisting equity of the judgment debtor.—Wells Fargo & Co. v. Clarkson, 5 Mont. 336; 5 Pac. 894.

127. Where a judgment once entered upon a verdict is again entered nunc pro tunc and is affirmed on appeal, the appellant can not claim that two judgments stand against him upon the same cause of action and verdict, as under Comp. Stat., p. 140, § 311, upon satisfaction of said judgment, entry of satisfaction must be made, showing the cancellation of all judgments entered upon said verdict.—Work v. Northern Pacific, 11 Mont. 513; 29 Pac. 280.

128. Plaintiff in a creditor's suit may testify that his judgment has never been satisfied, since the record is not the only means by which proof of payment of the judgment may be made. —Whiteside v. Hoskins, 20 Mont. 361; 51 Pac. 739.

129. The receipt of a clerk of a court for money paid to him on a judgment docketed in his office is admissible as evidence to show receipt of the money by the judgment creditor.—Matusevitz v. Hughes, 26 Mont. 212; 66 Pac. 939; 68 Pac. 467.

130. Under Code Civ. Proc., § 691, a judgment can not be set off against an action of conversion, but defendant's remedy is by bill in equity or other proceeding to offset one judgment against the other.—Potter v. Lohse, 31 Mont. 91; 77 Pac. 419.

XVI. ACTIONS ON JUDGMENTS, 131-135.

131. In an action on a judgment, complainant must allege ownership of it.—Ryan v. Spieth, 18 Mont. 45; 44 Pac. 403.

132. In an action on a judgment of another court, parol evidence is not admissible merely to show that the summons in the original action was so served as to authorize rendition of the judgment, whatever may be the right as to amendment of the return to conform to the facts, so as to show service in accordance with the statute.—Sanford v. Edwards, 19 Mont. 56; 47 Pac. 212.

133. Comp. Stat., p. 68, § 41, providing that an action on a judgment of any court of the United States or any state therein shall be commenced within six years, applies to judgments rendered by the courts of Montana.—Haupt v. Burton, 21 Mont. 572; 55 Pac. 110.

134. Under Comp. Stat., p. 59, § 1, providing that there shall be but one form of civil action for the enforcement of private rights, a judgment may be revived by a civil action; and this, though § 349 also authorizes an execution to issue after five years from the judgment, by leave of court.—Id.

135. Under Code Civ. Proc., § 745, a complaint alleging that on a certain date certain parties were adjudged bankrupts by the district court of the United States at a term of the court held in a certain city, in proceedings then pending in the court, under the provisions of the bankruptcy act of Jul. 1, 1898 (30 Stat., § 544), was an insufficient allegation of the rendition of the adjudication, in that it failed to allege that it was "duly given or made."—Mears v. Shaw, 32 Mont. 575; 81 Pac. 338.

XVII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE, 136-140.

136. Where the judgment offered in evidence may have been based upon any one of a number of questions of fact, it is not conclusive upon any one of them when there are no means of determining upon which the verdict has been founded. (See 9 Otto. 261.)—Campbell v. Rankin, 2 Mont. 363.

137. Under Comp. Stat., p. 86, § 103, permitting a judgment of a court of special jurisdiction to be pleaded by stating it "to have been duly given or made," an allegation that judgment was rendered is not sufficient.—Harmon v. Comstock, 9 Mont. 243; 23 Pac. 470.

138. Under Comp. Stat., p. 86, § 103, permitting a judgment of a court or officer of special jurisdiction to be pleaded by stating it "to have been duly given or made," an allegation, that in an action before a justice of the peace, defendant "recovered judgment" against plaintiff, is insufficient.—Weaver v. English, 11 Mont. 84; 27 Pac. 396.

139. An estoppel by judgment, to be available as a bar, must be pleaded.—Josephi v. Clothing Co., 13 Mont. 195; 33 Pac. 1.

140. Where a demurrer setting up want of facts alleged to constitute a cause of action, misjoinder of causes, and misjoinder of parties, is sustained generally, and plaintiff, abiding his complaint, suffers judgment to be entered, the presumption is not that each and every ground of the demurrer was held sufficient, but rather that the court would first consider the objections to form, and finding them well taken, would go no further; so that one pleading such judgment as an estoppel to said plaintiff's allegations of the same facts has the burden to show that the demurrer was not sustained on the first ground.—Kleinschmidt v. Binzel, 14 Mont. 31; 35 Pac. 460.

JUDICIAL SALES.

1. One purchasing property on sale under a judgment void as to creditors acquires no title, as against them, whether or not he obtained actual possession.—Pincus v. Reynolds, 19 Mont. 564; 49 Pac. 145.

JURY.

I. Right to Trial by Jury, 1-18.
A. Civil actions and proceedings, 1-10.
B. Loss and waiver of right, 11-12.
C. Denial or infringement of right, 13-18.
II. Qualifications of Jurors, 19.
III. Summoning, Attendance, Discharge, and Compensation, 20-31.
IV. Competency of Jurors, Challenges, and Objections, 32-54.

I. RIGHT TO TRIAL BY JURY, 1-18.

A. Civil Actions and Proceedings, 1-10.
B. Loss and Waiver of Right, 11-12.
C. Denial or Infringement of Right, 13-18.

A. CIVIL ACTIONS AND PROCEEDINGS, 1-10.

1. The Constitution of the United States does not secure the right of trial by jury in causes of equity jurisdiction, and the legislature of this territory has power to determine the number of jurors that can render a verdict in the trial of issues of fact arising in such cases. (See 11 Wall. 610.)—Kleinschmidt v. Dunphy, 1 Mont. 118.

2. Under the Code of Civil Procedure, cases in equity and actions at law in which an equitable defense is made, can not be tried by a jury, as at law, but the decree must be rendered by the judge, sitting as a chancellor in a court of chancery.—Gallagher v. Basey, 1 Mont. 457.

3. Under Civ. Pr. Act, a party to the proceedings in mandamus does not have the absolute right to a trial of the facts by a jury, and the courts can exercise their discretion respecting the mode of trial. (See 2 Otto. 358.) —Chumasero v. Potts, 2 Mont. 242.

4. Act Cong., Apr. 7, 1874 (18 U. S. Stat. 27), concerning the practice in territorial courts, in recognizing the right of trial by jury in cases cognizable at common law, does not include proceedings in mandamus.—Id.

5. Upon the trial of an action for an injunction restraining the diversion of water, trial by jury can not be claimed as a right.—Fabian v. Collins, 3 Mont. 215.

6. Under 12th Session Laws, p. 5, § 9, an action to foreclose a chattel mortgage may be united with an action to recover possession of the mortgaged property; and if the answer in such action admits the mortgagee's right to possession there is no issue for a jury.—Clark v. Baker, 6 Mont. 153; 9 Pac. 911.

7. A defense that a written contract on which an action of replevin was founded falsely expressed the agreement of the parties, and in effect asking for a reformation of same on the ground of deceit, being equitable, it was not necessary to submit to the jury whether fraudulent misrepresentations by the adverse party were relied on as an inducement to its execution.—Stanford v. Gates, 21 Mont. 227; 53 Pac. 749.

8. Since parties in an action under Laws 1864-65, p. 92, § 233, authorizing an action to determine adverse claims to real property or an interest therein, in force prior to the adoption of Const., art. 3, § 23, declaring that the right of trial by jury shall be secured to all and remain inviolate, were not entitled to a jury trial of such action, a defendant in an action under such statute, as re-enacted in Code Civ. Proc., § 1310, subsequent to the Constitution, to try an adverse claim to mining property, is not entitled to have the issues submitted to a jury.—M. O. P. Co. v. Mining Co. 27 Mont. 410; 71 Pac. 403.

9. Since the right of trial by jury guaranteed by the Constitution is the right as it existed at common law, and since an action to quiet title to mining property, brought under Code Civ. Proc., § 1310, is an equitable action, neither party thereto is entitled, as a matter of right, to a jury trial.—M. O. P. Co. v. Mining Co., 27 Mont. 536; 71 Pac. 1005.

10. Under U. S. Const., amend. 7, in force

at the time of the adoption of the Constitution of Montana, and under Montana Const., art. 3, § 23, and Code Civ. Proc., § 1300, and Civ. Code, §§ 4550, 4555, 4590, plaintiff in an action for damages for the maintenance of a nuisance is entitled to a trial by jury of his right to damages, although he also asks for the equitable relief of injunction to restrain the continuance of the acts complained of.—Chessman v. Hale, 31 Mont. 577; 79 Pac. 254.

B. LOSS AND WAIVER OF RIGHT, 11-12.

11. In the trial of all felonies, more specially of capital offenses, a jury of 12 men, neither more nor less, is an indispensable requirement of the law.—Territory v. Ah Wah, 4 Mont. 149; 1 Pac. 732.

12. Under Const., art. 3, §§ 23, 29, and Code Civ. Proc., § 1110, plaintiff's right to a jury trial in an action for damages for a nuisance could only be waived in one of the modes specified, and was not waived by his failure to demand a trial by jury, or to submit to the court the question as to whether he had a right to a jury trial, or by endeavoring to maintain his claim under the theory of the case which the court, by its ruling that it was an action in equity, compelled him to adopt.—Chessman v. Hale, 31 Mont. 577; 79 Pac. 254.

C. DENIAL OR INFRINGEMENT OF RIGHT, 13-18.

13. So much of Act Jan. 15, 1869, as provides that three-fourths of a jury may find a verdict in a common law action, is in conflict with Const., art. 8, which secures the right of trial by jury in certain cases.
Kleinschmidt v. Dunphy, 1 Mont. 118.
Aylesworth v. Reece, id., 200.

14. Laws 1883, p. 52, providing that the value of certain kinds of stock killed by a railroad company should be determined by appraisement, and that such appraisement should be conclusive evidence of such value, is unconstitutional under the Constitution and laws of the United States, as depriving the company of the right of trial by jury.—Graves v. Northern Pacific, 5 Mont 556; 6 Pac. 16.

15. Comp. Stat., p. 458, § 287, subd. 11, which provides that having formed or expressed an opinion shall disqualify a juror, unless he has formed his opinion from the newspapers and can state on oath that he feels able to decide the case impartially, is not in conflict with Const., amend. 6, conferring the right of trial by an impartial jury.—Territory v. Bryson, 9 Mont. 32; 22 Pac. 147.

16. Under Const., art. 3, § 23, the direction of a verdict in a creditor's suit to set aside a sale as fraudulent was not an infringement of defendant's right to a trial by jury, though the testimony in the case was conflicting, since such cases were within the exclusive jurisdiction of chancery at the time the Constitution was adopted, and the Constitution did not enlarge the right of trial by jury.—Finch v. Kent, 24 Mont. 268; 61 Pac. 653.

17. Pen. Code, § 2051, provides that no person shall be disqualified as a juror by reason of having formed or expressed an opinion on the matter, found on public rumor, statements in public journals, or common notoriety, provided he can and will act impartially. *Held*, that the statute is not unconstitutional, as not granting a fair and impartial trial.—State v. Mott, 29 Mont. 292; 74 Pac. 728.

18. Where minority stockholders restrain an attempted transfer of the entire property of the corporation to a foreign corporation, and the court allows attorneys' fees as a part of the plaintiffs' costs and expenses taxable according to the course and practice of courts of equity, that such mode of allowance deprives the defendant of a jury trial on the issues as to the amount does not render the mode illegal.—Forrester v. Mining Co., 29 Mont. 397; 74 Pac. 1088; 76 Pac. 211.

II. QUALIFICATIONS OF JURORS, 19.

19. During the progress of a trial defendant objected that there was an alien on the jury, and it was found that one of the jurors came to America when two years old, and had taken out no naturalization papers; whereupon opportunity was given by the court, and he was naturalized in proper form, and the trial proceeded. *Held*, that the objection of alienage would not apply.—Territory v. Hart, 7 Mont. 489; 17 Pac. 718.

III. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION, 20-31.

20. If, between the time of selecting the panel and the commencement of the trial, the law should be changed so as to require a larger panel, the litigant has the right to demand the larger panel.—Kennon v. Gilmer, 4 Mont. 433; 2 Pac. 21.

21. At the time of drawing the jury panel by the county commissioners they were required by law to draw 18 names from the general jury list. A subsequent law required the commissioners to draw 30 names, and directed the judge at the beginning of the term to examine the jurors present and reduce the panel to 24. Rev. Stat., p. 84, § 246, provides that when the panel is exhausted by challenge, absence or sickness, the court may cause the sheriff to summon so many persons as might be needed to complete the jury for the pending trial. *Held*, that the court could not select, before the term, additional names to fill the panel from the 18 drawn by the commissioners to the 24 required by the new law for a full panel.—Id.

22. It was no ground for challenege to the panel, in a territorial case, that jurors for the trial of United States causes had been drawn from the box provided by the county commissioners, so long as a full panel was left from which the territory and defendant might select a jury.—Territory v. Reed, 5 Mont. 92; 1 Pac. 717.

23. When the regular panel becomes exhausted, the court may direct the sheriff to summon from the body of the county enough qualified persons to complete the jury.—Id.

24. Laws 12th Session, p. 58, provide that if for any reason the panel shall not be full at the opening of court, or at any time during the term, the clerk, under direction of the court, shall draw from the jury box furnished by the county commissioners so many additional names as may be needed to fill the panel. *Held*, that where members of the regular panel were found to be residents of a new county, set off from the county in which the court is sitting when the jurors were drawn, the court properly caused further jurors to be drawn from the box.—Wykoff v. Loeber, 5 Mont. 535; 6 Pac. 363.

25. In 12th Sess. Laws, p. 57, §§ 773, 774, it is provided that the county commissioners shall select the names of 100 qualified persons from the assessor's books and from such number shall draw 30 persons for trial jurors; that at the commencement of the term the judge shall examine the jurors who appear and discharge by lot the number in excess of 24; that if for any reason the panel shall not be full at the opening of court or at any time during the term, the clerk shall, under the direction of the judge, draw from the box furnished by the commissioners so many additional names as the

court may direct to fill the panel. *Held*, that it was error, after exhausting the regular panel, consisting of only 23 jurors, to issue an open venire, instead of drawing from the names on the commissioners' list.—Dupont v. McAdow, 6 Mont. 226; 9 Pac. 925.

26. Under such sections it was error to compel defendant to select the jury from a panel consisting of only 23 jurors.—Id.

27. The issue of an open venire raises no presumption that the list of 100 names drawn by the county commissioners has been exhausted.—Id.

28. Const., art 8, § 17, provides that the district court in each county which is a judicial district by itself shall "always be open" for the transaction of business, and that in each district where two or more counties are united the judges of such district shall "fix the term of court." *Held*, that the Constitution does not annul Act 16th Sess., p. 166, providing that it shall be the duty of the judge of the district court, "at each regular term," to appoint jury commissioners. The act applies to district courts which are in session continuously, as well as to those having regular appointed terms.—State v. McHatton, 10 Mont. 370; 25 Pac. 1046.

29. Laws 1889, p. 168, providing that if, during the trial, where a jury has been drawn, it shall become necessary to summon additional jurors, such jurors may be summoned by open venire, a court is not obliged, before calling a case, to await the return of a portion of the regular panel, who may be out deliberating upon a case which has been previously tried, but a special venire may be issued.—O'Donnell v. Bennett, 12 Mont. 242; 29 Pac. 1044.

30. Where the absence of one or two jury commissioners will not prevent a majority from selecting the jurors (Laws 1889, p. 168, § 12), the fact that the district clerk, who is one of the five commissioners, did not act with, and as one of, the commissioners who selected the jury in a certain case, does not render such jury illegal.—State v. Osnes, 14 Mont. 553; 37 Pac. 13.

31. Under the provisions of Code Civ. Proc., §§ 232, 241-243, 262, where the jury commissioners intentionally omitted from their list persons known to them to be exempt from jury duty, though they were competent jurors, such action was a mere irregularity, not affecting any right of defendant, and hence no ground for challenge to the panel.—State v. Tighe, 27 Mont. 327; 71 Pac. 3.

IV. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS, 32-54.

32. A party who has been indicted for grand larceny and receiving stolen goods in violation of the laws of the United States, is entitled to three peremptory challenges to the jury empanelled to try the case, under 17 Stat. 282.—United States v. Upham, 2 Mont. 113.

33. A juror testified, when examined respecting his qualifications to serve, that he had formed an opinion concerning the merits of a case by talking with one of the parties and believed what he said regarding it; that he could not say that it was an unqualified opinion; that sufficient evidence would change his opinion; that he thought he could render an impartial verdict, and that his opinion was dependent upon the truth of what he heard. *Held*, that such juror was not competent to sit in the trial of the case.—Ruff v. Rader, — Mont. 211.

34. A juror who hears and accepts as true the statement of a case by a party or witness, forms an "unqualified opinion," within the meaning of Civ. Pr. Act, § 198.—Id.

35. A juror testified upon his voir dire that he had not formed or expressed any opinion as to the guilt or innocence of defendant, and was accepted as a juror. After the verdict had been returned it was shown by affidavits that the juror had stated several months before the trial that defendant was guilty and that he would hang him. The juror then testified that he had forgotten these statements and that he had no prejudice against the defendant when he was sworn to try the case. *Held*, that such juror was incompetent.—Territory v. Kennedy, 3 Mont. 520.

36. Any defect in the panel is cured if the party waives the jury and proceeds to trial before the court.—Wykoff v. Loeber, 5 Mont. 535; 6 Pac. 363.

37. When the accused, objecting to the alienage of a juror, fails to exercise the right of peremptory challenge, such disqualification is thereby waived.—Territory v. Hart, 7 Mont. 42; 14 Pac. 768.

38. On trial for murder, a juror who has said "if B is the man who killed O, he is liable to be cinched plenty, and sent over the road," is not for that reason disqualified as having expressed an opinion as to the guilt of defendant.—Territory v. Burgess, 8 Mont. 57; 19 Pac. 558.

39. Under Comp. Stat., p. 458, § 287, subd. 11, providing that having formed or expressed an opinion shall disqualify a juror, unless he has formed his opinion from the newspapers, and can state on oath that he feels able to decide the case impartially, where a juror states that he only knows of the case from the newspapers, that he may have formed an opinion, but that he is without bias, and can decide the case fairly, he is competent.—Territory v. Bryson, 9 Mont. 32; 22 Pac. 147.

40. The excusal by the court of certain jurors in a criminal case, under an erroneous construction of the statute prescribing their qualifications, is an irregularity which is cured by a recall of the jurors excused, who stated that they had talked with no one during their absence from the court room, and the offer to defendant of the full number of peremptory challenges in addition to those already exercised, the court having discovered the error and revoked the ruling before it had been reduced to writing and recorded by the clerk.—State v. Linebarger, 12 Mont. 292; 30 Pac. 140.

41. A juror who has formed and expressed an opinion on the case from reading newspaper statements and from hearsay, but who states that he does not know the defendant, has no prejudice, and, notwithstanding such opinion, can impartially try the case, is competent under Comp. Stat. p. 458, § 287, subd. 11.—State v. Sheerin, 12 Mont. 539; 31 Pac. 543.

42. A juror's opinion, expressed before he was called, that defendant was a "tough citizen," would not show that he was prejudiced, in the face of his voir dire testimony that he had no prejudice, and had formed no opinion as to defendant's guilt or innocence.—State v. Anderson, 14 Mont. 541; 37 Pac. 1.

43. An acceptance of a juror over a party's objection will not be considered unless the record shows that, at the time of the acceptance, such party had used all his preemptory challenges.—Davidson v. Bordeaux, 15 Mont. 245; 38 Pac. 1075.

44. A juror who has formed a fixed opinion as to the guilt or innocence of the person charged to be the principal offender ought not to sit upon the trial of the person charged as an accessory.—State v. Gleim, 17 Mont. 17; 41 Pac. 998.

45. A juror who has not on his voir dire shown himself disqualified under Pen. Code, § 2048, by implied or actual bias, is not disqualified, under § 2046, by the fact that he is

a brother-in-law of the prosecuting attorney.—State v. Cadotte, 17 Mont. 315; 42 Pac. 857.

46. Defendant challenged the panel of the trial jury on the ground that the officials who made up the jury list did not enter thereon the names of all persons whom they believed qualified, and offered to prove, in support of the challenge, that the facts set forth in it were true, but he did not file any affidavits or call any witnesses to sustain the challenge. *Held*, that the challenge was properly overruled.—State v. Bowser, 21 Mont. 133; 53 Pac. 179.

47. Under Pen. Code, §§ 2044, 2045, 2047, defendant is entitled to 10 peremptory challenges, and the state to five, which must be taken as provided by Code Civ. Proc., § 1059, declaring that, if no peremptory challenges are taken until the panel is full, they must be taken by the parties alternatively, commencing with plaintiff. *Held*, that accused was compelled to exhaust alternatively two peremptory challenges to each one taken by the state, where none were taken until the panel was full.—State v. Sloan, 22 Mont. 293; 56 Pac. 364.

48. Where the state waived its fourth peremptory challenge, whereupon defendant exhausted his peremptory challenges, it was not error, on the panel's being filled and passed for cause, to permit the state to peremptorily challenge a juror who was in the box when the state waived its fourth challenge; since the state's waiver of its fourth challenge was not a waiver of any subsequent challenge it was entitled to.—State v. Peel, 23 Mont. 358; 59 Pac. 169.

49. Under the provisions of Pen. Code, §§ 2036-2039, 2170, a demurrer to a challenge is equivalent to an exception, the mere name not being important.—State v. Tighe, 27 Mont. 327; 71 Pac. 3.

50. In a criminal case it was proper for counsel for defendant to ask each juror, when called and sworn on his voir dire, whether he was a member of the Knights of Pythias, Odd Fellows, or Sons of Hermann, he having stated that decedent was probably a member of one or more of those societies.—Id.

51. The provisions of Code Civ. Proc., §§ 243, 261, 263-265, 281, are mandatory, and, being extended to criminal cases by Pen. Code, § 2009, a challenge to the panel, drawn in the first instance from box 3, should have been sustained.—State v. Landry, 29 Mont. 218; 74 Pac. 418.

52. Where a veniremen in a criminal case stated on his voir dire that he had read the newspaper accounts of the alleged robbery, and had formed an opinion, but not a fixed one, and on re-examination he said he could entirely discard the opinion thus formed, and give the defendant as fair a trial as if he had never heard of the case, he was competent. Pen. Code, § 2051.—State v. Howard, 30 Mont. 518; 77 Pac. 50.

53. Where defendant's offer to submit a challenge to the panel on the testimony taken at a prior term of court was withdrawn, and no evidence whatever was offered, defendant's request to discharge the jury was properly denied, under Pen. Code, § 2038.—State v. Jones, 32 Mont. 442; 80 Pac. 1095.

54. In a criminal prosecution the burden on the trial of a challenge was on the defendant interposing it.—Id.

JUSTICES OF THE PEACE.

I. Appointment and Tenure, 1-2.
II. Civil Jurisdiction and Authority, 3-7.
III. Procedure in Civil Actions, 8-26.
IV. Review of Proceedings, 27-57.
A. Appeal and error, 27-51.
B. Certiorari, 52-57.

I. APPOINTMENT AND TENURE, 1-2.

1. The provision of the Butte City charter authorizing the mayor and council to appoint a police magistrate, is not in conflict with Org. Act nor with U. S. R. S., § 1856, providing that justices of the peace shall be elected by the people in such manner as the legislature may provide.—Parks, Petitioner, 3 Mont. 426.

2. The title of a de facto officer to his office can only be inquired into by a direct proceeding instituted for that purpose, and not by a collateral proceeding, as in habeas corpus.—Id.

II. CIVIL JURISDICTION AND AUTHORITY, 3-7.

3. In an action before a justice to recover ore, plaintiffs' evidence tended to prove that defendants took the ore from within the limits of plaintiffs' claim. Defendants' evidence tended to show that the apex of the vein from which the ore was taken lay outside such claim and within the limits of another claim. *Held*, that the justice had jurisdiction, the question being one of boundary, and not of title.—Driscoll v. Dunwoody, 7 Mont. 394; 16 Pac. 726.

4. Neither the title nor right of possession can be made an issue in an action under the forcible detainer act (Comp. Stat., p. 245), and hence a justice of the peace properly refused to certify such action to the district court without trial, and that court, on appeal, properly refused to allow any question of title to be raised.—Sheehy v. Flaherty, 8 Mont. 365; 20 Pac. 687.

5. An official act of a special officer, for which a justice of the peace will be liable, is what is done under color of or by virtue of his office, but in excess of his authority, as where, having a writ of attachment, he destroys the property instead of seizing and holding it, or imprisons the debtor while seizing and holding the goods, and pretends to do these things under warrant or color of his office.—Ramsey v. Burns, 27 Mont. 154; 69 Pac. 711.

6. An action against a sheriff for damages for non-performance of an official duty, and to recover a penalty imposed by law for its non-performance, is not an action on contract, within Code Civ. Proc., § 66, subd. 1, and Civ. Code, §§ 2090, 2091.—Oppenheimer v. Regan, 32 Mont. 110; 79 Pac. 695.

7. An action against a sheriff to recover $239 with 25% penalty, and interest at the legal rate, whether figured at 10% a month, as authorized by Pol. Code, § 4389, or at 8%, the ordinary legal rate, was in excess of the $300 limit provided for the jurisdiction of a justice of the peace by Code Civ. Proc., § 66, subd. 1.—Id.

III. PROCEDURE IN CIVIL ACTIONS, 8-26.

8. Where an action on a note is tried in justice's court without any reference to the answer, which is insufficient, and no exception is taken to evidence on the ground of variance, the sufficiency of the answer can not be objected to. Comp. Stat., p. 259, § 678, and p. 261, § 777, providing that in justices' courts pleadings may be oral in actions other than forcible entry and detainer, and that a variance shall be disregarded unless the adverse party has been misled to his prejudice.—Budd v. Power, 8 Mont. 380; 20 Pac. 820.

9. Comp. Stat., p. 79, § 80, provides that in case of attachment without personal service the

judgment and execution shall be against the "property attached, as provided by § 73 of this chapter." Sec. 73 is silent upon the subject, as the part referred to in § 80 was repealed by Laws 1883, p. 51. Sec. 245 provides that in case of service by publication and proper proof, judgment may be rendered for planitiff for the amount due, in cases in the district court. There is no statute in the Procedure Act requiring that the judgment in case of service by publication shall be against the attached property, and it is provided that the procedure in the district court shall apply to the justices' courts as far as applicable. Secs. 745, 792, 804-806. *Held*, that in case of attachment of a non-resident's property and service by publication in an action in a justice's court, a general judgment cou'd be rendered for plaintiff.—State v. Eddy, 10 Mont. 311; 25 Pac. 1032.

10. A judgment by confession in a justice's court, entered after the commencement of an action and the voluntary appearance of defendant, has no validity where the confessed judgment is not evidenced by any written document executed by the defendant, and may be annulled on certiorari.—Hunter v. Eddy, 11 Mont. 251; 28 Pac. 296.

11. An entry in a justice's docket that defendant "confessed judgment" can not be treated as the record of an oral pleading sufficient to confer jurisdiction, upon a voluntary appearance without service of summons, under the provisions of the Code requiring the substance of an oral pleading to be entered in the docket. Such entry is merely a statement of a conclusion of the justice, and not of a jurisdictional or other fact.—Id.

12. Under Comp. Stat., p. 269, § 804, providing that the provisions of the Code of Civil Procedure relative to practice, pleading and trial shall, so far as applicable, and not in conflict with the provisions of the justices' code, be observed in justices' courts, a justice may open a default, and allow a defense to be interposed, in accordance with the provisions of § 116.—Schwabe v. Lissner, 13 Mont. 215; 33 Pac. 1012.

13. Comp. Stat., p. 271, § 820, providing that in certain cases a new trial may be granted by a justice of the peace, on motion, within 10 days after entry of judgment, requires the motion to be made within such time, and mere giving of notice of the motion within that time is insufficient.—State v. Votaw, 16 Mont. 308; 40 Pac. 597.

14. An assignment of an account must be alleged in the declaration, though the action thereon is brought in justice's court.—Balden v. Thomasen, 17 Mont. 487; 43 Pac. 627.

15. All defects in a summons issued by a justice of the peace are cured by defendant's appearing and moving the justice to set aside the judgment, and then appealing to the district court.—Schilling v. Reagan, 19 Mont. 508; 48 Pac. 1109.

16. Code Civ. Proc., § 1510, declaring that service of summons in justices' courts may be made by any male resident, over 21 years old, not a party to the suit, and § 635, providing that, when summons is served by another than the sheriff, it must be returned with the affidavit of such person of its service, apply to case of appointment, under § 1688, declaring that the justice may, at the request of a party, specially depute any proper person, by writing on the process, to serve a summons, and without such affidavit of service the justice has no jurisdiction to render default judgment.—Layton v. Trapp, 20 Mont. 453; 52 Pac. 208.

17. The justice's docket must show affirmatively that plaintiff appeared at the time specified in the summons, in order to give the justice jurisdiction to enter judgment against a defaulting defendant, since Code Civ. Proc., § 1621, subd. 2, provides that, where plaintiff does not appear within an hour from the time specified in the summons, the justice may dismiss the case without prejudice.—State v. Laurandeau, 21 Mont. 216; 53 Pac. 536.

18. Under Comp. Stat., p. 263, § 786, providing that if either party fails to appear at the time set for trial the case may proceed at the request of the party present, and judgment be given in conformity with the pleadings and proofs, judgment rendered by a justice in plaintiff's favor when plaintiff was not present was void for want of jurisdiction.—Driscoll v. Creighton, 24 Mont. 140; 60 Pac. 989.

19. Where defendant, on being granted a change of venue, refused to pay the accrued costs as provided by Code Civ. Proc., § 1484, it was the duty of the justice to proceed with the trial.—Taney v. Vollenweider, 28 Mont. 147; 72 Pac. 415.

20. Code Civ. Proc., §§ 2152-2155, give certain claimants for services a preferred lien over attaching creditors for services rendered within 60 days, and provide that if, after notice of claim to the attaching officer, the claim is disputed, the claimant shall sue within 10 days to establish his claim, and require the officer holding the attached property or proceeds to retain so much as shall be necessary to satisfy the claim and costs, with a reasonable attorney's fee. *Held*, that an action to establish such claim for services, in so far as it sought to establish and enforce a lien on a debtor's attached property, was equitable in its nature, and was therefore not within the jurisdiction of a justice, who was precluded from trying equitable causes by Const., art. 8, § 21.—Shea v. Regan, 29 Mont. 308; 74 Pac. 737.

21. Where defendant in a justice's court filed an answer which put in issue the allegations of the complaint, the justice could not enter judgment by default on failure of defendant to appear at the time set for trial.—Clark v. Great Northern, 30 Mont. 458; 76 Pac. 1003.

22. Where the record of an action before a justice showed that he tried the issues, and entered judgment on the proof adduced by plaintiff, the judgment was not one by default, although the justice's docket recited the notice and entry of defendant's default.—Id.

23. Where defendant appears in a justice's court, and files an answer, and the trial is then adjourned to a day certain, a judgment by default can not be entered on such trial, though defendant does not then appear and take part in the trial.—State v. Justice Court, 31 Mont. 258; 78 Pac. 498.

24. Under Code Civ. Proc., §§ 1510, 635, 636, the service of a justice's summons without a copy of the complaint gives no jurisdiction of defendant.—State v. Harrington, 31 Mont. 294; 78 Pac. 484.

25. Code Civ. Proc., § 1688, as amended by Laws 1899, p. 138, did not affect § 1510, authorizing a non-official person to serve a justice's summons.—Id.

26. The return on a justice's summons is presumed to show all that was done by the person making the service.—Id.

IV. REVIEW OF PROCEEDINGS, 27-57.

A. Appeal and Error, 27-51.

B. Certiorari, 52-57.

A. APPEAL AND ERROR, 27-51.

27. Trial on appeal from a justice's court being, by Comp. Stat., p. 273, § 826, de novo on the papers filed in justice's court, judgment by default must be affirmed, on appeal, where the

complaint was sufficient, and no motion was made to set aside the default, or for other relief, in the justice's court.—Gage v. Maryatt, 9 Mont. 265; 23 Pac. 337.

28. Irregularties in a summons issued from a justice's court, in not apprising defendant of the nature of the action, or of the relief that will be demanded in case of default, are waived by appealing after judgment, though defendant appear specially in the appellate court to move to dismiss the action.—Id.

29. Where a verdict is rendered in favor of plaintiff in justice's court, and also on appeal in the district court, for a balance due on an account, and there is ample evidence to support the verdicts, it is an abuse of discretion in the trial court to set aside the latter verdict on the ground of the insufficiency of the evidence. —Falk v. Brown, 13 Mont. 125; 32 Pac. 492.

30. Under Comp. Stat., p. 249, §§ 730, 731, 822-826, providing that on appeal from a justices' court the cause shall be tried de novo in the district court, the latter court can not review the action of the justice in rendering judgment five days after hearing instead of within four days, as provided by § 794.—Missoula E. L. Co. v. Morgan, 13 Mont. 394; 34 Pac. 488.

31. Where an appeal from a justice's court was not filed within 30 days after the appeal was perfected, as required by rule of the district court, and appellee moved to dismiss, and appellant filed and docketed his appeal before the hearing of the motion, and the case was one in which appellant was entitled to a jury, but no jury was in attendance until after the appeal was docketed, the motion should have been denied, since the rule is not jurisdictional, and should be applied with discretion.—Stevenson v. Caldwell, 14 Mont. 311; 36 Pac. 185.

32. Under the provisions of Code Civ. Proc., §§ 1760, 1762, where a justice's transcript was not filed until 32 days after judgment, the fees for transcript not being tendered before, the appeal was properly dismissed, in the absence of a sufficient excuse by the appellant.—Meyers v. Gregans, 20 Mont. 450; 52 Pac. 83.

33. An appeal lies from a judgment entered by a justice on default of defendant to answer after the overruling of a general demurrer to the complaint, under Code Civ. Proc., § 1761. —Maxey v. Cooper, 21 Mont. 456; 54 Pac. 562.

34. Under Const., art. 8, § 23, and Code Civ. Proc., §§ 1760, 1761, where a justice refuses to set aside a judgment by default, an appeal lies, and it is for the court to determine on the papers filed in the justice's court as to whether the discretion of the justice has been abused. —State v. Lindsay, 22 Mont. 398; 56 Pac. 827.

35. Where appellee on an appeal from justice's court excepted to the sufficiency of appellant's sureties, who did not testify, nor give any notice that they would testify, but a new undertaking was filed, Code Civ. Proc., §§ 1760, 1763, were not complied with, since they require the sureties to testify on notice that they will do so; and hence the district court had no jurisdiction.—State v. Napton, 24 Mont. 450; 62 Pac. 686.

36. Where a justice had no jurisdiction of a suit to enforce a lien for services as a preferred claim over the claims of attaching creditors, the district court acquired no jurisdiction by an appeal from the justice's judgment.—Shea v. Regan, 29 Mont. 308; 74 Pac. 737.

37. The parties to an appeal from a justice stipulated for an extension of time within which the sureties might justify, beyond that fixed by statute, and, within the time so stipulated for, defendant signed as a surety. Six months later the appeal was dismissed. *Held*, that the signature of defendant was not without consideration, it being for the purpose of preventing the appeal from becoming ineffectual, and it having, at least, operated to stay proceedings for several months.—Morin v. Wells, 30 Mont. 76; 75 Pac. 688.

38. Code Civ. Proc., § 1763, provides that appellee, on an appeal from a justice, may except to the sufficiency of the sureties on the appeal bond, and, unless they or others justify within five days, the appeal must be regarded as if no bond had been given, and that an appeal is not effectual unless there is a proper bond. *Held*, that an exception to the sureties does not divest the court of jurisdiction.—Id.

39. Where appellee excepted to the sufficiency of the sureties, counsel for the parties had a right to stipulate for an extension of the time within which the sureties might justify, beyond the time fixed by statute.—Id.

40. If appellee insists that the sureties jusify, the statute is mandatory on appellant. —Id.

41. The statute is directory, and for appellee's benefit, and he may waive his privilege of excepting to the sureties, and may withdraw it after exception.—Id.

42. Code Civ. Proc., § 1760, provides that an appeal from a justice is to be taken by filing a notice of appeal with the justice, and serving a copy on the adverse party. *Held*, that in the absence of any showing to the contrary, it is to be presumed that a notice filed with the justice was properly served.—Id.

43. The only appeal from a justice's court provided for being from a judgment, which the Code of Civil Procedure authorizes within 30 days after judgment, an appeal from a judgment of a justice, and his subsequent order refusing to open a default, taken more than 30 days after judgment, gives the district court no jurisdiction. —State v. District Court, 30 Mont. 93; 75 Pac. 862.

44. Under the provisions of Const., art. 8, §§ 11, 23, and Code Civ. Proc., § 1760, 1761, only such questions as were raised and presented in the justice's court can be tried on appeal in the district court, and where there was no showing that a motion was made in the justice's court to set aside the judgment and dismiss the cause, but the record showed that the case was tried on issues of fact raised by the answer, it was proper for the district court, on appeal from a judgment for plaintiff, to overrule a motion to dismiss the cause, and to try the issues of fact which had been raised before the justice.— Clark v. Great Northern, 30 Mont. 458; 76 Pac. 1003.

45. Under Code Civ. Proc., § 1761, providing that all appeals from the justice's court must be tried anew in the district court, that court sits as a justice of the peace in the case, and with no greater jurisdiction, and either party may have reviewed any question of law or fact which was raised before the justice and presented to the district court.—State v. Justice Court, 31 Mont. 258; 78 Pac. 498.

46. The district court, sitting to hear appeals from the court of a justice of the peace or police court, must try the case de novo, and exercises only the same jurisdiction as was exercised by the court appealed from.—Duane v. Molinak, 31 Mont. 343; 78 Pac. 588.

47. The pleadings in the district court on an appeal from a justice or police court are governed by the same rules as pertain to pleadings in such court.—Id.

48. Where, in an action to recover a balance on a contract for the purchase of land, defendant answered, denying the allegations of the complaint, and alleging damages on account of certain misrepresentations as to a counterclaim,

such answer was not superceded by an amendment subsequently filed by defendant, after an appeal had been taken from the police court to the district court, pleading the statute of frauds as an affirmative defense.—Id.

49. Where an action was brought in the police court to recover a balance due on a sale of land, and defendant answered, denying the allegations of the complaint, and alleging as a counterclaim damages arising from certain misrepresentations of plaintiff, and on appeal from the police court pleaded the statute of frauds by amendment, such pleadings raised issues of fact to be tried in the ordinary maner, and it was therefore error for the court to render judgment for defendant on the pleadings.—Id.

50.—Where a justice of the peace had no jurisdiction of the subject matter of an action, the district court could acquire none by appeal.—Openheimer v. Regan, 32 Mont. 110; 79 Pac. 695.

51. Under Code Civ. Proc., § 1004, subd. 6, where more than six months has elapsed after an order sustaining a motion to dismiss an appeal from a justice, and appellee had not demanded a judgment in accordance with ruling on the motion, it was error to deny a motion to dismiss the case and to render a judgment dismissing the appeal.—Franzman v. Davies, 32 Mont. 251; 80 Pac. 251.

B. CERTIORARI, 52-57.

52. Where a justice, eight days after rendering judgment in accordance with the verdict of the jury, changes the judgment as to costs, without having jurisdiction to do so, certiorari is the proper remedy.—State v. Case, 14 Mont. 520; 37 Pac. 95.

53. Pending a right to appeal from a judgment of the district court quashing a writ of review to a justice's judgment denying a change of venue, certiorari will not lie to this court to review the justice's judgment.—State v. Lenahan, 17 Mont. 518; 43 Pac. 712.

54. Where a justice issues an execution against a stranger to the judgment, and inserts her name in the execution as a defendant, he acts judicially, and certiorari will issue to review the proceedings.—State v. Votaw, 18 Mont. 279; 44 Pac. 982.

55. Under Code Civ. Proc., § 1761, where a justice overruled a motion to vacate a default judgment, an appeal is authorized, and the judgment can not be reviewed by certiorari.—State v. Laurendeau, 27 Mont. 522; 71 Pac. 754.

56. Where, after a writ of certiorari had been issued to review a justice's judgment, but before the justice had made his return thereto, and before the hearing of the writ by the district court, the judgment was satisfied, as appeared by the transcript filed in the return to the writ, it was error for the district court to enter judgment in the certiorari proceedings setting aside the judgment.—Id.

57. Where defendants appear in an action before a justice, file their separate answers, and by stipulation agree to a particular time for trial, they are chargeable with actual notice of all subsequent proceedings, and, though they do not appear at such time, their remedy is by appeal, which excludes a remedy by writ of certiorari.—State v. Justice Court, 31 Mont. 258; 78 Pac. 498.

KIDNAPPING.

1. Under Pen. Code, § 380, subd. 3, as amended by Laws 1901, p. 169, providing that whoever wilfully entices or by force or fraud takes away another from a place without the state, and afterwards brings such person into this state, is guilty of kidnapping, the crime is complete when these acts are done, though without intent to cause the person to be secretly confined and imprisoned within the state, notwithstanding subd. 1, making that an element of the crime where the person is seized within this state.—State v. Stickney, 29 Mont. 523; 75 Pac. 201.

LANDLORD AND TENANT.

I. Creation and Existence of Relation, 1.
II. Leases and Agreements in General, 2-3.
III. Landlord's Title and Reversion, 4-10.
IV. Termination of Relation, 11-12.
V. Premises, and Enjoyment and Use Thereof, 13-17.
VI. Rent and Advances, 18-29.
VII. Re-entry and Recovery of Possession by Landlord, 30-32.

I. CREATION AND EXISTENCE OF RELATION, 1.

1. Where a party buys cattle, and has the bill of sale made out in his own name, and leases the cattle to another at a certain rent, with the understanding that the tenant may purchase the same at any time during the hiring at a certain price, by paying the difference between the rent paid and the price, title meanwhile to remain in vendor, the transaction is a lease with privilege of purchase.—Miles v. Edsall, 7 Mont. 185; 14 Pac. 701.

II. LEASES AND AGREEMENTS IN GENERAL, 2-3.

2. Defendant, proprietor of a hotel, adjoining which plaintiff had a three-story building in process of construction, agreed with plaintiff to lease the two upper floors for five years, the contract providing that the "building" should be completed on or before September 1st, "and, upon such completion, said term of five years shall begin and date therefrom." *Held*, that time was not of the essence of the contract, and, the upper stories being completed at the time specified, defendant could not repudiate the contract because the entire building was not then completed.—Lynch v. Bechtel, 19 Mont. 548; 48 Pac. 1112.

3. In the absence of statute or agreement there is no implied warranty that leased premises are suitable for the purpose for which they are demised.—Landt v. Schneider, 31 Mont. 15; 77 Pac. 307.

III. LANDLORD'S TITLE AND REVERSION, 4-10.

4. Where a tenant in possession at the time of a sale continues in possession under a parol agreement with the vendee to purchase, his possession is not adverse.—Lamme v. Dodson, 4 Mont. 560; 2 Pac. 298.

5. One who enters on land under a lease from a mortgagee in possession is estopped to deny the rightful possession of the mortgagee.—Alderson v. Marshall, 7 Mont. 288; 16 Pac. 576.

6. Where one enters on premises under a lease, he can not set up adverse possession until he surrenders the premises or gives notice that he does not hold them in subordination to the title under which he enters.—Id.

7. A tenant cannot set adverse possession against his landlord until he gives notice to the

latter that he disclaims the relation and holds adversely.—Id.

8. Under Comp. Stat., p. 67, § 37, providing that when the relation of landlord and tenant has existed the possession of the tenant shall be deemed that of the landlord until five years after the termination of the tenancy, in the absence of fraud and mistake, a lessee, though in possession of the premises at the time of the execution of the lease, can not controvert his lessor's title.—Parrott v. Hungelburger, 9 Mont. 526; 24 Pac. 14.

9. Since Comp. Stat., p. 548, § 727, authorizes the administrator of a deceased landlord's estate to proceed against the tenant on a breach of the lease as the landlord might have done, the rule which estops the tenant from questioning the landlord's title applies in favor of such administrator.—State v. Votaw, 13 Mont. 403; 34 Pac. 315.

10. On an issue as to the rights of plaintiffs and defendant in the waters of a certain creek, plaintiffs alleged that defendant had leased the waters from them, and was estopped from claiming any adverse rights until the expiration of five years from the termination of the tenancy. Defendant claimed by adverse user. The testimony showed that, if the relation of landlord and tenant had ever existed, it was only for a few days, when the water was turned back to plaintiffs, and the relationship terminated. The court instructed the jury that if the relationship of landlord and tenant had existed, there could be no adverse possession until the expiration of five years from the termination of the tenancy. *Held*, that the instruction was erroneous, as Comp. Stat., p. 67, § 37, providing that, when the relation of landlord and tenant has existed, the tenant's possession is deemed that of the landlord until the expiration of five years from the termination of the tenancy, does not apply after the tenant delivers up possession, but only where the tenant is holding possession obtained under the lease.—Talbott v. Water Co., 29 Mont. 17; 73 Pac. 1111.

IV. TERMINATION OF RELATION, 11-12.

11. The retention of the key to leased premises by the landlord, it having been accepted by his agent, who was only authorized to collect the rents, and delivered by him to the landlord, and a subsequent offer of the premises for rent, are not an acceptance of a surrender of the lease.—Blake v. Dick, 15 Mont. 236; 38 Pac. 1072.

12. The waiver by a lessor of real property of forfeiture for non-payment of rent at the time provided in the lease is not a waiver of other independent stipulations.—Murray v. Heinze, 17 Mont. 353; 42 Pac. 1057; 43 Pac. 714.

V. PREMISES, AND ENJOYMENT AND USE THEREOF, 13-17.

13. Where a tenant, after having abandoned the premises with knowledge of their condition, remains in possession, he waives any right to avoid the lease on account of concealment by the landlord at the time of the execution of the lease as to their condition.—Blake v. Dick, 15 Mont. 236; 38 Pac. 1072.

14. In a tenement lease there is no implied warranty that the property is fit for the purpose for which it is let, or that it shall remain in a tenantable condition.—York v. Steward, 21 Mont. 515; 55 Pac. 29.

15. Civ. Code, §§ 2620, 2621, providing that, where a leased building is intended for the occupation of human beings, the lessor must, in the absence of agreement to the contrary, put the same in a condition for habitation, and repair subsequent dilapidations, etc., do not apply to business property, but are limited in their application to property used for dwelling-house purposes.—Landt v. Schneider, 31 Mont. 15; 77 Pac. 307.

16. In the absence of statute or agreement, there is no implied warranty that the lessor will keep the leased property in repair.—Id.

17. Where defendant entered on premises he had leased to plaintiff, and proceeded to build an addition to the rear of the building, taking away the steps, and thereby preventing access from the back yard, excavating to the depth of several feet for the foundation of the new building, and destroying a chimney used by plaintiff's lodgers in the basement of the building, and compelling them to seek lodging elsewhere, and driving away other lodgers by the noise incident to the work, plaintiff was by these acts actually evicted from part of the premises and constructively from the rest.—Osmers v. Furey, 32 Mont. 581; 81 Pac. 345.

VI. RENT AND ADVANCES, 18-29.

18. The common law right to distrain for rent has been superceded by the statutory remedies given to the landlord by the laws of Montana.—Bohm v. Dunphy, 1 Mont. 333.

19. The assignee of a lease, after having been in possession and paid rent for nine months, by endorsement on the lease reassigned to the original lessee, but without the latter's knowledge or consent, and went out of possession, having notified the lessor thereof, and requested him to look to the lessee for the rent. *Held*, that the reassignment was of no effect, and that the assignee was still liable for the rent.—Beattie v. Copper Co., 7 Mont. 320; 17 Pac. 451.

20. In an action upon a lease a defense that defendant was merely a tenant from month to month is not inconsistent with a defense that by reason of acts and omissions of plaintiff, amounting to an eviction, defendant was compelled to remove from the premises.—Kline v. Hanke, 14 Mont. 361; 36 Pac. 454.

21. The fact that the landlord, after the cellar had become flooded with filth and water, gratuitously undertook the removal of the same, but did so negligently and imperfectly, does not entitle the tenant to abandon the premises.—Blake v. Dick, 15 Mont. 236; 38 Pac. 1072.

22. The assignment of a lease is a sufficient consideration for an agreement to pay rents.—Edwards v. Spalding, 20 Mont. 54; 49 Pac. 443.

23. The mere acceptance of rent from the assignee of a lease does not release the assignor.—Id.

24. In an action for rent the tenant may show that the landlord was in possession of the part of the building immediately above the leased portion, and negligently permitted water therefrom to flow into tenant's portion, thereby rendering it untenable, and refused to stop it after notice thereof, since that amounts to a breach of the implied covenant of quiet enjoyment, and is a constructive eviction.—York v. Steward, 21 Mont. 515; 55 Pac. 29.

25. An allegation that the landlord falsely represented the premises as suitable for the purposes for which they were leased charges neither fraud nor concealment in making such representations.—Id.

26. Under the first paragraph of the habendam clause, the property was leased to defendant for the full term of two years, unless the lease was sooner forfeited. It then provided that the lessee should pay the lessor, as rent for the premises, $150 per month "during occupancy" thereof, and that, should the lessee fail

to make such payments, the lessor might re-enter without this working a forfeiture of the rents to be paid, and that the lessee should not sublet, and should surrender the property "at the expiration of the time herein recited." *Held*, that "during occupancy" meant "while possession continues," that is, during the whole term; so that the lessee could not, before expiration of the term, surrender possession and relieve himself from liability for further rent.—Bickford v. Kirwin, 30 Mont. 1; 75 Pac. 518.

27. Leaving the key of a leased building at the lessor's place of business over his protest, and in spite of his refusal to accept a surrender of the premises demised is not such an acceptance by the lessor as will relieve the lessee from the payment of rent.—Landt v. Schneider, 31 Mont. 15; 77 Pac. 307.

28. Where defendant entered on premises he had leased to plaintiff, and proceeded to build an addition to the rear of the building, taking away the steps, and thereby preventing access from the back yard, excavating to the depth of several feet for the foundation of the new building, and destroying a chimney used by plaintiff's lodgers in the basement of the building, and compelling them to seek lodging elsewhere, and driving away other lodgers by the noise incident to the work, plaintiff was at liberty to abandon possession, and thus be discharged from any obligation to pay rent.—Osmers v. Furey, 32 Mont. 581; 81 Pac. 345.

29. Eviction by the landlord is a complete defense to any action for rent.—Id.

VII. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD. 30-32.

30. An allegation, in an action to reject a tenant holding over, of a writen demand for possession prior to the action, and of the tenant's refusal to deliver possession, need not be proved when not denied in the answer. (See 149 U. S. 17.)—Gassert v. Bogk, 7 Mont. 585; 19 Pac. 281.

31. Under Comp. Stat., p. 259, § 769, which provides that the pleadings in an action in a justice's court for a forcible entry or unlawful detainer of lands shall be in writing, a defendant who fails to file an answer in the justice's court will not be permitted to file an answer in the district court on appeal from the judgment of the justice, where there is no showing of surprise, inadvertance, etc.—Pincus v. Dowd, 11 Mont. 88; 27 Pac. 393.

32. Justices of the peace have jurisdiction of actions under Comp. Stat., p. 246, § 716, et seq., for the possesion of premises by a landlord against a tenant holding after default in the ment of rent, as such jurisdiction is provided by the act, and Const., art. 8, § 21, expressly declares that such courts shall "have concurrent jurisdiction with the district courts" in cases of forcible entry and detainer.—State v. Votaw, 13 Mont. 403; 34 Pac. 315.

LARCENY.

1. It is error to charge the jury that simply killing an ox, with another party, knowing the ox was not the property of such party, but that it belonged to a third party, amounts to larceny without adding thereto, "with a view to converting it to his own use, or of permanently depriving the owner thereof," and the fact that elsewhere in the charge larceny is correctly defined will not cure such error.—Territory v. Paul, 2 Mont. 314.

2. An indictment for larceny of bank bills, describing them as "sundry bank bills issued by the authority of the United States of America," and giving only the aggregate amount and value, is bad on demurrer for insufficiency of description. The number and denomination of each bill should be given, or the failure to do so accounted for.—Territory v. Shipley, 4 Mont. 468; 2 Pac. 313.

3. On an indictment for larceny of mules, a bill of sale found in the possession of accused, and claimed by the prosecution to be a forgery, is admissible in evidence, although the brands mentioned therein do not exactly correspond with those on the mules, and the vendee named therein is another party than the accused.—Territory v. Doyle, 7 Mont. 245; 14 Pac. 671.

4. On an indictment for larceny of mules, evidence that the owner of the mules had turned them loose on the range, that they were missing, and he never saw them again until delivered to him by the constable, where they were taken 85 miles from his ranch, that he had not sold them, and was still the owner, and the evidence of the constable that he found the mules in defendant's possession, in the mountains, at a great distance from their range, and evidence that defendant had lately been there and was traveling out of the territory, and had a forged bill of sale in his possession, is sufficient to support a verdict of guilty.—Id.

5. On trial for cattle stealing the court instrusted the jury: "If he (the defendant) drove the steer in off the range, when it was the property of corporation charged in the indictment," etc. *Held*, that this was not error, as it did not assume ownership, but was clearly hypothetical, and was preceded by the instruction that the proof must show, beyond a reasonable doubt "that the steer belonged to the company as alleged."—Territory v. Jaggers, 9 Mont. 5; 22 Pac. 121.

6. Under Rev. Stat., p. 366, § 72, declaring it to be grand larceny to steal certain domestic animals whatever may be their value, upon an indictment for stealing a steer it is unnecessary to allege or prove any particular value for the stolen animal, and that it had some value may be inferred from the facts and circumstances in the case, though there be no direct testimony in regard thereto.—Territory v. Pendry, 9 Mont. 67; 22 Pac. 760.

7. Comp. Stat., p. 516, § 78, provides that if any person shall steal a "mare, gelding, stallion, colt, foal, or filley," he shall be deemed guilty of grand larceny. Defendant was indicted for stealing "one * * * horse, a gelding, about three years old." All the witnesses for the state at the trial described the animal simply as a "horse" or "colt." *Held*, that the variance was fatal, and a new trial would be granted.—State v. McDonald, 10 Mont. 21; 24 Pac. 628;

8. An indictment under Comp. Stat., p. 519, § 85, which provides that "every person who shall feloniously steal the property of another in any other state, territory or country, and shall bring the same into the territory of Montana, may be convicted and punished in the same manner as if the larceny had been committed in this territory," alleged that defendant feloniously stole certain property in Canada and brought it into Montana, "and that he * * * did then and there (in Montana) * * * feloniously steal * * * the said personal property." *Held*, that the term "feloniously" was used in the indictment in reference to the laws of Montana, and it was not necessary to show that the act committed by defendant in Canada was felonious under the laws of that country.—State v. Kief, 12 Mont. 92; 29 Pac. 654.

9. Under Comp. Stat., p. 522, § 93, providing that if any bailee of money, goods or property convert the same to his own use, with intent to steal, he shall be guilty of grand or petit lar-

ceny, according to the amount of the property or the value of the goods or chattels converted, in the same manner as if the original taking had been felonious, a bailee of a horse, who converts it with intent to steal, can not be convicted of grand larceny without regard to its value, though § 78 makes the stealing of a horse of any value grand larceny.—State v. Hayes, 13 Mont. 116; 32 Pac. 415.

10. A taking with evil intent should be included in the definition of larceny given in the charge by proper words conveying the meaning of "felonious," though Pen. Code, § 880, provides that every person who, with intent to deprive the true owner of his property, appropriates to his own use, or that of any other person than the true owner, any article of value, is guilty of larceny.—State v. Rechnitz, 20 Mont. 488; 52 Pac. 264.

11. Under Pen. Code, § 899, making receiving stolen proerty a distinct crime, where the evidence on a prosecution for larceny justified the defense that, if defendant was guilty of any offense, it was that of receiving stolen property, it was error to refuse to charge that, if defendant had nothing to do with taking the money, and only received it from the hands of one who did take it, the jury could not convict, though defendant knew it had been stolen.—Id.

12. Evidence, in a prosecution for grand larceny, showed that defendant and prosecuting witness were seen together on the day of the crime; that prosecuting witness exhibited, in the presence of defendant and others, two $20 gold pieces; that he met with an accident; that defendant and a physician accompanied him in a wagon to the hospital; that during the doctor's absence from the room defendant asked prosecuting witness for money "to eat on;" that defendant was "pretty handy" in the room until the broken leg of witness was set; that two hours afterwards the two $20 gold pieces were missing from the pocket of witness' coat, where he carried them loose; that a few days thereafter defendant was seen to have a "lot of bills," and two $20 gold pieces, while he had claimed to have no money on the day of the accident. *Held*, that such evidence was not sufficient to convict defendant.—State v. Whorton, 25 Mont. 11; 63 Pac. 627.

13. On a prosecution for grand larceny, evidence that accused and others were following itineraries of political speakers under a conspiracy to commit larceny, and that at a political gathering the prosecuting witness carried his purse in his left hand in his pocket, and, while in a crowd, feeling a touching at his left arm, recognized accused and an associate standing at his left, and after going a distance of three blocks he discovered his purse was missing, is insufficient to justify a conviction of accused for the particular larceny.—State v. Foster, 26 Mont. 71; 66 Pac. 565.

14. Pen. Code, § 1841, subd. 4, providing that an information is sufficient if it can be understood therefrom that the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the county, is triable therein, has no application to an information charging felony.—State v. DeWolfe, 29 Mont. 415; 74 Pac. 1084.

15. Under Pen. Code, §§ 1561, 1569, 1572, permitting conviction in any county into which the guilty person takes stolen property, there is no variance between the venue as laid in an information charging larceny of horses in Cascade county, and proof that the horses were stolen in Canada, and driven into Cascade county.—Id.

16. An allegation in an information charging grand larceny that the property belonged to a certain person is material.—Id.

17. Where defendant was charged with stealing horses bearing certain brands, proof that one of the brands belonged to H, and that the horses bore such brands, is not proof that they belonged to H.—Id.

LIBEL AND SLANDER.

I. Words and Acts Actionable, and Liability Therefor, 1-8.

II. Actions, 9-18.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR, 1-8.

1. Where fornication is not by statute a criminal offense, defamatory language charging it is not actionable per se.—Ledlie v. Wallen, 17 Mont. 150; 42 Pac. 289.

2. Under Civ. Code, § 32, the existence of malice is not a necessary ingredient to entitle plaintiff to recover.—Paxton v. Woodward, 31 Mont. 195; 78 Pac. 215.

3. In an action for libel malice becomes material only as a circumstance affording a basis for increasing or diminishing the amount of recovery, and in cases involving the defense of privileged publication.—Id.

4. Malice is an inference of fact, which the jury may draw from a libelous publication alone.—Id.

5. To publish by a written unprivileged charge of an individual falsely that he is a common liar is libelous per se.—Id.

6. To say of a school teacher that he is "noted" though used in an inviduous sense, and referring to a particular district, "has done more damage and less good than any other teacher," and, referring to his application for a position as teacher of its school, "this district knows when it has had enough, so it turned the gentleman down," can not be said to impeach him of any of those qualities which are essentials of an accomplished teacher, and is not libelous per se.—Id.

7. In arriving at the sense in which alleged libelous language is employed it is proper to consider the cause and circumstances of its publication, and the entire language used.—Id.

8. Where a false and unprivileged publication possessing the ingredients that stamp it as libelous per se is established, injury is presumed to ensue therefrom, and affords ground for the allowance of at least nominal damages.—Id.

II. ACTIONS, 9-18.

9. Where, in an action for libel, defendant denied the publication, and also pleaded justification, the mere fact that plaintiff's reputation was shown to be good did not warrant a verdict in his favor.—Authier v. Bennett, 16 Mont. 110; 40 Pac. 182.

10. Where a complaint in slander for calling a woman a "whore" does not allege that plaintiff is married, the slanderous expression will be construed as importing fornication.—Ledlie v. Wallen, 17 Mont. 150; 42 Pac. 289.

11. An allegation in a complaint for slander, not actionable per se, that the words were spoken with intent to destroy plaintiff's business as a school teacher, is not a sufficient allegation of special damages, necessary in such an action. —Id.

12. Under the direct provisions of Code Civ. Proc., § 751, it is not necessary to state in a complaint for libel any extrinsic facts to show the application to plaintiff of the defamatory matter, but it is sufficient to state generally that the same was published concerning the

plaintiff.—Paxton v. Woodward, 31 Mont. 195; 78 Pac. 215.

13. In an action for libel where there is no suggestion in the complaint that plaintiff was damaged as an individual, but only that the injury was to him in respect to his profession, there can be no recovery of damage to plaintiff as an individual.—Id.

14. Where an imputation complained of is a conclusion from certain facts, a plea of jurisdiction averring the existence of a state of facts which warrants the inference of the charge is sufficient.—Id.

15. In an action for libel it is not error to allow defendant, as a witness, to be interrogated with respect to his motive in using certain language in the article alleged to be libelous, and to permit him to explain statements therein —whether they were true, as to the source of his information with respect to their truth—where such facts are involved in the issues presented by the pleadings.—Id.

16. In an action by a school teacher for libel, proof of statements made by defendant after the institution of the suit to the effect that he would take away plaintiff's license as a teacher is admissible to show malice, but not as a basis for extra compensation.—Id.

17. In an action by a school teacher for libel, evidence that defendant, after the publication of the alleged libel, had tried to have the certificate of plaintiff as a teacher revoked, is admissible to show malice, but not as a basis for extra compensation.—Id.

18. In an action for libel, where malice is shown, exemplary damages may be added to the compensatory damages.—Id.

LEWDNESS.

1. On the trial of an indictment under Comp. Stat., p. 545, § 161, proof that the parties are living together unlawfully, not being married to each other, makes out the crime of fornication; and the prosecution is not obliged to prove further that the persons were not married to other persons. (Modifying Territory v. Whitcomb, 1 Mont. 359.)—Territory v. Jaspar, 7 Mont. 1; 14 Pac. 647.

LICENSES.

I. Power to License or Tax, 1-2.
II. Constitutionality and Validity of Acts and Ordinances, 3-8.
III. Subjects of License Tax, 9-11.
IV. License Fees, 12.
V. Actions, 13.
VI. Criminal Prosecutions, 14-23.

I. POWER TO LICENSE OR TAX, 1-2.

1. By Const. art. 12, § 1, which, after authorizing the legislative assembly to provide revenue for the support of the state by the levy of taxes, provides that such assembly "may also impose a license tax upon both persons and upon corporations doing business in the state," the imposing of such license is not restricted to the single purpose of raising revenue for state purposes.—State v. Camp Sing, 18 Mont. 128; 44 Pac. 516.

2. Const., art. 12, § 4, providing that "the legislative assembly shall not levy taxes upon the inhabitants or property in any county, city or town, or municipal corporation for county, town or municipal purposes, but it may by law vest in the corporate authorities thereof power to assess and collect taxes for such purposes," applies only to taxation of property, and not to license taxes.—Id.

II. CONSTITUTIONALITY AND VALIDITY OF ACTS AND ORDINANCES, 3-8.

3. Const., art. 12, § 1, provides that the legislature shall levy a uniform rate of assessment and taxation, and, in another sentence, provides that the legislature shall impose a license tax on persons or corporations doing business in the state. Sec. 11 provides that taxes shall be uniform. *Held*, that such licenses need not be uniform.—State v. French, 17 Mont. 54; 41 Pac. 1078.

4. The license tax provided by Pol. Code, §§ 4079, 4080, providing that every person carrying on a steam laundry business shall pay a license of $15 per quarter, and that every male person engaged in the laundry business, other than the steam laundry business, shall pay a license of $10 per quarter if engaged in business by himself, and $25 if employing other persons, are not taxes, within Const., art. 12, § 11, requiring the assessment and levy of taxes to be uniform.—Id.

5. In the absence of constitutional restrictions the legislature need not tax all property and occupations equally or uniformly.—Id.

6. Pol. Code, § 4079, imposing a license on all male persons engaged in the laundry business, is not rendered unconstitutional by the provisions of the following sections of the act that 70% of the licenses thereunder shall be retained by the counties in which collected.—State v. Camp Sing, 18 Mont. 128; 44 Pac. 516.

7. Laws 1903, p. 226, creating the office of meat and milk inspector, and imposing a license fee on the right to do business with a vehicle by the owner thereof who milks over five cows, and exempting others, is not objectionable as an unreasonable classification of dairies.—State v. McKinney, 29 Mont. 375; 74 Pac. 1095.

8. The license fee provided for in Laws 1903, p. 132, § 15, imposed on persons selling milk, and authorizing the collection thereof by the meat and milk inspector, which office is created by the act, is not a tax, though required to be paid into the state treasury.—Id.

III. SUBJECTS OF LICENSE TAX, 9-11.

9. An agent carrying samples of his principal's merchandise and soliciting orders for his goods, who exhibits the samples to, solicits and obtains an order for goods of the same character as the samples from a third person, is a commercial traveler, within the meaning of the act of July 22, 1879. (See 129 U. S. 104.)—Territory v. Farnsworth, 5 Mont. 303; 5 Pac. 869.

10. A merchant tailor fashioning suits of clothes from purchased cloth, is not a "manufacturer" within Pol. Code, § 4082, requiring a manufacturer to pay a license fee.—State v. Johnson, 20 Mont. 367; 51 Pac. 820.

11. A merchant tailor must pay a license fee under Pol. Code, § 4064, requiring the payment of such fee by one who "sells any goods, wares or merchandise."—Id.

IV. LICENSE FEES, 12.

12. Because one liable for the payment of a license fee does not pay at the time when the law requires him to do so, he is not thereby released from payment altogether, and it is within the authority of the county treasurer to collect and receipt for the fee for such past period as well as for future period.—State v. Raymond, 12 Mont. 226; 29 Pac. 732.

V. ACTIONS, 13.

13. Defendant kept a gambling house for some time, and afterwards applied for and received a license to conduct such business, which license was regularly issued, and was antedated so as to cover the period during which the business had been conducted prior to the issuance thereof. *Held*, that the acceptance of the license fee by the county treasurer and the issuance of the license did not estop the state from prosecuting defendant for keeping a gambling house without a license for the time covered thereby prior to the issue thereof; Laws 1887, bottom p. 75, providing that any person who shall keep a gambling house "shall, before starting such business, pay a license," etc.—State v. Raymond, 12 Mont. 226; 29 Pac. 732.

VI. CRIMINAL PROSECUTIONS, 14-23

14. Whether the game of poker is a game of chance, and within the statute requiring the keepers of houses where games of chance are played for money to pay licenses therefor, is for the court.—Kennon v. King, 2 Mont. 437.

15. A verbal agreement for the use of water is a mere verbal license and can not be sold or transferred.—Fabian v. Collins, 3 Mont. 215.

16. A verbal agreement between A and B whereby A has the privilege of using certain water upon his mine, but, upon demand of B, was to permit the water to flow down to the mining ground of B, is a verbal license which B may revoke at any time.—Id.

17. On a trial under Comp. Stat., p. 1025, § 1356, and p. 1027, § 1366, requiring "every person who shall carry on any gift, lottery or prize distribution business" to pay a license fee, and providing that "any person who shall transact any business" requiring a license, without first obtaining the same, shall be deemed guilty of a misdemeanor, the use in the charge of the word "transact," as the equivalent of "carry on," is not error, in view of §§ 202, 204, providing that words and phrases are to be liberally construed, and according to the approved and common usage.—Territory v. Harris, 8 Mont. 140; 19 Pac. 286.

18. In a criminal prosecution for keeping a gambling house without a license, a witness for the state testified that he visited the room where the gambling was carried on a dozen times during the period covered by the information, and that he almost always saw defendant there, either dealing faro or sitting about the place, and that defendant was running the game, and described the place as defendant's room. *Held*, that this evidence, taken in connection with the evidence of the county treasurer that defendant afterwards took out a license and conducted this same business, was sufficient to prove that defendant kept the room.—State v. Raymond, 12 Mont. 226; 29 Pac. 732.

19. A complaint in a prosecution against a lawyer for failure to pay a license required by ordinance need not state that he followed his profession for compensation.—Bozeman v. Cadwell, 14 Mont. 489; 36 Pac. 1042.

20. A license to lay water mains through land can not be created by parol.—Great Falls W. W. Co. v. Great Northern, 21 Mont. 487; 54 Pac. 963.

21. Under a parol license to lay "water mains" the licensee has a right to lay only one main, where only one was contemplated when the license was given.—Id.

22. A parol license to a water company to lay mains through land may be revoked at any time at the pleasure of the licensor.—Id.

23. After the revocation of a license to lay water mains, the licensee should be allowed to remove his property at his own expense within a reasonable time.—Id.

LIMITATION OF ACTIONS.

I. Statutes of Limitation, 1-17.
- A. Nature, validity, and construction in general, 1-11.
- B. Limitations applicable to particular actions, 12-17.

II. Computation of Period, 18-35.
- A. Accrual of right of action or defense, 18-27.
- B. Performance of condition, demand, and notice, 29-30.
- C. Death and administration, 31-32.
- D. Concealment of cause of action, 33.
- E. Pendency of other action, 34.
- F. Commencement of action, 35.

III. Acknowledgment, New Promise, and Part Payment, 36-39.

IV. Operation and Effect of Bar by Limitation, 40.

V. Pleading, Evidence, Trial, and Review, 41-44.

I. STATUTES OF LIMITATION, 1-17.

A. Nature, Validity, and Construction in General, 1-11.

B. Limitations Applicable to Particular Actions, 12-17.

A. NATURE, VALIDITY, AND CONSTRUCTION IN GENERAL, 1-11.

1. A right of action for damages against the defendant for mal-practice accrued Feb. 28, 1868. The statute regarding limitation of actions in force at the time barred the action after the lapse of two years. In January, 1870, the legislature passed a second statute repealing the former statute, by which actions of this character were limited to five years instead of two. The action was commenced in 1871. *Held*, that the act January, 1870, was controlling and that the action was not barred.—Coady v. Reins, 1 Mont. 424.

2. Act February, 1865, limited the time within which certain actions could be brought to two years. By Act January, 1870, the time was extended to five years. *Held*, that a cause of action which accrued less than two years before the latter act was governed by that act, and not the former.—Id.

3. The general law of limitation of actions for the recovery of real estate is limited by special provisions applicable to placer mines and quartz lodes. The specific and not the general law must control such cases.—Davis v. Clark, 2 Mont. 310.

4. If, before the expiration of the period of limitation existing when a cause of action arises, a new statute is enacted providing a different period, the effect thereof, in the absence of express words to the contrary, is to give a new lease of life to such cause of action.—Gillette v. Hibbard, 3 Mont. 412.

5. When a cause of action has arisen under a given limitation act the same becomes a rule of property; hence limitation acts can not have a retrospective operation, else they would interfere with vested rights of property.—Id.

6. Foreign corporations doing business in

the territory, having an accredited agent on whom legal process may be served, who exercises openly his authority as such, may have the benefit of the statute of limitations.—King v. Engineering Co., 4 Mont. 1; 1 Pac. 727.

7. R contracted a debt in Canada. Afterwards he went to Nevada, and there remained until an action would have been barred by the law of that state. He then emigrated to Montana. *Held*, that the statute of limitations of Nevada constitutes no defense to an action brought against R in Montana.—Chevrier v. Robert, 6 Mont. 319; 12 Pac. 702.

8. Code Civ. Proc., §§ 3455, 3482, 3483, changed the time for commencing an action on an open account from five years, as prescribed by Laws 1899, p. 173, to three years, and provided that it shall not affect existing debts or actions under prior statutes before the Code went into effect. *Held*, that a reasonable time is prescribed for commencing an action on an account existing at the Code's adoption, where plaintiff had two years before and one year after its adoption for commencing the suit.—Guiterman v. Wishon, 21 Mont. 458; 54 Pac. 566.

9. Such provisions apply to an action brought after their enactment on an account existing before that event.—Id.

10. Laws 1899, p. 172, provides that an action on account, not founded on a written instrument signed by a party chargeable therewith, shall be commenced within five years. Code Civ. Proc., § 514, subd. 1, which took effect Jul. 1, 1895, declares that actions of that nature shall be commenced within three years. Sec. 3456 provides that, when a limitation prescribed in any existing statute has begun to run before the Code takes effect, the time which has already run shall be deemed part of the time prescribed as such limitation by the Code. *Held*, that suit commenced Dec. 29, 1897, on an open account not founded on a writing, due Dec. 31, 1892, was barred by limitations, notwithstanding the period of six months after Jul. 1, 1895, allowed by the Code within which to commence suit, was unreasonably short, since suit was not commenced within a reasonable time thereafter.—Sherman v. Nason, 25 Mont. 283; 64 Pac. 768.

11. A note secured by mortgage fell due Jun. 11, 1886, and by the statute in force at that time action thereon would be outlawed in six years. *Held*, that Laws 1889, p. 172, and the limitations prescribed in Code Civ. Proc., § 557, had no application to the note in suit, but it was governed by the law in force at its maturity.—Wilson v. Pickering, 28 Mont. 435; 72 Pac. 821.

B. LIMITATIONS APPLICABLE TO PARTICULAR ACTIONS, 12-17.

12. Under Code Stat., p. 516, §§ 8, 9, providing that an action for waste or trespass upon real property, and an action for relief not otherwise provided for, shall be commenced within three years after the cause of action shall have accrued, the obligee in an undertaking given to stay execution on a judgment for plaintiff in an action to enjoin the diversion of water, can recover only such damages as were sustained within three years from the time the action was brought.—Toombs v. Hornbuckle, 3 Mont. 193.

13. Under Comp. Laws, § 47, providing that an action for relief "not hereinbefore provided for must be commenced within three years," an aplication for mandamus to require an officer to allow a claim for expenses, is barred after three years.—Territory v. Potts, 3 Mont. 364.

14. Under the statute, which requires that the statute be pleaded by stating that the cause of acton is barred by the provisions of Section ———, subdivision ——— of the Code, a plea that the action is barred by the statute of limitations (Rev. Stat., p. 68) is fatally defective, as making no reference to the Code of Civil Procedure or to the subdivisions of § 41.—Stewart v. Budd, 7 Mont. 573; 19 Pac. 221.

15. An action to recover an indebtedness of a corporation from its trustees individually, on the ground that the corporation failed to make the annual report required by statute, is, as regards the question of limitation, one for a penalty, and, under Comp. Stat., p. 69, § 45, must be commenced within one year from its accrual.—State Savings Bank v. Johnston, 18 Mont. 440; 45 Pac. 662.

16. Code Civ. Proc., § 518, applies to suits in equity as well as actions at law.—Mantle v. Mining Co., 27 Mont. 473; 71 Pac. 665.

17. Code Civ. Proc., § 518, does not apply to actions concerning real estate.—Grogan v. Trading Co., 30 Mont. 229; 76 Pac. 211.

II. COMPUTATION OF PERIOD, 18-35.

A. Accrual of Right of Action or Defense, 18-27.
B. Performance of Condition, Demand, and Notice, 29-30.
C. Death and Administration, 31-32.
D. Concealment of Cause of Action, 33.
E. Pendency of Other Action, 34.
F. Commencement of Action, 35.

A. ACCRUAL OF RIGHT OF ACTION OR DEFENSE, 18-27.

18. Under Act Jan. 11, 1872, Code Stat., p. 591, providing that no action to recover any mining claim shall be commenced unless plaintiff, or his attorneys, or predecessors in interest, were in the actual seizin or possession of such mining claim within one year next before the commencement of the action, plaintiff in ejectment must show that he or his attorneys or predecesors in interest were in the actual possession of the mine within one year next before the commencement of the action.—Davis v. Clark, 2 Mont. 394.

19. The statute can not run against a mining claim until the patent thereto has been issued, any state or territorial legislation to the contrary notwithstanding.—King v. Thomas, 6 Mont. 409; 12 Pac. 865.

20. The statute of limitations does not commence to run against a mining claim until the issuance of a patent thereto. (See 164 U. S. 325.)—Mayer v. Carothers, 14 Mont. 274; 36 Pac. 182.

21. The statute of limitations begins to run against a mining claim when the patent thereto has been issued, and not from the date of the register's receipt.—Clark v. Barnard, 15 Mont. 176; 38 Pac. 834.

22. In an action to recover the amount paid, as surety, in satisfaction of a foreign judgment, a paragraph of the answer pleading limitations as a defense is properly striken out as sham, where plaintiff paid the judgment only a short time before the commencement of the action, until which time his right of action did not accrue—Oppman v. Steinbrenner, 17 Mont. 369; 42 Pac. 1015.

23. Under Comp. Stat., p. 374, § 404, declaring that action against the sureties on a guardian's bond must be commenced within three years from the "discharge or removal" of the guardian, the statute commences to run from the death of the ward, not from the accounting by the guardian.—Berkin v. Marsh, 18 Mont. 152; 44 Pac. 528.

24. Where a husband sold a flock of sheep belonging to his wife without her knowledge, the statute began to run against her, in favor of the purchaser, at the time of the sale, and not at the time of her discovery of the sale.—Yore v. Murphy, 18 Mont. 342; 45 Pac. 217.

25. Where a corporation fails to make its annual report, its trustees become at once liable for its debts, and the statute of limitations begins to run, as to a cause of action then accruing, in favor of a creditor.—State Savings Bank v. Johnson, 18 Mont. 440; 45 Pac. 662.

26. The cause of action accruing in favor of a creditor against the trustees of a corporation who fail to file an annual report as required by statute is not renewed or extended by subsequent defaults in filing reports.—Id.

27. Where a contract was made to become due on the happening of a certain contingency, a suit brought within eight years after the happening of the contingency, but more than eight years from the date of the execution of the contract, was not barred.—Noyes v. Young, 32 Mont. 226; 79 Pac. 1063.

B. PERFORMANCE OF CONDITION, DEMAND, AND NOTICE, 29-30.

29. Where, after sale of land under execution, the judgment creditor obtained a decree setting aside the judgment, execution and sale, the statute did not commence to run against the execution purchaser's cause of action against the creditor for the price paid, given by Comp. Stat., p. 153, § 347, until rendition of the decree.—Elling v. Harrington, 17 Mont. 322; 42 Pac. 851.

30. An action on a trust agreement, which authorizes the trustee to sell the interest of a defaulting party at public auction and apply the net proceeds of the sale upon the payment of the amount due from such defaulting party to plaintiff, and giving plaintiff an action against such defaulting party for the balance remaining due after such application, accrued when the trustees sold the property under the terms of the declaration of trust.—Goodell v. Sanford, 31 Mont. 163; 77 Pac. 522.

C. DEATH AND ADMINISTRATION, 31-32.

31. Even if the cause of action on a guardian's bond does not accrue till accounting by the guardian, the administrator of the deceased ward is not for that reason under "disability" between the ward's death and such accounting, within Comp. Stat., p. 374, § 404, requiring action against the sureties on a guardian's bond to be commenced within three years from the discharge of the guardian, unless at the time of the discharge the person entitled to bring the action is under legal "disability" to sue.—Berkin v. Marsh, 18 Mont. 152; 44 Pac. 528.

32. The provisions of Comp. Stat., p. 313, § 155, requiring the holder of a claim against a decedent to bring action thereon within three months from its rejection by the executor or administrator; and § 162, suspending the right to issue execution on a judgment against a decedent rendered in his life time, do not affect the running of the general statute of limitations (Comp. Stat., p. 68) against an action on a judgment; and under such statute the action is barred in six years, the only time to be excluded on account of the death of the judgment debtor being that intervening between the date of his death and the qualification of his executor or administrator.—Whiteside v. Catching, 19 Mont. 394; 48 Pac. 747.

D. CONCEALMENT OF CAUSE OF ACTION, 33.

33. Where complainant and L purchased a part of a mining claim, and the deed to the interest of both was taken in the name of L, the five year statute of limitations prescribed by Code Civ. Proc., § 518, began to run against an action by complainant to enforce the trust created by such conveyance on the date complainant acquired knowledge that L repudiated the trust.—Mantle v. Mining Co., 27 Mont. 473; 71 Pac. 665.

E. PENDENCY OF OTHER ACTION, 34.

34. Where complainant sued to enforce an express trust to a portion of a mining claim, such suit did not suspend the operation of limitations against an action for an accounting of ores extracted from the claim, and to restrain the operation thereof.—Mantle v. Mining Co., 27 Mont. 473; 71 Pac. 665.

F. COMMENCEMENT OF ACTION, 35.

35. In an action brought for a minor child, the mere substitution, after the expiration of the period of limitation fixed by the statute, of a guardian ad litem in the place of the attorneys of record for such minor, is not the commencement of a new action, so that the same will be barred.—Territory v. Cox, 3 Mont. 197.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT, 36-39.

36. A reply to a counterclaim for goods sold, denying the counterclaim, but admitting the receipt of a large portion of the goods from one Stat., p. 70, § 53, that no acknowledgment shall that defendant, within the provision of Rev. Stat., p. 70 § 53, that no acknowledgment shall be sufficient to take the case out of the statute unless contained in some writing signed by the party to be charged, nor does a demurrer to a complaint reciting such reply amount to an acknowledgment.—Howes v. Lynde, 7 Mont. 545; 19 Pac. 249.

37. A debtor wrote to his creditor: "If I do not hear from you soon, I will tender the amount due. Whatever is due is ready whenever I can safely pay either you or B;" and also: "I am not satisfied about the settlement. Please write me your understanding of it,—if I settle with your folks, if they will see me clear of B." *Held*, that the letters did not constitute such a new promise as to remove the statute of limitations, as it was not an unqualified and definite acknowledgement and promise to pay the demand.—Braithwaite v. Harvey, 14 Mont. 208; 36 Pac. 38.

38. A partial payment by one joint maker of a note does not remove the bar of limitations as to the others, in view of Comp. Stat., p. 70, § 53, providing that no acknowledgment shall evidence a new contract, and thereby remove the bar of the statute, unless signed by the party, but that the act shall not alter the effect of a payment; and § 54, providing that the limitation shall begin to run after the last payment due, and Comp. Stat., p. 1006, § 1296, providing that joint obligations shall be taken as joint and several.—First Nat'l Bank v. Bullard, 20 Mont. 118; 49 Pac. 658.

39. Under Comp. Stat., p. 70, §§ 53, 54, providing that, in case a payment of a debt is made after maturity, the statutory limitation shall commence from the time of such payment, and payment by a joint maker of a note after its maturity, without the assent of the co-maker, does not extend the period of limitation as to the latter.—Oleson v. Wilson, 20 Mont. 544; 52 Pac. 372.

IV. OPERATION AND EFFECT OF BAR BY LIMITATION, 40.

40. Under Cod. Stat., p. 518, § 21, a cause of action which is not barred by the statute of

limitations of California, is not barred by the statute of this state.—Knox v. Gerhauser, 3 Mont. 267.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW, 41-44.

41. In an action on a note which on its face appeared barred by limitation, the complaint alleged that there was endorsed thereon a certain sum, within the time necessary to prevent the bar of the statute, but contained no direct averment that the maker had paid the amount so endorsed. *Held*, that the complaint was bad on demurrer.—Murphy v. Phelps, 12 Mont. 531; 31 Pac. 64.

42. In an action on a note, which appeared on its face to have been barred by the statute of limitations, the complaint alleged that there was endorsed on the note, "Dec. 30th, 1888, rec'd. $90.30," and averred that "said note of $558.26, less the endorsement thereon of $90.30, is now due and unpaid;" but there was no direct allegation that the maker had paid anything on the note. *Held*, that by failing to rest on the demurrer, and by pleading over, defendant waived the insufficiency of the allegations to defeat the statute.—Murphy v. Phelps, 12 Mont. 531; 31 Pac. 64.

43. A refusal of the court to allow an amendment of an answer setting up the statute of limitations, made after the close of the testimony in the case, is not an abuse of discretion.—Baxter v. Hamilton, 20 Mont. 327; 51 Pac. 265.

44. Under the provisions of Code Civ. Proc., § 558, the objection that an action was not commenced within the time limited by law can be taken only by answer.—Grogan v. Trading Co., 30 Mont. 229; 76 Pac. 211.

LIS PENDENS.

1. Filing lis pendens in a suit to reform description in a mortgage does not affect a grantee of the land from the mortgagor, whose deed was executed after the mortgage, but before the filing of the lis pendens, though not recorded until after such filing, the person filing the lis pendens not being a "purchaser," nor the lis pendens a "conveyance," within Comp. Stat., p. 661, § 260, declaring that every conveyance of real estate which shall not be recorded as provided by statute shall be deemed void as against subsequent "purchasers" of the same real estate, where his own "conveyance" shall be first duly recorded.—Baker v. Bartlett, 18 Mont. 446; 45 Pac. 1084.

LOGS AND LOGGING.

1. In an action by a riparian owner against one engaged in floating logs, for causing an overflow, it is error to refuse to charge that plaintiff's case is based on negligence; that there is no presumption that it was unlawful to float logs; and that plaintiff must show want of ordinary care,—and to charge, instead, that plaintiff should recover if the logs formed a gorge obstructing the natural flow of the stream, and the gorge was suddenly released, causing the stream to overflow, as the latter charge practically ignores the question of negligence.
Hopkins v. Copper Co., 13 Mont. 223; 33 Pac. 817.
Same case, 16 Mont. 356; 40 Pac. 865.

2. In an action for an overflow of land, caused by a jam resulting from negligence in driving logs, evidence of the method adopted by defendant of breaking jams, by releasing and precipitating other jams upon them instead of releasing them as they formed, is admissible.—Hopkins v. Butte & M. C. Co., 16 Mont. 356; 40 Pac. 865.

3. In an action for the overflow of his lands, caused by a jam resulting from negligence in driving 5,000,000 feet of logs, plaintiff testified to the formation of a jam partially across the stream; that the jam caused the water to overflow the banks above it, but that below it the water was within the banks, and that the swales and sloughs below the jam, which ordinarily in high water were filled up before the water went over the banks, were dry, and that defendant had only one man looking after the jam on the day in question. There was evidence that the next year, when the water was as high, defendant, while driving its logs, stationed men along the drive to break the jam, and no overflow occurred. There was also evidence that the water stood upon plaintiff's ranch for 36 hours, that the floating and rolling of logs carried on the land by the flood contributed to the injury, and that at the time of the jam there was a freshet in the creek. *Held*, that the evidence warranted a finding that the overflow was caused by the jam, which resulted from defendant's negligence.—Id.

4. In an action for damage done by the overflow of a creek, caused by a jam due to negligence in driving logs, evidence that a mare and colt were in a pasture when the flood came, and that the water was from 2 to 15 feet deep, and nothing was again seen of the mare and colt, is sufficient to sustain a finding that the animals were lost in the flood.—Id.

LOST INSTRUMENTS.

1. Evidence of the contents of a lost deed, claimed to have been given by one as administrator, was properly excluded where there was no evidence that he was an administrator, or had authority to make the deed.—Gassert v. Noyes, 18 Mont. 216; 44 Pac. 959.

2. In an action to recover a portion of a mining claim, in which plaintiffs claimed under a deed which had been destroyed, evidence considered and *held* not to show the contents of the deed by such direct and positive evidence as to enable the court to say that there was a conveyance.—Capell v. Fagan, 30 Mont. 507; 77 Pac. 55.

3. While, under the statutes, the consideration need not be mentioned in a deed, yet, if it is mentioned and set forth in the deed, it becomes a substantial part of the contents thereof, and must be proved like any other of the contents on loss thereof.—Id.

4. When a written contract is to be proved by oral testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself, but the substance of the agreement must be proved satisfactorily.—Id.

5. Proof of negotiations, conversations and acts of parties before, at the time of, and after the execution of a written instrument, are not competent to prove its contents where the instrument is lost.—Id.

6. Under Code Civ. Proc., §§ 3106, 3107, 3131, 3132, 3146, 3228, in order to establish the former existence of an instrument in writing, under which plaintiff claims, he is compelled to prove its execution and contents, including all the substantial parts of the lost instrument, to such an extent as to constitute a practical reproduction of the instrument in all of its substantial parts.—Id.

LOTTERIES.

1. On a trial under Comp. Stat., p. 1025, § 1356, and p. 1027, § 1366, requiring "every

person who shall carry on any gift, lottery or prize distribution business" to pay a license fee, and providing that "any person who shall transact any business" requiring a license, without first obtaining the same, shall be deemed guilty of a misdemeanor, the use in the charge of the word "transact," as the equivalent of "carry on," is not error, in view of §§ 202 and 204, providing that words and phrases are to be liberally construed, and according to the approved and common usage.—Territory v. Harris, 8 Mont. 140; 19 Pac. 286.

MALICIOUS PROSECUTION.

1. An averment in the answer that defendant acted upon the advice of counsel is insufficient to show probable cause, and may be stricken out if there be not also an averment that the advice was upon a full presentation of the facts. —Smith v. Davis, 3 Mont. 109.

2. In an action for malicious prosecution it is competent to allege and prove special as well as ordinary damages.—Id.

3. In an action against a railroad company for malicious prosecution in causing plaintiff's arrest for petit larceny, it appeared that one of the defendant's freight cars had been broken open in another county, and underwear and other articles taken therefrom; that soon afterwards plaintiff was in possession of three suits of such underwear, claiming to have bought them of one S; that he concealed the suits because he suspected they had been stolen; that S made a confession to defendant's agent, implicating plaintiff; and that plaintiff was discharged. *Held*, that the facts justified the arrest, and plaintiff failed to show want of probable cause, and hence could not recover, though defendant's agent acted maliciously.—Weaver v. Montana Central, 20 Mont. 163; 50 Pac. 414.

4. In an action for malicious prosecution in causing the arrest of plaintiff for larceny, the burden is upon plaintiff to prove that defendant acted maliciously and without probable cause.—Id.

MANDAMUS.

I. Nature and Grounds in General, 1-20.

II. Subjects and Purposes of Relief, 21-56.

- A. Acts and proceedings of courts, judges, and judicial officers, 21-37.
- B. Acts and proceedings of public officers and boards, and municipalities, 38-56.

III. Jurisdiction, Proceedings, and Relief, 57-82.

- A. Jurisdiction and venue, 57-59.
- B. Time for commencing proceedings, 60-63.
- C. Parties, 64-65.
- D. Pleadings and evidence, 66-76.
- E. Trial and proceedings thereafter, 77-82.

I. NATURE AND GROUNDS IN GENERAL, 1-20.

1. An application for a writ of mandamus is an equitable proceeding, and the maxims in equity applicable apply thereto.—Territory v. Gilbert, 1 Mont. 371.

2. Mandamus affords the only remedy to citizens who seek to compel an officer to perform his duty to the public. (See 2 Otto. 358.) —Chumasero v. Potts, 2 Mont. 242.

3. A proceeding in mandamus is not a case at common law, or a civil action under the Civil Practice Act.—Id.

4. Any citizen of the territory may be the relator in an application for a writ of mandate, where the subject matter relates to the validity of an election.—Id.

5. A proceeding in mandamus is not a civil action under the Code.—Territory v. Potts, 3 Mont. 364.

6. Mandamus will not lie to compel the board of medical examiners to issue a certificate to practice medicine to an applicant whose demand has been refused, as the statute creating such board has provided a plain, speedy and adequate remedy at law in such case in an appeal to the district court.—State v. Board, 10 Mont. 162; 25 Pac. 440.

7. Where the ownership of shares of stock is litigated in an injunction suit, as the court can order an officer of the corporation, who is a party to the suit, to issue the stock to the successful party, though the corporation is not a party, it being entirely disinterested, the remedy is complete, so that mandamus will not lie to compel such issuance.—Durfee v. Harper, 22 Mont. 354; 56 Pac. 582.

8. Refusal in the district court of a change of venue on the ground of residence is a judicial act, which by Code Civ. Proc., § 1742, may be reviewed on an appeal from the judgment; and hence mandamus will not lie to compel a judge to grant a change on such ground.—State v. Smith, 23 Mont. 329; 58 Pac. 867.

9. On denial of an order permitting a survey and inspection of a mining claim, this court will not grant a writ of supervisory control, there being a remedy by appeal, and a question of title involved in the case being one for the district court in the first instance.—State v. District Court, 26 Mont. 274; 67 Pac. 625.

10. The district court having jurisdiction to strike out scandalous and impertinent affidavits, and to deny a motion for new trial based thereon, and its acts in so doing being subject to review on appeal, mandamus will not lie to prevent the exercise of such discretion.—State v. District Court, 26 Mont. 372; 68 Pac. 465.

11. Mandamus was not the proper remedy to compel the clerk of the district court to issue an alias order of sale of property under a foreclosure lien, as there was an adequate remedy at law, by motion in the case in the court in which the decree of foreclosure was rendered. —State v. Wright, 26 Mont. 540; 69 Pac. 101.

12. Code Civ. Proc., § 2183, providing that the judgment in a case of contempt is final and conclusive, and there is no appeal, but the action of a district court can be reviewed on a writ of certiorari by this court, if intended to preclude this court from reviewing, except by certiorari, a judgment of contempt, violates Const., art. 8, § 2, giving the supreme court a general supervisory control over all inferior courts, under such regulations and limitations as may be prescribed by statute; a writ of supervisory control being the only means by which the question whether there is evidence to support a judgment of contempt can be determined.—State v. District Court, 27 Mont. 128; 69 Pac. 983.

13. Code Civ. Proc., § 373, provides that the stenographer must, upon demand, and payment of his fees, furnish to the attorney of a party to any civil cause, a transcript of the proceedings. *Held*, that the proper remedy to compel a stenographer to furnish such transcript is a writ of mandate, rather than an order to the stenographer by the trial court.—State v. Ledwidge, 27 Mont. 197; 70 Pac. 511.

14. A writ of supervisory control will not be granted to correct alleged errors in the decisions of a trial court that a complaint does not state a cause of action, discharging the jury, and entering judgment for defendant, the same being reviewable on motion for new trial on an appeal.—State v. District Court, 27 Mont. 280; 70 Pac. 981.

15. Code Civ. Proc., § 1742, provides that intermediate orders affecting the judgment, and not otherwise appealable, may be reviewed on appeal from the judgment. In the trial of disbarment proceedings, a motion for postponement, based on the absence of witnesses and the inability of counsel to prepare the case in the short time given, was refused. *Held*, that while the denial of the motion might have been contrary to law, and while temporary injustice might result therefrom, yet this court would not be justified in the exercise of its extraordinary supervisory power, in issuing a writ to compel a postponement, since the error, if any, and if not corected during the course of the trial, or by a final favorable judgment, would be reviewable on appeal from an adverse one. —State v. District Court, 27 Mont. 349; 71 Pac. 159.

16. Mandamus is a discretionary writ, and will be allowed only in furtherance of justice upon a proper case presented.—State v. Barret, 30 Mont. 203; 81 Pac. 349.

17. Where a mandamus proceeding is abated because of the expiration of the terms of office of the officials against whom it is directed, it will be dismissed, although, the question of abatement is not raised by counsel on either side.—State v. Board, 32 Mont. 13; 79 Pac. 402.

18. Mandamus proceedings instituted against state officers to compel them to perform an official duty will be dismissed where, prior to the hearing the terms of the officers against whom the proceedings were brought had expired, so that they could not perform the mandate of the writ, if issued, and their successors were given no notice of the proceedings, and no demand was made on them to perform the duties, the performance of which was sought.—Id.

19. The writ of supervisory control is one to be seldom issued, and then only when other writs may not issue and other remedies are inadequate, and when the acts of the court complained of as threatened will be arbitrary, unlawful and so far unjust as to be tyrannical. —State v. District Court, 32 Mont. 579; 81 Pac. 345.

20. While the lower court is proceeding within and before it has exceeded its jurisdiction, the invocation of action on the part of this court by writ of supervisory control or otherwise is premature.—Id.

II. SUBJECTS AND PURPOSES OF RELIEF, 21-56.

A. Acts and Proceedings of Courts, Judges, and Judicial Officers, 21-37.

B. Acts and Proceedings of Public Officers and Boards, and Municipalities, 38-56.

A. ACTS AND PROCEEDINGS OF COURTS, JUDGES, AND JUDICIAL OFFICERS, 21-37.

21. Under Rev. Stat., 537, § 603, relating to the attaching of one county to another for judicial purposes, the order of the judge apportioning the expenses is final, and may be enforced by mandamus.—Territory v. Yellowstone, 6 Mont. 147; 9 Pac. 918.

22. Mandamus will lie to compel a justice of the peace to issue an order to compel a garnishee to appear and testify under oath, where it appears that the justice has refused to make the order, and that the judgment and execution against the defendant are lawful.—State v. Eddy, 10 Mont. 311; 25 Pac. 1032.

23. Plaintiff in a foreclosure suit moved for the appointment of a receiver under Comp. Stat., p. 115, § 229, on the ground that the property was "probably insufficient to discharge the mortgage debt," and at the time set for hearing the motion the parties were given opportunities to introduce testimony as to whether the property was probably insufficient, as alleged by plaintiff and denied by defendant, but no testimony was offered, the question being submitted on the pleadings, and plaintiff's motion was denied. *Held*, that the court did not refuse to determine the motion; and a writ of mandamus to compel it to do so should be denied.—State v. District Court, 16 Mont. 274; 40 Pac. 600.

24. Where a foreign insurance company complies fully with the laws of the state relative to such companies, and files with the auditor all papers and certified copies and statements required by Civ. Code, tit. 4, c. 1, relating to stock and mutual insurance corporations, and tenders a certificate designating an agent to receive process as required by § 1036, and the fee for filing the same, mandamus will lie, on the petition of such company, to compel the secretary of state to file in his office such certificate, and the consent of the person so appointed to act as such agent.—State v. Rotwitt, 18 Mont. 92; 44 Pac. 407.

25. Mandamus lies to compel the court stenographer to write out and file a list of the objections, rulings and exceptions occurring on the trial of a cause, as required by Code Civ. Proc., § 372, where the order of the trial court in reference thereto is insufficient, since such order is not appealable.—State v. Supple, 22 Mont. 184; 56 Pac. 20.

26. In such case mandamus is the proper remedy, because, by stating in its order that the filing of a mere list of consecutive objections, rulings and exceptions was a compliance with § 372, the court, in efect, refused to make an order compelling him to comply therewith.—Id.

27. Mandamus will not issue to compel a court to hear a motion to dissolve or modify an interlocutory injunction granted on order to show cause, based on the discovery of additional evidence tending to establish facts alleged in opposition to the injunction, unless the privilege of applying for such dissolution or modification was reserved in tne order granting the injunction; such hearing being in the discretion of the court.—State v. District Court, 23 Mont. 564; 59 Pac. 917.

28. Where the district court erroneously struck from the files a contest of a will on the ground that it was inadmissible, because of a former contest, which had been disimssed as not stating a ground of contest, as an appeal would not lie from the order, a writ of mandamus will be granted to compel the court to take jurisdiction.—Raleigh v. District Court, 24 Mont. 306; 61 Pac. 991.

29. Where the district judge dismisses contempt proceedings, holding that he was not authorized to entertain them, mandamus to compel him to hear and determine them was the proper remedy, since an appeal from the order of dismissal would not lie.—State v. Loud, 24 Mont. 428; 62 Pac. 497.

30. Under Const., art. 8, § 2, giving the supreme court a general supervisory control over all inferior courts, a writ of supervisory control will not be granted to command a district court to sustain a motion for judgment on the

pleadings, since the party has a remedy if he should be finally defeated in the action.—State v. District Court, 24 Mont. 566; 63 Pac. 389.

31. Mandamus will not lie to compel the court to hear a motion for dissolution of an injunction, where the court had dismissed the motion after having its attention called to the pleadings, orders and records in other cases between the same parties, and having determined that the same question had been decided, though the evidence on which its determination was based was unsatisfactory, since mandamus can not be used to control the discretion of an inferior court acting within the scope of its authority—State v. District Court, 25 Mont. 202; 64 Pac. 352.

32. Under Pen. Code, §§ 1730-1732, requiring that when the defendant has been examined and committed, or admitted to bail, or upon leave of court, the county attorney must file an information, etc., no leave of court is necessary to file an information after commitment on preliminary examination, and a writ of supervisory control will not issue to compel the granting of leave.—State v. District Court, 26 Mont. 275; 67 Pac. 943.

33. Under such section, leave to file an information without a preliminary examination may be granted or refused, within the sound discretion of the court, and a writ of supervisory control to revise such discretion will therefore be denied.—Id.

34. A decision of a trial court that a complaint in a suit does not state a cause of action, being a determination of an issue of law arising in the case, will not be corrected by mandamus. —State v. District Court, 27 Mont. 280; 70 Pac. 981.

35. Where, from the facts stated on the application for the substitution of attorneys, it was the plain legal duty of the court to grant the application, and was without its proper discretion to refuse the same, the applicant was entitled to mandamus to compel the court to grant such application.—State v. District Court, 30 Mont. 8; 75 Pac. 510.

36. An order made in a divorce suit restraining defendant from disposing of his property was modified so as to allow him to mortgage certain property in order to comply with an order awarding plaintiff alimony and counsel fees, and might also pay certain debts, defendant mortgaged the property, paid counsel fees and two months alimony, in compliance with the order, and, after paying certain debts, spent the rest of the money in meeting his own current expenses. *Held*, that the court did not, in adjudging defendant guilty of contempt, and directing him to be punished for failure to comply with the order, act in an arbitrary or unlawful manner, such as to entitle defendant to a writ of supervisory control.—State v. District Court, 32 Mont. 34; 79 Pac. 401.

37. Where, after defendant's motion for judgment on the pleadings has been argued and submitted to the court, the court dismissed the action without prejudice on plaintiff's motion, mandamus will lie, under Code Civ. Proc., § 1961, to require the court to reinstate the cause, and determine defendant's motion, as an appeal from a judgment of dismissal would not raise for review the question of defendant's right to such judgment.—State v. District Court, 32 Mont. 37; 79 Pac. 546.

B. ACTS AND PROCEEDINGS OF PUBLIC OFFICERS AND BOARDS, AND MUNICIPALITIES, 38-56.

38. The governor of the territory may be compelled by mandamus to canvass the votes on "An Act to change the seat of government," as directed by Act Feb. 11, 1874. (See 2 Otto, 358.)—Chumasero v. Potts, 2 Mont. 242.

39. The courts may compel an executive officer to perform a mere ministerial act.—Id.

40. Cod. Stat., c. 40, authorized the general recorder to have published at the expense of the state a list of certain brands and marks. *Held*, that mandamus will lie to compel the auditor to issue a warrant in payment of the services of one who published such list under a contract with the general recorder, although the law did not fix a certain compensation for such services, and the auditor defended on the ground that he had no power to fix the same.—Fisk v. Cuthbert, 2 Mont. 593.

41. Under Comp. Stat., p. 625, § 121, providing that the state auditor "shall audit all claims against the treasury, and when the law recognizes a claim, but no appropriation has been made therefor, shall settle the claim, and give the claimant a certificate therefor," it is his duty to audit and settle a claim by a member of the legislature for mileage and attendance; and he may be compelled to do so by mandamus, under Comp. Stat., p. 206, § 566, authorizing that right to compel the performance of an act which the law specially enjoins as a duty resulting from an office.—State v. Kenney, 9 Mont. 223; 23 Pac. 733.

42. On application by a member of the legislature for a writ of mandate to compel the state auditor to audit and settle his account for mileage and attendance, an allegation merely that a controversy has arisen as to his election is immaterial.—Id.

43. Laws 1889, p. 116, which fixes the compensation of the Code commissioners at $4000 each, and which provides that on filing any one of the completed Codes with the secretary of the territory the auditor shall draw his warrant for the pro rata salaries of the commissioners, constitutes an appropriation of money required for the compensation of the commissioners, and mandamus will issue to the state auditor to compel him to draw his warrant in favor of the commissioners who have performed their duties as prescribed by the Act.—State v. Kenney, 10 Mont. 485; 26 Pac. 197.

44. Comp. Stat., p. 1214, § 1993, provides that the state reporter shall publish 300 copies of each volume of the State Reports, "provided that the same shall be paid for at the rate of $6 for each volume of 600 pages, and that each volume of more than 600 pages shall be paid for at the same rate for the number of pages exceeding 600," and that upon delivery the auditor "shall issue to said reporter a warrant for the amount to be found as provided above, and also a warrant for the sum of $300, to cover the expenses of stationery and clerical work: * * * provided, that the whole expense of the publication and preparation of a full volume shall not exceed the sum of $2100." *Held*, that mandamus will lie to compel the auditor to issue a warrant to the reporter for the payment of all pages in excess of 600 at the rate of $6 for 600 pages.—State v. Kenney, 10 Mont. 533; 26 Pac. 999.

45. A county canvassing board has no authority to receive affidavit that illegal votes were cast in a precinct; and when it has done so, and the returns from such precinct are excluded for that reason, mandamus will lie to compel the board to canvass such returns.—State v. Choteau, 13 Mont. 23; 31 Pac. 879.

46. A county canvassing board, to which an alternative writ of mandate was issued, to compel it to canvass the votes from B precinct, or to show cause for not doing so, answered "that it appeared from an inspection of the registration list and of the list of persons returned as voting at said precinct that 16 names of persons (naming them) appeared on the list of persons returned as voting at said precinct, which 16 names did not appear to have ever been registered as voters at said precinct,

and no surrendered certificates of registration were transmitted by the judges of election to the clerk of the board of county ocmmissioners in connection with or as a part of the election returns of such precinct, or in any manner whatever, and it appeared from said returns that said 16 persons were not entitled to vote at all at said election." *Held*, that this answer presented an issue which should be tried.—Id.

47. Where a school was removed three years prior to the commencement of an action to compel the trustees by mandamus to move it back to the district school house, and the judge continued the case, and ordered on election, which resulted in an approval of the action of the trustees in removing the school, mandamus should be denied, though the judge had no authority to order such election, and the same was irregular.—State v. Marshall, 13 Mont. 136; 32 Pac. 648.

48. Under Act Mar. 7, 1895, § 5, providing that the state furnishing board shall immediately contract for the publication and annotation of the Codes, contracting with the lowest responsible bidders therefor, the board has discretionary power, and mandamus does not lie to compel it to award the contract to a bidder who, though the lowest, is, in its judgment, not responsible.—State v. Rickards, 16 Mont. 145; 40 Pac. 210.

49. Code Civ. Proc., § 1961, provides that mandamus may issue to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station; and § 1962 provides that the writ must be issued in all cases where there is not a plain, speedy or adequate remedy in the ordinary course of law. *Held*, that mandamus was the proper remedy to compel a city to levy a special tax to pay certain water rentals due under a valid contract for a water supply, which contract the city had repudiated.—State v. Great Falls, 19 Mont. 518; 49 Pac. 15.

50. Mandamus will lie to compel a city to audit and pay a bill which it owes to a water company for hydrant rent, although Pol. Code, § 4703, provides that cities may sue or be sued in all courts and places.—State v. Philipsburg, 23 Mont. 16; 57 Pac. 405.

51. Const., art. 4, § 1, prohibiting any one department of the state government from exercising any powers belonging to another, does not prevent the courts from controlling by mandamus the exercise by the state executive of a purely ministerial duty.—State v. Smith, 23 Mont. 44; 57 Pac. 449.

52. Const., art. 5, § 30, provides that the state printing shall be done under contract, to be given to the lowest responsible bidder, under such regulations as may be prescribed by law, and that all such contracts shall be subject to the approval of the governor and state treasurer. Pol. Code, §§ 704-714, provide for the letting of the contract by the state board of examiners, of which the governor is made a member; § 710 providing that all contracts made by the board must be approved by the governor and state treasurer. *Held*, that the duty of such officers to approve a contract let by the board is not ministerial, but involves judicial discretion, and can not be controlled by mandamus.—Id.

53. Under Code Civ. Proc., §§ 150, 152, 1210, 1211, a writ of mandate to compel the clerk to issue an execution, bearing the former name of a county, is the proper remedy, where the legisalture, by a void act, has attempted to change the name of the county.—Sackett v. Thomas, 25 Mont. 226; 64 Pac. 503.

54. The attorney general, seeking to enforce by mandamus the payment of his stenographer's salary, can not occupy any stronger position than the stenographer would occupy, nor enforce any rights which the stenographer could not enforce.—State v. Barret, 30 Mont. 203; 81 Pac. 349.

55. Const., art. 5, § 34, prohibits the payment of money out of the state treasury otherwise than as provided by law. The legislature appropriated $600 a year for the years 1903 and 1904, to pay the salary of the attorney general's stenographer. The auditor, acting under the attorney general's advice, issued warrants to pay the stenographer $100 per month until the appropriation of $1,200 was exhausted. Thereupon the attorney general, acting with other members of the board of examiners, attempted to divert money appropriated for a different purpose to the fund for the payment of the stenographer. *Held*, that the attorney general could not, by mandamus, compel the state treasurer to pay a warrant issued by the auditor for stenographer's services after the exhaustion of the appropriation made by the legislature.—Id.

56. Under Code Civ. Proc., § 1000, authorizing telephone companies to construct lines on any public road by the erection of necessary fixtures, including posts, piers and abutments for the wires, where a city council refuses to designate the location of poles for a telephohe line, and requires the wires to be laid in conduits, the proper remedy is by mandamus to compel the council to designate the location of the poles.—State v. Mayor, 30 Mont. 338; 76 Pac. 758.

III. JURISDICTION, PROCEEDINGS, AND RELIEF, 57-82.

A. Jurisdiction and Venue, 57-59.
B. Time for Commencing Proceedings, 60-63.
C. Parties, 64-65.
D. Pleadings and Evidence, 66-76.
E. Trial and Proceedings Thereafter, 77-82.

A. JURISDICTION AND VENUE, 57-59.

57. Any court upon which common law jurisdiction has ben conferred may issue a writ of mandamus. (See 2 Otto 358.)—Chumasero v. Potts, 2 Mont. 242.

58. The grant of common law jurisdiction to the supreme court by Org. Act carries with it jurisdiction in mandamus, which can not be taken away by the legislature.—Id.

59. The fact that the statute provides that issues of fact in mandamus may be tried by a jury, and yet makes no provision for the calling of a jury by this court, does not show that such court has no jurisdiction to entertain an application for mandamus.—Id.

B. TIME FOR COMMENCING PROCEEDINGS, 60-63.

60. Though the statute of limitations only applies in express terms to civil actions, and the issuance of a writ of mandate rests in the discretion of the court, yet courts in exercising that jurisdiction will be guided by the bearing of that statute, upon analagous civil actions, as is done in equity causes, and an account for the expenses of an officer presented to the governor four years after such expenses accrued was barred by the statute, under Comp. Laws, § 47.—Territory v. Potts, 3 Mont. 364.

61. Where unreasonable delay is shown by the applicant for a writ of mandate, his application will be refused.—Id.

62. Where an officer, in advance of the time fixed by law for the performance of a certain duty, refuses to perform it, mandamus lies to compel a performance at the proper time.—State v. Rotwitt, 15 Mont. 29; 37 Pac. 845.

63. An objection that the proceeding is prematurely brought is waived by counsel of respondent appearing and asking that the rights of the parties be adjudicated.—State v. Weston, 31 Mont. 218; 78 Pac. 487.

C. PARTIES, 64-65.

64. Any citizen of the territory may be the relator in an application for a writ of mandate, when the subject matter relates to the validity of an election. (See 2 Otto 358.)—Chumasero v. Potts, 2 Mont. 242.

65. Two persons, who each put in a separate bid for county printing, can not, on the rejection of such bids by the county commissioners, join in a proceeding for a writ of mandate to compel the contract for such printing to be awarded to them.—Wright v. Commissioners, 6 Mont. 29; 9 Pac. 43.

D. PLEADINGS AND EVIDENCE, 66-76.

66. An application for mandamus need not allege that petitioner has no plain and adequate remedy at law. (See 2 Otto 358.)—Chumasero v. Potts, 2 Mont. 242.

67. In mandamus against a city to compel payment of rental for hydrants under a contract, the city could not dispute its records as to the number of hydrants for which rentals were due under the contract, in the absence of an averment in the return laying a foundation therefor.—State v. Great Falls, 19 Mont. 518; 49 Pac. 15.

68. In mandamus against a city to compel payment of rentals under a contract with a water company, in the absence of an averment in the return to support its admission, evidence that the water company had no license to carry on its business was properly excluded.—Id.

69. The sufficiency of the affidavit on which an alternative writ of mandate is based may be tested by a motion to quash the writ.—State v. Hogan, 22 Mont. 384; 56 Pac. 818.

70. Motions noticed for hearing March 6, were postponed by the judge, at his own instance, to March 15, when they, with another motion returnable on that day, were postponed to March 18. On the 18th the judge again postponed them to March 30. To an alternative writ of mandate issued March 21, directing him to show cause why he should not hear the motions, he answered that on March 15 he had designated the 18th as the time for hearing them, but that thereafter he had been served with a writ of prohibition from the supreme court; that on the 18th he was engaged in a jury trial, and therefore postponed the hearing till March 30, intending to hear them at that time, but in the meantime the alternative writ was served on him, and on the 30th he was engaged in the trial of another case, and that, considering the application for mandamus unjustifiable and premature, he determined to move to have it set aside, and therefore postponed the hearing of the motions to April 7; that on March 31 he was informed that the writ of prohibition prohibiting him from proceeding with the case had been denied, and he thereupon vacated the order setting the motions for April 7 and set them for hearing on April 1; that, in any event, he intended to have the hearing on April 3, and would not refuse to hear and determine said motions until requested to do so by order of the supreme court. *Held*, that the answer was evasive, and did not show a sufficient excuse for refusing to hear the motions.—State v. District Court, 22 Mont. 438; 56 Pac. 865.

71. The mere fact that the trial judge had delayed the determination of a motion for new trial for 45 days is not sufficient, in mandamus proceedings to compel a decision thereof, to show that the court had unnecessarily delayed the decision.—State v. District Court, 26 Mont. 372; 68 Pac. 465.

72. The relator in mandamus to compel the trial judge to determine a motion for new trial, the decision of which is alleged to be unnecessarily delayed, has the burden of showing such unnecessary delay.—Id.

73. Under rule 2, subd. 2, requiring that the application for a writ of mandate shall set out the reasons which render it necessary that the writ should issue originally from this court, and that the sufficiency of such reasons shall be determined by the court on the issuance of the writ, a motion to quash the writ, not setting out new matter, admits the truth of the matters in the application, and will not raise such questions for re-consideration in this court.—State v. Ledwidge, 27 Mont. 197; 70 Pac. 511.

74. An alternative writ of mandamus to compel a district court to amend a statement on motion for new trial will be quashed on motion, where the application fails to show that the motion for new trial has not been decided.—State v. District Court, 29 Mont. 265; 74 Pac. 498.

75. A delay of four years in making an application for a writ of mandamus to compel a court to amend a statement on motion for new trial, and an additional delay of two years after the alternative writ was ordered before it was issued, authorizes the court issuing it to quash the writ on motion.—Id.

76. An affidavit for mandamus to the governor to issue a certificate of election to relator as judge of a certain district is insufficient, it merely alleging that the law provides for three judges of such district, that at the election there were six candidates, and that relator received the third highest number of votes; the court taking judicial notice of the fact that the governor's proclamation called for the election of two judges only, and that three political parties had tickets in the field; so that it is not shown that the voters sought to fill more than two judgeships.—State v. Toole, 32 Mont. 4; 79 Pac. 403.

E. TRIAL AND PROCEEDINGS THEREAFTER, 77-82.

77. No appeal lies from a mere order or decision of the district court setting aside the report of a referee on an application for a writ of mandate; but the court must grant or deny the same before an appeal can be taken.—Thomas v. Smith, 1 Mont. 21.

78. In mandamus to compel the state auditor to draw warrants on the state capitol fund for payment of the services rendered by the capitol commission, the validity of the commission, which is acting under a known appointment from competent authority, can not be questioned.—State v. Cook, 17 Mont. 529; 43 Pac. 928.

79. If it is necessary that two justices of this court should concur in the issuance of a writ of mandamus, where the application is made to two justices, and the order directing the clerk to issue the writ is signed by only one of them, the other concurring, the writ is properly issued.—State v. Coad, 23 Mont. 131; 57 Pac. 1092.

80. Where a court has jurisdiction of an application for mandamus, and authority to determine all questions presented by the application, the fact that it granted the relator more comprehensive relief than was warranted by the application is not a defense in contempt proceedings for failure to obey the mandate,—at least so far as it related to matters contem-

plated by the application.—State v. District Court, 23 Mont. 171; 57 Pac. 1095.

81. On an application for a writ of supervisory control to annul a contempt order, this court may look into the evidence properly before it for the purpose of ascertaining whether there was any substantial evidence on which to base the order.

Chowen v. Phelps, 26 Mont. 524; 69 Pac. 54.

State v. District Court, 27 Mont. 134; 69 Pac. 671.

82. Where the county clerk and recorder erroneously refused to place the names of all the candidates on the official ballot who had been nominated by one faction of a political party, on the ground that the opposing faction was legally entitled to the use of the party name, the court, in mandamus to compel the clerk to print the name of one of the candidates so excluded on the ballot, had jurisdiction to decide the entire controversy, and require the printing of the names of all the candidates so erroneously excluded.—State v. Weston, 27 Mont. 185; 70 Pac. 519.

MARRIAGE.

1. In an action for the death of plaintiff's husband, evidence of one who knew deceased and plaintiff from infancy, and was present when the marriage was announced, and knew that they lived together as man and wife, and acknowledged that relation, establishes a prima facie case as to the relation of deceased to plaintiff during life.—Soyer v. Water Co., 15 Mont. 1; 37 Pac. 808.

2. Plaintiff and intestate married in 1858, and six years afterwards she left intestate, who married B in 1894. Plaintiff alleged that intestate had never been divorced from her. *Held*, that the burden of proving the absence of a divorce was on plaintiff, though it was a negative, since the law raises a strong presumption that all marriages are legal.—In re Rash's Estate, 21 Mont. 170; 53 Pac. 312.

MASTER AND SERVANT.

I. The Relation, 1.
II. Services and Compensation, 2-4.
III. Master's Liability for Injuries to Servant, 5-63.
A. Tools, machinery, appliances, and places for work, 5-10.
B. Methods of work, rules, and orders, 11-12.
C. Warning and instructing servant, 13.
D. Fellow servants, 14-19.
E. Risks assumed by servant, 20-24.
F. Contributory negligence of servant, 25-30.
G. Actions, 31-63.
1. Pleading, 31-34.
2. Evidence, 35-42.
3. Questions for jury, 43-56.
4. Instructions, 57-63.
IV. Liabilities for Injuries to Third Persons, 64-65.

I. THE RELATION, 1.

1. In a prosecution for violation of Laws 1897, p. 245, making it unlawful for a corporation to work through a vertical shaft where mining cages are used to a greater depth than 300 feet, unless the cage shall be provided with an iron bonnet safety cage, evidence that such devices or cages would be dangerous is inadmissible, since the question whether such appliances were the best or wisest method is for the legislature to decide.—State v. Mining Co., 23 Mont. 498; 59 Pac. 854.

II. SERVICES AND COMPENSATION, 2-4.

2. Plaintiff entered into a contract which provided that he should be engaged as general manager of a mining business "during the continuance of the agreemnt," which was for five years, at so much per year. The contract did not provide when plaintiff should receive pay for services. *Held*, that the contract was an entire one, and that the services of plaintiff for the whole period was a condition precedent to be performed before he could sue on the contract.—Isaacs v. McAndrew, 1 Mont. 427.

3. In a suit to recover wages for caring for property, where the evidence is conflicting as to the existence of any contract for hiring, and it appeared that the defendant had no interest in the property, had not derived any benefit from such services, and that plaintiff had not spoken to defendant in regard to compensation during the entire period of his employment, extending over two years, and it also appeared that defendant denied the contract, a verdict for plaintiff will be set aside.—Mattock v. Goughnour, 11 Mont. 265; 28 Pac. 301.

4. Plaintiff, who was employed by defendant to superintend a ranch at a fixed sum for a year, to be paid from the proceeds of the ranch, was forced, through the threats and orders of defendant, and without fault on his own part, to abandon the work before the end of the year. *Held*, that he could recover on a quantum meruit for the services performed.—Keyser v. Rehberg, 16 Mont. 331; 41 Pac. 74.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT, 5-63.

A. Tools, Machinery, Appliances, and Places for Work, 5-10.
B. Methods of Work, Rules, and Orders, 11-12.
C. Warning and Instructing Servant, 13.
D. Fellow Servants, 14-19.
E. Risks Assumed by Servant, 20-24.
F. Contributory Negligence of Servant, 25-30.
G. Actions, 31-63.

A. TOOLS, MACHINERY, APPLIANCES, AND PLACES FOR WORK, 5-10.

5. Defendant, on the opinion of an engineer that a boiler could be repaired for temporary use, had it repaired and used it for six months, when defendant's engineer, knowing of its defective condition, placed it in a position where the service was more severe. *Held*, that on explosion of the boiler, defendant was liable for an employee killed thereby.—Johnson v. Mining Co., 16 Mont. 164; 40 Pac 298.

6. Where a miner is engaged in running a tunnel, drilling and blasting from its face, the employer is bound to furnish a safe place for work, by using proper precautions to prevent the falling of the roof of that part of the tunnel already created, and by keeping the floor so free from debris as not to obstruct his escape in case of accident.—Kelly v. Mining Co., 16 Mont., 484; 41 Pac. 273.

7. A master is not liable for latent defects

in the machinery which ordinary inspection and care would not detect.—Mulligan v. Montana Union, 19 Mont. 135; 47 Pac. 795.

8. A railroad is not an insurer of the safety of its employees, but is required only to exercise all reasonable care to provide and maintain safe, sound, and suitable machinery, right of way, structures, and instrumentalities.—McCabe v. Montana Central, 30 Mont., 323; 76 Pac. 701.

9. It is the duty of an employer to use all reasonable care, considered in relation to the kind of business, to provide a safe place in which the employee may perform his service.—Id.

10. While a master is bound to use reasonable diligence to provide and maintain a safe place to work, such rule does not apply to a case where servants are creating the place of work, when it is constantly being changed in character by their labor, when it only becomes dangerous by the carelessness or negligence of the workmen, when the dangers which arise are very short lived, or when by the negligence of the workmen the place is rendered unsafe without the master's fault or negligence.—Shaw v. Mines Co., 31 Mont. 138; 77 Pac. 515.

B. METHODS OF WORK, RULES, AND ORDERS, 11-12.

11. It is negligence for a conductor to run his train into the yard limits of a station, without a headlight and without sending a flagman ahead to see if the track is clear before entering.—Criswell v. Montana Central, 17 Mont. 189; 42 Pac. 767.

12. Mere failure of a master to adopt rules to prevent injury to a servant is not proof of negligence, unless it appears that the master, in the exercise of reasonable care, should have foreseen the necessity for such precaution.—Shaw v. Mines Co., 31 Mont. 138; 77 Pac. 515.

C. WARNING AND INSTRUCTING SERVANT, 13.

13. The rule that a master is not bound to provide and maintain a safe place for his servants to work, where they are creating the place, and when it is constantly being changed in character by their labor, and becomes dangerous solely by their negligence, does not justify a vice-principal in giving false information to plaintiff, a workman in a mine, that an unexploded blast in the mine, which had been left by a former shift of workmen, had been exploded before plaintiff went into the mine at the time he was injured.—Allen v. Bell, 32 Mont. 69; 79 Pac. 582.

D. FELLOW SERVANTS, 14-19.

14. Comp. Stat., p. 817, § 697, provides that in every case the liability of a railroad company to a servant or employee acting under the orders of his superior shall be the same in case of injury sustained by default or wrongful acts of his superior, or to an employee not appointed or controlled by him, as if such servant or employee were a passenger. A complaint alleged that plaintiff was employed by defendant as a fence builder along its line of railroad, and that while he was propelling a handcar, under orders from a superior, defendant's train, suddenly, and without warning of any kind, appeared, coming at a high rate of speed around a curve in a deep cut, which prevented a view of the tracks beyond, and that plaintiff jumped from the handcar to avoid the danger, and was injured. *Held*, that the complaint was not subject to the objection that it showed that the negligence, if any, was the failure of the employees in charge of the train to give warning of its approach, and that, therefore, the negligence was that of fellow servants, since the defendant, in ordering plaintiff into a place of danger, was bound to protect him from injury.—Schmidt v. Montana Central, 15 Mont. 106; 38 Pac. 226.

15. Both the conductor and engineer of a train are the superiors of a brakeman on the same train, within the meaning of Comp. Stat., p. 817, § 697, providing that "the liability of the corporation to a servant or employee acting under orders of his superior shall be the same in case of injury sustained by default or wrongful act of his superiors or to an employee not appointed or controlled by him, as if such servant or employee were a passenger."—Criswell v. Montana Central, 17 Mont. 189; 42 Pac. 767.

16. The foreman of a small extra gang of six men, engaged in repairing defendant's track, is the fellow servant of the laborers in the gang, though they are under his orders, and he has power to employ and discharge them.—Goodwell v. Montana Central, 18 Mont. 293; 45 Pac. 210.

17. A section hand is a fellow servant of the section boss and of an engineer employed by the same company.—Hastings v. Montana Union, 18 Mont. 493; 46 Pac. 264.

18. The engineer and firemen are fellow servants.—Mulligan v. Montana Union, 19 Mont. 135; 47 Pac. 795.

19. Where in an action for injuries to a miner by the discharge of a blast, it appeared that B had charge of the operating department of the entire mine for defendant, and was authorized to hire and discharge men, and that he directed them where, when and how to work, and that his supervision of the men was supreme, except that defendant directed when new work was to be commenced, and B falsely stated to plaintiff before he went into the mine that a blast by which plaintiff was injured had been discharged, B was a vice-principal, and not plaintiff's fellow servant, for whose negligence defendant was liable.—Allen v. Bell, 32 Mont. 69; 79 Pac. 582.

E. RISKS ASSUMED BY SERVANT, 20-24.

20. In an action by a section hand for injuries due to defects in a handcar on which he was riding, causing it to jump from the track while crossing a bridge, it was shown that plaintiff knew of such defects, and informed his superiors, but continued to use the car on being told merely that request had been made for a new car, and on being directed to use the one at hand with great care until a new one came. *Held*, that plaintiff could not recover.—McAndrews v. Montana Union, 15 Mont. 290; 39 Pac. 85.

21. In an action by a section hand for injuries due to defects in a handcar on which he was riding, causing it to jump from the track while crossing a bridge, it was shown that plaintiff knew of such defects, and informed his superiors, but continued to use the car on being told merely that request had been made for a new car, and on being directed to use the one at hand with great care until a new one came. It was also shown that the car was obviously dangerous, and that plaintiff had seen it leave the track, when going at a much less rate of speed than it had acquired at the time of the accident. *Held*, that plaintiff could not recover.—Id.

22. The doctrine of assumption of risk has no application to a case where an unexperienced laundry employee is directed to feed a mangle, the work requiring experience, and the employee receiving no instruction, notice or warning of

defects.—Coleman v. Perry, 28 Mont. 1; 72 Pac. 42.

23. Where a servant assumes the risk, the question of his contributory negligence is immaterial.—McCabe v. Montana Central, 30 Mont. 323; 76 Pac. 701.

24. While the occupation of a freight brakeman is a perilous one, and those who engage in it must be held to have anticipated its dangers, and to have assumed the risks ordinarily incident thereto, yet they assume only the ordinary risks of the employment, and not extraordinary ones, unless they are aware of such at the time of their employment, or, on learning of their existence, they continue in the employment after the lapse of a reasonable time for the defects to be remedied or removed. —Id.

F. CONTRIBUTORY NEGLIGENCE OF SERVANT, 25-30.

25. Where a miner engaged in running a tunnel calls the attention of the employer to debris on the floor behind him, and the master promises to remove it, the miner is not guilty of contributory negligence in remaining at work, notwithstanding his danger in case of the roof falling was increased by the accumulation, for such time after the promise as was reasonable to allow for its fulfillment; danger of the roof's caving not being obvious, and the miner being free from apprehension by reason of the assurance of the employer, who had charge of looking after the roof, and was an experienced man in such business, that the roof was safe.—Kelly v. Mining Co., 16 Mont. 484; 41 Pac. 273.

26. In an action for the death of plaintiff's decedent,—the foreman of a switching crew in defendant's yards,—it appeared that, the switch engine had gotten out of order, decedent procured a common road engine, the use of which was more hazardous than the use of a switch engine. The danger of using a road engine, though, could have been greatly obviated by placing a flat car in front, and decedent had authority to do so without orders from anyone. Decedent, in attempting to uncouple a car from the engine, in order to make a flying switch, fell from the pilot of the engine, on which he was standing, and was run over by the cars following the engine. There was evidence that it was not necessary to make flying switches at the point where the switch was being made, due to the grade of the track, and that such switches had been positively prohibited at that point. *Held*, that a finding that decedent was guilty of contributory negligence would not be disturbed.—Thompson v. Montana Central, 17 Mont. 426; 43 Pac. 496.

27. Plaintiff, an experienced practical miner, was injured while he was constructing an inclined raise in defendant's mine. On the day before the accident he blasted over the center of the raise, but did not go back to see the effect of the blast, it not being his duty to do so. In passing a ledge of rock on the side of the raise, he sounded it, and, finding it solid, did not brace it. Next morning, on returning to work, he found the face of the rock, including the ledge, entirely hidden by "lagging," an invariable custom, which was known to him, being to "lag" under ground blasted or about to be blasted. He saw that there had been blasting or drilling on the center of the raise, and knew he was the first man in after the night shift, but he did not examine the ledge further than to give it a side glance, and to notice that there was some dirt on the "lagging" under it. Its face hung too low for him to see it without stooping, but he thought it was safe, as it had not been blasted by the night shift. In order to fix some "lagging" he got under the ledge, which, having been drilled by the night shift, and thus weakened, fell on him. *Held*, that being charged with notice by the "lagging" and the conditions surrounding him that the ledge had either been blasted or drilled, plaintiff was guilty of contributory negligence in getting under it without first examining it.—Cummings v. Reduction Co., 26 Mont. 434; 68 Pac. 852.

28. A railroad employee engaged in switching is entitled to rely on the presumption that the railroad has properly constructed its line and appliances.—McCabe v. Montana Central, 30 Mont. 323; 76 Pac. 701.

29. The fact that a railroad employee went in and out of the yards in which he was employed during a period of three months, and that immediately before the accident he threw switches, was not conclusive on the question of notice to him of the proximity of the switch stand to the track.—Id.

30. Where, in an action for injuries to a miner by the discharge of a blast, it appeared that a foreman had charge of the operating department of the mine for defendant, and was authorized to hire and discharge men and directed them in the work, and that his supervision of the men was supreme, except that defendant directed when new work was to be commenced, plaintiff was entitled to rely on the information of such foreman with reference to the explosion of the blast, and was not guilty of negligence in working in the mine on the assumption that it had been exploded.—Allen v. Bell, 32 Mont. 69; 79 Pac. 582.

G. ACTIONS, 31-63.

1. PLEADING, 31-34.
2. EVIDENCE, 35-42.
3. QUESTIONS FOR JURY, 43-56.
4. INSTRUCTIONS, 57-63.

1. Pleading, 31-34.

31. In an action for injuries to an employee, an allegation that defendant's foreman and agents were "negligent and careless" is not equivalent to alleging that they were incompetent.—Kelly v. Cable Co., 13 Mont. 411; 34 Pac. 611.

32. A complaint alleged that plaintiff was injured by the fall of rock from the roof of a mine; that defendant failed to furnish a reasonably safe place for plaintiff to work, negligently allowed the roof of the mine to remain in an unsafe condition, failed to properly brace it, and that it was liable to cave in unless properly supported. There was evidence that the roof of the mine was in a loose and dangerous condition, but the fall of slate was immediately caused by the attempt of a mining engineer to remove a small portion of the slate in fixing a plug for a site. *Held*, that it was error to limit plaintiff's right of recovery to a showing that the roof fell from its own weight, and not in connection with any other cause.—Freeman v. Coal Co., 25 Mont. 194; 64 Pac. 347.

33. If the defense of assumption of risk is maintained, questions of contributory negligence do not arise, because, if plaintiff assumed the risk of employment, he can not recover, though he exercised the highest degree of care.—Ball v. Gussenhoven, 29 Mont. 321; 74 Pac. 871.

34. The defenses of contributory negligence and assumption of risk are inconsistent with each other, do not rest upon the same principal, and the existence of one necessarily excludes the existence of the other, but both defenses may be pleaded and relied upon by defendant, subject to proper instructions.—Id.

2. Evidence, 35-42.

35. Plaintiff was injured by an explosion, while working with a pick in defendant's mine. Charges had been exploded shortly before, and the foreman and two workmen testified positively that after the explosion a careful count was made, and that all the charges had been exploded. Plaintiff stated immediately after the accident that his pick struck a piece of giant powder in the loose rock. If plaintiff had struck an unexploded charge, the explosion would have been fatal. The place showed no signs of an explosion after the accident. There was evidence that a piece of giant powder might have come there without negligence. Four miners, sworn as experts, testified that plaintiff must have struck an unexploded charge. *Held*, that there being no evidence of negligence on defendant's part, plaintiff could not recover.—Kelley v. Cable Co., 8 Mont. 440; 20 Pac. 669.

36. In an action against a railroad company for damages for injuries to the person, evidence that plaintiff, who was defendant's employee, was working under a certain car standing upon defendant's sidetrack, and was so situated that he could not see an engine approaching on that track from either direction, and that while so working was injured by the car being suddenly moved over him by a train backing against it, will not support the essential averments of the complaint "that the defendant carelessly and negligently and without notice or warning to plaintiff backed or ran an engine against said car so as to set the same in motion," and in such case the denial of a motion for a new trial, based upon the insufficiency of the evidence to support the verdict, is error.—Sweeney v. Railway Co., 11 Mont. 523; 29 Pac. 15.

37. Plaintiff was injured by a fall while employed as a carpenter by defendant, and in an action therefor he alleged that the fall resulted from the incompetency of H, a coservant, and that because of the careless and unskillful treatment of the wound by a surgeon employed by defendant it was necessary to amputate plaintiff's leg. The evidence failed to show any lack of skill by H, or the necessity for his exercise of any particular skill, or that defendant had knowledge of any incompetency of H of which plaintiff was ignorant. Defendant's evidence tended to show that H was not working with plaintiff at the time of his injury, and that plaintiff had stated that he alone was to blame; that the surgeon employed was duly qualified under the laws of the state to practice his profession; and it failed to show any injury to the leg as a result of lack of skill. *Held*, that a non-suit was properly directed.—Jorgensen v. Copper Co., 13 Mont. 288; 34 Pac. 37.

38. In an action for the death of an employee of defendant through the caving in of earth while digging a ditch, evidence as to the character of the soil, and defendant's means of knowledge thereof, was admissible to show that props and braces should have been furnished for the safety of the workmen.—Soyer v. Water Co., 15 Mont. 1; 37 Pac. 808.

39. Evidence that plaintiff was employed by the officers of defendant, that he was paid by defendant, and that the bulletins posted on the bulletin boards at stations on the road showed that defendant was operating the road, is sufficient to show that the road was operated by defendant, so as to render it liable for injuries to plaintiff.—Criswell v. Montana Central, 17 Mont. 189; 42 Pac. 767.

40. An employee was struck and injured by a cable attached at one end to a locomotive and at the other to a plow then being used to unload cars of dirt at a curve. The cable slipped over a small stake in a socket on the edge of a car on the outside of the curve, behind which it was placed by plaintiff's fellow servants to prevent the plow being pulled off the car on the inside of the curve. There was a groove in the socket holding the stake, in which the cable was usually placed when unloading dirt at a curve. There was no evidence that a block and tackle would have been safer than the groove, which means was reasonably safe. *Held*, that the evidence did not support a verdict that the employee was injured by the employer's neglect to provide and use a block and tackle to guide such cable.—Nolan v. Montana Central, 25 Mont. 107; 63 Pac. 926.

41. Where, in an action for injuries to a servant, the burden is on plaintiff to prove that defendant was negligent, and that the injury complained of was the direct or proximate result of the negligence alleged, the burden is on defendant to show that plaintiff was guilty of contributory negligence such as would prevent his recovery, or that plaintiff assumed the risk of the employment.—Nord v. Mining Co., 30 Mont. 48; 75 Pac. 681.

42. In an action for injuries to a servant, evidence held insufficient to show that A, by whose alleged negligence plaintiff was injured, was plaintiff's vice-principal, and not his fellow servant.—Gillies v. Mining Co., 32 Mont. 320; 80 Pac. 370.

3. Questions for jury, 43-56.

43. Plaintiff's testimony showed that he was a common laborer, engaged in taking away rocks and debris caused by blasting in defendant's quarry. On the day of the accident defendant, by its workmen, put a charge of three kegs of powder in a rock, and fired the fuse. Plaintiff was warned, and he, with the foreman under whom he was working and the rest of the crew, sought a place of safety. Plaintiff had no knowledge of the amount of the charge, or the length of the fuse, or the time required to explode the blast. He was working in a department other than that of blasting. After waiting a while, and the blast not exploding, the foreman said, "I guess the blast is dead. We might as well turn out and go to work." They went back to work, when the blast exploded, injuring plaintiff. *Held*, that the court erred in granting a nonsuit, there being sufficient testimony of defendant's negligence to go to the jury.—Berg v. Mining Co., 12 Mont. 212; 29 Pac. 545.

44. Where, for the purpose of using a road engine as a switch engine, a flat car is put in front of it, it is a sufficient showing of negligence to go to the jury, that the brake staff on the end of the car, used in connection with the brake beam by brakemen in mounting the car, is bent, so that it turns in the hands of a brakeman mounting the car, and causes him to lose his hold.—Prosser v. Montana Central, 17 Mont. 372; 43 Pac. 81.

45. The question of the contributory negligence of a brakeman who, after throwing a switch, attempts to mount the flat car in front of an approaching engine, used in connection with the car as a switch engine, by means of a brake beam and brake shaft, and who, by reason of the brake shaft being bent, loses his hold and falls under the trucks, is for the jury, it appearing that the car was put in front of the engine for the purpose of enabling the brakemen and switchmen to mount it.—Id.

46. The evidence in an action for personal injuries showed that plaintiff was employed at defendant's roundhouse as night helper, to do work required by his superior, the hostler in the yard. The hostler, desiring to move an engine to the roundhouse, directed plaintiff to turn the switch. Plaintiff had no torch (having been forbidden to use one), and it was so dark he could not tell, when he got off the en-

gine to turn the switch, whether he was between the rails or not. While plaintiff was stooping to find the switch lever, without looking to see if the engine was coming, the hostler, without any signal, started the engine, to avoid a collision with an approaching train, and plaintiff was run down and injured. It was customary for the helper to signal the hostler by hallooing when the switch was turned, and plaintiff knew that it was defendant's custom to run engines about the yard at night without signals or lights. *Held*, that it was for the jury to say whether defendant's hostler was negligent, and whether plaintiff was guilty of contributory negligence.—Wastl v. Montana Union, 24 Mont. 159; 61 Pac. 9.

47. Evidence in an action by an employee for injuries received from machinery held sufficient to warrant the submission of plaintiff's case to the jury.—Coleman v. Perry, 28 Mont. 1; 72 Pac. 42.

48. The question of whether the danger of operating a laundry mangle is so obvious that an unexperienced employee could not fail to notice and avoid it in exercising ordinary care, is for the jury.—Id.

49. In an action for a servant's injuries a motion for non-suit was properly overruled where the evidence for plaintiff clearly tended to sustain the allegations of the petition of negligence of defendant in not providing reasonably safe machinery upon which the plaintiff was directed to work by defendant's agents, and in not keeping it in such condition, and that the injury complained of resulted from the use thereof.—Ball v. Gussenhoven, 29 Mont. 321; 74 Pac. 871.

50. Where, in an action for injuries to a servant, the negligence alleged was defendant's failure to provide and maintain a reasonably safe place for plaintiff to work, and there was sufficient proof of such negligence to go to the jury, a variance relating merely to the details of the occurrence by which the injury was caused did not entitle defendant to non-suit.—Nord v. Mining Co., 30 Mont. 48; 75 Pac. 681.

51. Where, in an action for injuries to a servant by falling into an empty ore bin while he was engaged in uncoupling a car on a track running over several bins, plaintiff testified that he did not know that the bin was empty, defendant was entitled to non-suit on the ground that plaintiff's testimony showed that he knew that the bin into which he fell and another one were empty and dangerous, or was charged with such knowledge from the fact that he passed over them frequently to and from his work.—Id.

52. In an action for injuries to a servant, alleged to have resulted from the master's failure to provide a safe place for plaintiff to work, evidence reviewed, and *held* not to justify a non-suit on the ground that it conclusively showed that plaintiff assumed the risk.—Id.

53. In an action for injuries to a servant alleged to have resulted from the master's failure to provide a safe place for plaintiff to work, evidence reviewed, and *held* not sufficient to justify a non-suit on the ground that it conclusively showed plaintiff to have been guilty of contributory negligence.—Id.

54. Whether a freight brakeman engaged in switching, and who was injured while mounting an engine by coming in contact with a switch stand placed near the track, knew or should have known of the dangerous proximity of such switch stand to the track, so as to have assumed the risk of injury therefrom, *held*, under the evidence, a question for the jury.—McCabe v. Montana Central, 30 Mont. 323; 76 Pac. 701.

55. Where a railroad negligently maintained a switch stand so near its track as to imperil the safety of its employees, and an injured employee testified that he did not know of such dangerous proximity, and had never thrown the switch prior to the day of the accident, and up to that day had never done any switching in the portion of the yard in which such switch stand stood, it could not be said, as a matter of law, that he was guilty of contributory negligence in attempting to mount an engine near the switch.—Id.

56. In an action against a mine owner for injuries to a miner caused by an explosion, evidence *held* not to justify submission of the issue of defendant's negligence.—Shaw v. Mines Co., 31 Mont. 138; 77 Pac. 515.

4. Instructions, 57-63.

57. In an action for damages brought by an employee against his employer, an instruction to the effect that if the employer employed, as fellow servants with the employee, men of usual competency and prudence in their business, then defendant is not liable for their negligence, and the law does not require defendant or his foreman to personally supervise such mine, but that he has a right to rely upon their discharging their duties with proper care, is misleading, as suggesting that the employer might be justified in neglecting his duties of supervision.—Kelley v. Cable Co., 7 Mont. 70; 14 Pac. 633.

58. In an action against an employer for personal injuries, where defendant admits that it was the duty of the foreman to see that certain blasting charges had been removed, and to warn plaintiff if they had not, it is error to instruct the jury that it was the duty of plaintiff's co-employees to remove the charges, and that, if the foreman undertook to do this, he acted as a fellow servant of plaintiff; and the defendant therefore was not responsible for negligence in the matter.—Id.

59. Plaintiff was injured by an explosion in defendant's mine, while working with a pick where blasting had been done shortly before by fellow miners, and in an action therefor there was evidence, though conflicting, that it was not the duty of the foreman to be present when every blast was made, to see that all the charges exploded, but that it was the duty of plaintiff's fellow servants to do the blasting. The evidence also showed that some times a piece of powder was accidentally dropped into the debris by a workman, and that such a piece could be exploded by the blow of a pick. *Held*, proper to charge that the men engaged in blasting were fellow servants with plaintiff, and if plaintiff was injured by their negligence, and defendant had no reason to believe such men were incompetent or careless, then the jury should find for defendant, unless it was the duty of the foreman to superintend the blasting, and see that all blasts had exploded.—Kelly v. Cable Co., 13 Mont. 411; 34 Pac. 611.

60. The modification of an instruction requested by defendant in an action by a brakeman for injury received while attempting to mount a flat car in front of an engine by means of the brake beam and staff, while the engine was approaching him, that "an established usage or custom among men engaged in the same employment cannot justify or excuse an act negligent in itself," by adding, "unless known and acquiesced in by defendant," while not as full as it should be, is not error, where such act of plaintiff was not negligence per se, and there was evidence that the arrangement of the car in front of the engine was for the purpose of enabling brakemen and switchmen thus to mount.—Prosser v. Montana Central, 17 Mont. 372; 43 Pac. 81.

61. An instruction that defendant railroad company was not bound to furnish its engineer with the latest improvements on the engine, but

merely with appliances reasonably safe, and that, if the boiler was a good one of its kind, and in good repair, the engineer assumed the risk, is not erroneous, when the jury are also instructed that the master must use ordinary care to furnish safe machinery in good repair, and make all necessary inspection.—Mulligan v. Montana Union, 19 Mont. 135; 47 Pac. 795.

62. An instruction that a fireman could not recover if his injury was caused by any "latent defect" in the boiler is not cause for reversal, where the jury were instructed that, if the explosion was occasioned by any of the defects named in the complaint, which defendant knew of, or by ordinary care should have known of, plaintiff could recover.—Id.

63. An instruction in an action by an employee for personal injuries that, although the plaintiff was negligent, he is not precluded from a recovery unless his negligence was "the" proximate cause of the injury, is erroneous, since the jury can infer from the use of the definitive "the" that the plaintiff, though guilty of negligence which could be called "a" proximate cause of the injury, should not be barred unless his negligence was the sole cause of the injury.—Wastl v. Montana Union, 24 Mont. 159; 61 Pac. 9.

IV. LIABILTIES FOR INJURIES TO THIRD PERSONS, 64-65.

64. In an action for injuries, evidence that defendant's servant, driver of a horse car, permitted a boy five years old to ride on the front platform of the car, from which he was thrown and injured, was sufficient proof of defendant's negligence to go to the jury.—Jensen v. Barbour, 15 Mont. 582; 39 Pac. 906.

65. A person employed by the agent of the owner of a street railroad, at a stipulated sum per month, to run a car and furnish a driver, the car and the road being controlled and the work directed by the agent, is not an independent contractor, and the owner is liable for the negligence of such employee's servant.—Id.

MECHANICS' LIENS.

I. Nature, Grounds, and Subject-matter in General, 1-8.
II. Right to Lien, 9-19.
III. Proceedings to Perfect, 20-38.
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I. Fees and costs, 92-94.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL, 1-8.

1. The mechanics' lien law is remedial in its character and rests upon the broad foundation of natural equity and commercial necessity.—Mochon v. Sullivan, 1 Mont. 470.

2. It is not a common law right, but simply a creature of the statute, and differs in some respects from all other liens known to the law.—Id.

3. It is not a general, but a particular law, and is in its nature peculiar and of an equitable nature.—Id.

4. It is founded upon the doctrine that the party, who has enhanced the value of property by incorporating therein his labor or materials, shall have a preferred claim on said property for the value of said labor or materials.—Id.

5. In so far as the mechanics' lien law of Montana authorizes the rendering of a personal judgment as at law, it blends law and equity together in the same proceeding, and is in contravention of the Organic Act of the territory.—Id.

6. Act June 12, 1872, Code Stat., c. 40, providing for liens to mechanics and laborers, is a proper enactment under Org. Act, § 6, providing that the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States. (See 4 Otto 545.)—Alvord v. Hendrie, 2 Mont. 115.

7. The mechanics' lien law having omitted to expressly give the right to a lien on a public school house, a sub-contractor has no lien for work done or materials furnished in the construction of such building.—Whiteside v. School District, 20 Mont. 44; 49 Pac. 445.

8. Comp. Stat., p. 146, § 321, subd. 9, after providing that public property shall be exempted from execution, declares that "no article or species of property mentioned in this section shall be exempt from execution, on a judgment issued for its price." *Held*, not to render a school house subject to sale to enforce the lien of a sub-contractor for work done or materials furnished.—Id.

II. RIGHT TO LIEN, 9-19.

9. Under the statute of this territory a mechanic can claim a lien for services under an implied contract.—Black v. Appolonio, 1 Mont. 342.

10. A claim of a mechanic's lien against the buildings, machinery and mining ground of a corporation by one who alleges himself to have been employed as agent, manager and superintendent of said corporation, in the erection of buildings and the working of mines, does not come within the spirit or letter of the mechanics' lien law, Code Stat., p. 509, § 1.—Smallhouse v. Mining Co., 2 Mont. 443.

11. Rev. Stat., p. 581, §§ 821, 822, provide that sub-contractors shall give notice to the owner at the time of furnishing any material, or performing any labor, of the probable value thereof. *Held*, that the words "probable value" mean that the employer should be notified of some particular sum approximating the value, which requirement must be strictly complied with; and a complaint containing no allegation of such notice will not support a judgment.—Whiteside v. Lebcher, 7 Mont. 473; 17 Pac. 548.

12. Comp. Stat., p. 147, § 322, exempts homesteads from forced sale or execution, or any other final processes from a court. Sec. 323 provides that such exemption "shall not affect any laborer's lien." *Held*, that a homestead is not exempt from a lien of a plasterer who performs work and labor in plastering a building, and in setting a mantel therein.—Merrigan v. English, 9 Mont. 113; 22 Pac. 454.

13. A sub-contractor has a direct lien for his labor and materials upon the property benefitted thereby, and his rights are not limited by those of the contractor.—Id.

14. A lien for materials furnished is a "mechanic's lien," within the meaning of Comp.

Stat., p. 147, § 323, providing that such a lien shall not be affected by the provisions for homestead exemptions.—Bonner v. Minnier, 13 Mont. 269; 34 Pac. 30.

15. A building contractor's agreement to "furnish all materials and do all labor" is not satisfied unless the materials and labor are paid for.—Cockrill v. Davie, 14 Mont. 131; 35 Pac. 958.

16. As against a sub-contractor authorized to do the work, the owner must prove that he was paid. It is not enough that the work was within the contract, and the owner paid the contractor for it.—Gould v. Barnard, 14 Mont. 335; 36 Pac. 317.

17. Sub-contractors in the third degree are entitled to file a mechanic's lien under Comp. Stat., p. 1034, § 1391, providing that "all persons furnishing things or doing work shall be considered sub-contractors," and as such are entitled to a lien.—Duignan v. Montana Club, 16 Mont. 189; 40 Pac. 294.

18. The building contractor and the owner of a building can not, by contract between them, deprive all other persons who labor and furnish materials in the construction of the building of their right to claim a lien thereon, without their assent.—Miles v. Coutts, 20 Mont. 47; 49 Pac. 393.

19. Code Civ. Proc., § 2130, declares that one furnishing material for a building shall have a lien thereon for such material; and Civ. Code, § 1076, declares that a thing is affixed to land when it is permanently attached to the building, as by cement, plaster, nails, bolts, and screws. *Held*, that a cover for a stovepipe flue, opening into the chimney from the interior of a building, and removable when such flue was to be used, was not material entering into the construction of the building, nor a fixture; and hence such building was not subject to a lien therefor.—Missoula Merc. Co. v. O'Donnell, 24 Mont. 65; 60 Pac. 991.

III. PROCEEDINGS TO PERFECT. 20-38.

20. It is sufficient that the facts set forth in the complaint show that respondent performed the work under a contract. It is not necessary for a party to state the name of the contract he sues under. When he states facts amounting to a contract the law names it.—Nolan v. Lovelock, 1 Mont. 224.

21. A party will not lose his lien because he claims a lien for larger amount than he was entitled to, unless it clearly appeared that there was some fraud connected therewith.—Id.

22. The fact that the complaint and notice of lien claimed as due to plaintiffs a larger amount than that found by the court will not destroy their lien for the amount actually due, unless there be a fraudulent intent in filing the same, which must be proven and will not be presumed. (See 12 Wall. 259; 20 Wall. 689.) —Mason v. Germaine 1 Mont. 263.

23. Where fraud can not be inferred from the facts presented by the record, a court will not hold a lien vitiated by the mere fact that an excess was claimed as a lien over what the court found a party entitled to.—Black v. Appolonio, 1 Mont. 342.

24. The foundation of a suit to enforce a mechanic's lien arises only by virtue of an express or implied contract with the owner, and the proceedings to some extent resemble and are somewhat in the nature of proceedings in rem.—Mochon v. Sullivan, 1 Mont. 470.

25. A mechanic's lien, being an equitable right, or in the nature of an equitable right, must be enforced in conformity to the established rules and principles governing proceedings in chancery.—Id.

26. A notice of lien given under Rev. Stat., p. 581, § 821, which describes the property as the "said building, and the lot of ground upon which said building was erected and now stands, said lot known and described as lot 8 in block 32 of the town of Miles City, county and Territory aforesaid, as platted and filed for record in the office of recorder of deeds of said county," is sufficient.—Whiteside v. Lebcher, 7 Mont. 473; 17 Pac. 548.

27. Under Comp. Stat., p. 1029, § 1371, providing that a notice of lien shall give a correct description of the property sought to be charged, but that any error or mistake in the description shall not affect the validity of the lien, provided the property may be identified by the description, a notice of lien particularly describing lot 14 on a certain survey as the lot to be charged, is not sufficient to create a lien on lot 13 on the same survey.—Goodrich Lumber Co. v. Davis, 13 Mont. 76; 32 Pac. 282.

28. The mere fact that a notice of lien erroneously describing lot 13 as lot 14 refers to the lot as the lot on which there were "certain frame buildings and out houses," will not constitute a sufficient identification, as such description might apply to any lot on which such buildings stood, even though it appeared that there were no buildings on lot 14, while there were on lot 13.—Id.

29. A lien account is sufficiently itemized which describes the windows, sash and all classes materials sold, with great particularity, except as to price, which apears at the foot of the account, showing the whole amount due at the price agreed upon, since the account contains sufficient information to enable anyone to ascertain whether the price of the materials was reasonable, and whether the materials entered into the construction of the building.—Bardwell v. Anderson, 13 Mont. 87; 32 Pac. 285.

30. Where a mechanic's lien seeks to charge only the building, and not the land, the notice need not state the name of the owner of the land.—Montana L. & M. Co. v. Copper Co., 15 Mont. 20; 37 Pac. 897.

31. Comp. Stat., p. 1029, § 1371, provides that a corporation claiming a lien for material furnished for a building shall file an account for the amount, verified by affidavit. *Held*, that an affidavit to an account filed by a corporation, signed "M Co., by M, Asst. Mgr.," is sufficient, when its terms show that it is the individual expression and affirmation of M from his own personal knowledge.—Id.

32. In an action against a contractor and the owner of the property to foreclose a mechanic's lien for material furnished the contractor under an agreement, the jury specially found that the contractor was to notify plaintiff into which particular contract he put the material sold at a particular time; that the contractor had the right to furnish the material himself, or buy it from others than plaintiff; that each day's order made by the contractor on plaintiff was due when the material was delivered, and was not a separate and independent contract from orders made upon every other day; that plaintiff furnished the material without a specific agreement as to the amount to be furnished, and was to furnish it whenever required; and that there was a running account under which the orders were filled. *Held*, that the materials were delivered under one contract, and the delivery dated from the day of the delivery of the last item.—Helena S. H. & S. Co. v. Wells, 16 Mont. 65; 40 Pac. 78.

33. Under Comp. Stat., p. 1030, § 1373, providing that, on the filing of a mechanic's lien the recorder shall make an abstract of the lien account, showing the name of the person against whose property the lien is filed, etc., an account of lien stating that the amount due is

claimed "from L (whose Christian name is unknown)," and that the work was done "at the special instance and request of L (whose Christian name is unknown), the owner of said building and ground." etc., are sufficient to suport a mechanic's lien on property belonging to L Bros.—Richards v. Lewishon, 19 Mont. 128; 47 Pac. 645.

34. A recorded lien claim for materials furnished in the construction of a building, failing to state that the person to whom such materials were furnished was the owner or interested therein, was valid, under Code Civ. Proc., §§ 2131, 2132.—Missoula Merc. Co. v. O'Donnell, 24 Mont. 65; 60 Pac. 991.

35. Code Civ. Proc., § 2132, requires the county clerk's abstract of a claim for a material man's lien to contain the name of the person against whose property the lien is filed; and §§ 2133-2135 authorize the interest of the person constructing the building to be charged with the lien, whether such interest be a fee or less, or only in the building. Sec. 2140 defines "owner" as any person, etc., not a tenant or lessee, for whose use, benefit or enjoyment any building is constructed or improved. *Held*, that the name of the owner required to be mentioned in the claim is the name of the owner of the interest to be charged, and hence mention of the record owner is not sufficient to charge the interest of one holding possession under a contract of purchase, for whose use the building was erected.—Id.

36. Where, in proceedings to foreclose a mechanic's lien, the record disclosed that the building sought to be charged was monumental in character, easily distinguishable, and known as the paper mill of a particular corporation, and that no other mill or building of like character or description existed in the town, a notice of lien describing the property as "that certain two-story brick mill building * * * with the lot or lots on which the same is situated, comprising portions of the following," including a general description of certain blocks in the townsite of such town and certain real estate outside the same, was sufficient.—Western Iron Works v. Paper Co., 30 Mont. 550; 77 Pac. 413.

37. Code Civ. Proc., § 2130, provides for a mechanic's lien on a "building or improvement" in the construction of which the labor or materials claimed for were used; § 2133 extends the lien to the "land" on which the structure is erected; and § 2131 provides that a person desiring to perfect a mechanic's lien must file a notice containing a correct description of the property to be charged. *Held*, that the "property" to be identified under § 2131 is a building or improvement on which the lien is given, and hence a specific description of the "land" is not required.—Id.

38. Where a notice of a mechanic's lien, after describing the building on which the lien was claimed, added a description of land, in addition to that covered by the building, largely in excess of the statutory amount on which a lien might be foreclosed, such defect was not fatal to the lien: the amount to which the claimant was entitled being subject to adjudication in the proceedings for the enforcement of the lien.—Id.

IV. OPERATION AND EFFECT, 39-49.

39. When a mechanic's lien once attaches it relates back to and takes effect from the commencement of the labor or appropriation.—Mochon v. Sullivan, 1 Mont. 470.

40. Where the work for which a lien was filed was done by a sub-contractor subsequent to the filing of a mortgage, such lien takes precedence of the mortgage, and dates from the commencement of the work by the original contractor.—Merrigan v. English, 9 Mont. 113; 22 Pac. 454.

41. A finding by the trial court that a mortgage which erroneously described the premises intended to be covered thereby took precedence of a mechanic's lien subsequently arising will not be disturbed when, so far as appears, the error in description must have been palpable to anyone furnishing labor and materials on the property, and there is nothing to show that the finding was not based on actual knowledge by the lienors as to the property intended to be covered by the mortgage.—Opera House Co. v. Maguire, 14 Mont. 558; 37 Pac. 607.

42. A provision in a lease of mining land that improvements placed thereon by the lessee shall become the property of the lesosr, and remain as part of the land, is subject to Comp. Stat., p. 1031, § 1375, which provides that where a person has a lien on a building for material furnished, and the interest of the owner of the building in the land is a leasehold, the building may be sold to satisfy the lien, and may be removed by the purchaser.—Montana L. & M. Co. v. Copper Co., 15 Mont. 20; 37 Pac. 897.

43. A mechanic's lien acquired on a building for material furnished to a lessee of land on which the same is erected is not restricted to the material furnished, but covers the entire interest of the lesseé in the building.—Id.

44. Under Comp. Stat., p. 1030, § 1374, providing that liens for work done or material furnished as specified in said chapter "shall be prior to and have precedence over any mortgage * * * made subsequent to the commencement of work on any contract for the erection of such building," etc., a lien for work done in plastering a building is superior to a previous mortgage given after the commencement of such building.—Murray v. Swanson, 18 Mont. 533; 46 Pac. 441.

45. Under Comp. Stat., p. 1030, § 1374, declaring that liens shall extend to the land on which the improvement is situated, and shall be prior to any mortgage or other lien made subsequent to the commencement of the work; and § 1376, providing that such liens shall attach to the improvement in preference to any prior lien or mortgage on the land, that the person enforcing the lien may have such improvement sold under execution, and that the purchaser may remove the same, etc.—the mechanic has a lien on the improvements paramount as to all other liens, whether created before or after the commencement of the work, but his lien on the land itself is superior only to liens accruing after the work was begun.—Johnson v. Puritan M. Co., 19 Mont. 30; 47 Pac. 337.

46. If the improvement is incapable of severance, the lien attaches to the land itself, and is subsequent to a pre-existing mortgage.—Id.

47. Where, in an action to enforce a mechanic's lien, one of the defendants claims under a judgment recovered by him in a prior suit against the debtor, against whom execution was levied, plaintiff can not object to the admission of the judgment roll, execution, etc., on the ground that said defendant was not the owner of the judgment at the time the motion and affidavit for execution were filed.—Id.

48. Plaintiff, employed by lessees of adjoining buildings, cut a doorway between them, and fitted a bar to the floor and walls, the bar being the lessor's property. He also furnished materials, which he used in papering and painting parts of the buildings. *Held*, that after the lessees had forfeited their lease, plaintiff could not enforce a mechanic's lien, as Code Civ. Proc., §§ 2133, 2134, provide that if the person who caused the building to be constructed or repaired owned less than the fee in the land,

only his interest therein is subject to a mechanic's lien.—Stenberg v. Liennemann, 20 Mont. 457; 52 Pac. 84.

49. Where a mortgage was executed subsequent to the furnishing of materials and labor, for which a lien was claimed on the mortgaged property, the mortgagee, by purchase of the property on foreclosure, did not become a bona fide purchaser, but was substituted only to the rights of the mortgagor, and took the property subject to the mechanic's lien, under Code Civ. Proc., § 2133.—Western Iron Works v. Paper Co., 30 Mont. 550; 77 Pac. 413.

V. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION, 50-53.

50. Where one performs labor for part of which he is entitled to a mechanic's lien, and for part of which he is not entitled to such lien, he may, on payments being made without specifying on which account they are to be credited, appropriate them to either account.—Christnot v. Montana, etc. Co., 1 Mont. 44.

51. The lien of a mechanic for labor that has been performed follows the assignment of the account for labor. (See 12 Wall. 259; 20 Wall. 689.)—Mason v. Germaine, 1 Mont. 263.

52. In an action to recover the amount defendant had agreed to pay plaintiff for an account alleged to be secured by mechanic's lien, testimony as to the date of the items of the account was admissible to show that plaintiff was entitled to a lien at the date of its assignment, as bearing on the authority of defendant's agent to bind it by the purchase of the account.—Mahoney v. Hardware Co., 19 Mont. 377; 48 Pac. 545.

53. A material man, as surety on the bond of a contractor, expressly contracted not to suffer liens to be placed against the owner's premises for work and material performed or furnished by the contractor, and that he would save the owner free and harmless against all loss, liens, etc. *Held*, that he was estopped to enforce a lien of his own for materials furnished the contractor.—Aikens v. Frank, 21 Mont. 192; 53 Pac. 538.

VI. ENFORCEMENT, 54-94.

A. Set-offs and Counterclaims, 54-55.
B. Parties, 56-59.
C. Pleading and Evidence, 60-71.
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E. Judgment, 78-81.
F. Sale, 82-86.
G. Deficiency and Personal Liability, 87.
H. Review, 88-91.
I. Fees and Costs, 92-94.

A. SET-OFFS AND COUNTERCLAIMS, 54-55.

54. Under Code Civ. Proc., § 691, orders on the property owner to laborers, given by the contractor for work done in the removal of buildings, are properly pleaded as counterclaims in an action by the contractor or his assigns to foreclose a lien for the contract price of such removal.—Boucher v. Powers, 29 Mont. 342; 74 Pac. 942.

55. Where a property owner contracts for the removal of buildings from his property, and on completion of the work the contractor issues orders on the property owner to the laborers assisting in the work, which the property owner refuses to pay until liens therefor are foreclosed, he is not entitled to set off the costs of foreclosure in an action to foreclose a lien for the contract price.—Id.

B. PARTIES, 56-59.

56. Since the existence of a mechanic's lien for materials depends on the establishment of a debt for which the building is security, and such debt can only be shown by a judicial proceeding, to which the debtor is a party, a judgment establishing a lien against a building in an action to which neither the person contracting the debt nor the owner of the building at the time such debt was contracted was a party, is invalid.—Missoula Merc. Co. v. O'Donnell, 24 Mont. 65; 60 Pac. 991.

57. A material man's lien can not be enforced until the claim secured is adjudicated, and hence parties to be charged with the debt are necessary parties to a proceeding to enforce the lien, and, in the absence of service on them, a judgment can not be rendered authorizing a sale of the property.—Id.

58. Under Code Civ. Proc., §§ 2131, 2132, the filing of notice of a lien upon the property of the Yellowstone Park Railway Company and the Yellowstone Park Railroad Company will not warrant intervention in a mechanic's lien foreclosure against the Gallatin Railroad Company, though the complaint in intervention alleges, on information and belief, that the corporations are substantially the same.—Cook v. Railroad Co., 28 Mont. 340; 72 Pac. 678.

59. A money demand against a defendant in a mechanic's lien foreclosure will not warrant intervention therein, though plaintiffs consent thereto.—Id.

C. PLEADING AND EVIDENCE, 60-71.

60. In a suit by a sub-contractor against the owner, a denial of defendant's indebtedness to plaintiff is a conclusion of law, and raises no issue of fact.—Merrigan v. English, 9 Mont. 113; 22 Pac. 454.

61. In an action to foreclose a mechanic's lien for materials furnished in the erection of depot buildings for a railroad company the complaint alleged that the land sought to be subjected to the lien was "appurtenant and necessary to the convenient and ordinary use of the depot buildings and appurtenances." Defendant answered alleging that it had long since had its road in operation; that the land in question became part of its property long before the erection of the depot buildings, and that it was incident to its franchise, and indispensable to the operation of its road. *Held*, that this allegation was not admitted by the complaint, and that it was error to strike out a replication denying it.—Helena Lumber Co. v. Montana Central, 10 Mont. 81; 24 Pac. 702.

62. A complaint alleging that defendant A, by contract with defendants C and L, furnished the materials and erected a building on the land of C and L, herein described, and bought of plaintiff's assignor windows, frames, stairs, doors, inside finishing material, timber, etc., of the agreed value of $2,695, which went into the construction of said building, is sufficient.—Bardwell v. Anderson, 13 Mont. 87; 32 Pac. 285.

63. The objection to the introduction of a lien account "because there is nothing therein which operates as a notice to defendants of the materials, and value thereof, which were furnished for said building," raises a question of law as to the sufficiency of the lien notice, and should have been raised by demurrer.—Id.

64. A lien account showing that part of the materials furnished were of the agreed value of $2,585, and part of the reasonable value of $110, is not inconsistent with a complaint alleging that the goods were of the reasonable value of $2,985.—Id.

65. No cause of action is stated by a complaint to foreclose a mechanic's lien on mining

claims, a tract of land, several town lots in different blocks, and other property, where it neither alleges that the property sought to be charged is contiguous nor that the materials for which a lien is claimed were furnished under one contract, but, on the contrary, shows that such materials were furnished during a period of 15 months, and were principally timbers for developing mines, which are ordinarily contracted for in small quantities, though it does not allege that all the property was operated as one mining plant, and the materials furnished on the credit of the whole property.—Big Blackfoot Co. v. Blue Bird Co., 19 Mont. 454; 48 Pac. 778.

66. Such a complaint against defendants not parties to the contract for material is bad for ambiguity and indefiniteness, where it does not designate the particular property on which such material was used, or offer any excuse for not doing so.—Id.

67. The husband of the owner of a building contracted with plaintiff to furnish the hardware for the building, and plaintiff's books showed the items charged to the husband. The account was kept separate from other accounts of the husband, and, on being subsequently examined by him, he declared it correct and promised to pay it; but there was no evidence that the hardware charged was ever furnished for, or entered into, the construction of the building. *Held*, that such proof was insufficient to show that the materials were used for, or enhanced the value of, the building, so as to entitle plaintiff to a mechanic's lien therefor.—Missoula Merc. Co. v. O'Donnell, 24 Mont. 65; 60 Pac. 991.

68. A complaint in an action to enforce a mechanic's lien must state that the necessary architect's certificate was given or demanded, and, if refused, the reasons why it should have been given, or, if waived, a statement of that fact.—McGlauflin v. Wormser, 28 Mont. 177; 72 Pac. 428.

69. In an action to enforce a mechanic's lien, allegations showing compliance with Code Civ. Proc., § 2131, are jurisdictional, and when denied must be proven as alleged, in order to authorize decree of foreclosure.—Id.

70. In a mechanic's lien foreclosure, a witness' testimony that a certain person made calculations as to the amount of work done, and dictated them to him, is insufficient to warrant the introduction of such estimates.—Cook v. Railroad Co., 28 Mont. 340; 72 Pac. 678.

71. In a proceeding to foreclose a mechanic's lien, evidence reviewed, and *held* to sustain a finding that the materials and labor were furnished under a single contract on an open continuous account.—Western Iron Works v. Paper Co., 30 Mont. 550; 77 Pac. 413.

D. TRIAL, 72-77.

72. A suit to enforce a mechanic's lien is an equitable action, and is properly tried to the judge sitting as a chancellor, and without the intervention of a jury; a jury in such a case is only proper when asked for by the court, in aid of its conscience upon any particular question or issue in the case.—Simonton v. Kelly, 1 Mont. 483.

73. Evidence of the lien account of a subcontractor is not objectionable because, at the time it is offered, there is no evidence of contractual relations existing between the furnisher of materials and the owner of the land, as required by statute, since such evidence was offered to prove an allegation in the complaint; and, if no such relation was shown after all the evidence was in, the objection could be made in summing up the case.—Bardwell v. Anderson, 13 Mont. 87; 32 Pac. 285.

74. In an action to foreclose a lien for building material it is not necessary to prove the filing of the lien before introducing proof that the materials were furnished and entered into the construction of the building.—Id.

75. An objection to the introduction of a lien account, on the ground that the paper purporting to be a lien is not a charge on the property described in the complaint and lien, should be disregarded, since it specifies no ground of objection to the account.—Id.

76. The question whether material was furnished under separate contracts, and whether it was furnished under a running account, are questions for the jury.—Helena S. H. & S. Co. v. Wells, 16 Mont. 65; 40 Pac. 78.

77. In proceedings to foreclose a mechanic's lien, the question whether the materials were furnished and the labor was performed under one general contract, or under separate contracts, is one of fact.—Western Iron Works v. Paper Co., 30 Mont. 550; 77 Pac. 413.

E. JUDGMENT, 78-81.

78. The judgment in a lien case is not void through indefiniteness of description of the property subject to such lien, and can not be attacked therefor collaterally.—Vantilburgh v. Black, 2 Mont. 371.

79. Where, in an action on an account against a contractor of a building, and to foreclose a lien against the owner, the complaint states a cause of action on the account, a judgment that plaintiff take nothing because no cause of action was stated against the owner will be so modified as to include in its operation the defendant owner only.—Goodrich Lumber Co. v. Davie, 13 Mont. 76; 32 Pac. 282.

80. Under Comp. Stat., p. 1032, § 1383, relating to mechanics' liens, a personal judgment can not be rendered against a defendant who has been served by publication only, and has not appeared.—Richards v. Lewisohn, 19 Mont. 128; 47 Pac. 645.

81. A sub-contractor, invoking, in the same action, judgment against the contractors and foreclosure of his mechanic's lien, may have judgment of foreclosure, though unable to get personal service on the contractors, and therefore unable to get a valid personal judgment against them.—O'Rourke v. Butte Lodge, 19 Mont. 541; 48 Pac. 1106.

F. SALE, 82-86.

82. A sale will not be disturbed on the ground of representation made by a mortgagee at the former lien sale, the same being true in fact.—Vantilburgh v. Black, 2 Mont. 371.

83. Under Comp. Stat., p. 1031, § 1376, providing that liens for labor or materials shall attach to the buildings or improvements for which the materials were furnished or work done, in preference to any prior lien or encumbrance, and that any person enforcing such lien may have such building or improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter, a purchaser on foreclosure of such lien may, as against the holder of a prior mortgage on the land, remain in possession until the mortgage is foreclosed, and does not by so doing lose his right to remove the building or improvement from the land.—Opera House Co. v. Maguire, 14 Mont. 558; 37 Pac. 607.

84. Under Comp. Stat., p. 1031, § 1376, providing that any person enforcing a mechanic's lien may have the building or improvement sold, and the purchaser may remove the same, the fact that the decree foreclosing the lien made no provision for the removal of the building does not affect the right of removal.—Id.

85. A building purchased on foreclosure of a mechanic's lien thereon can not be removed before the expiration of the time of redemption. —Id.

86. The fact that a building is of brick and slate, the removal of which would cause great loss, does not affect the statutory right of one claiming under a lien thereon to remove it. —Id.

G. DEFICIENCY AND PERSONAL LIABILITY, 87.

87. Where the evidence showed that defendant in an action to foreclose a mechanic's lien was not a proper party to the contract sued on, a charge to the effect that plaintiff was entitled to a personal judgment against him for the work done was error.—Gilliam v. Black, 16 Mont. 217; 40 Pac. 303.

H. REVIEW, 88-91.

88. On appeal from a territorial court to the United States supreme court in an action to enforce a mechanic's lien, the bond, to act as supercedeas, should be executed to the appellees, conditioned to prosecute the appeal to effect or be answerable in damages, and should provide for an amount to secure the liens recovered, the costs of suit, just damages for delay and detention of the property, and costs and interest on appeal.—Mason v. Germaine, 1 Mont. 279.

89. Objections that the complaint in a lien suit did not recite that the material was used in the building will not be heard first on appeal.—Duignan v. Montana Club, 16 Mont. 189; 40 Pac. 294.

90. In an action to enforce a mechanic's lien, the question of non-joinder of a party defendant can not be raised on appeal, where no demurrer was interposed, and the parties went to trial without objection.—Id.

91. Where, in a suit to enforce a mechanic's lien, no proof is made showing the existence of any lien, questions raised on appeal as to the extent or validity of the lien are not open to consideration.—McGlauflin v. Wormser, 28 Mont. 177; 72 Pac. 428.

I. FEES AND COSTS, 92-94.

92. Laws 1889, p. 172, adding to Comp. Stat., p. 1035, § 1394, a provision that whenever, in any action, "brought for the purpose of foreclosing a lien or liens under the provisions of this act, plaintiff shall prevail," he shall recover as costs "a reasonable attorney fee," is not restrictive in its application to the enforcement of the liens of ranchmen, herders, and others enumerated in § 1394, but is applicable to the enforcement of all liens under the chapter in which that section is found, including mechanics' liens.—Wortman v. Kleinschmidt, 12 Mont. 316; 30 Pac. 280.

93. Under laws 1889, p. 172, providing that, in an action to enforce a mechanic's lien, plaintiff shall, if successful, recover a reasonable attorney's fee, such fee is taxable as costs in the trial court only, and not in the supreme court. —Murray v. Swanson, 18 Mont. 533; 46 Pac. 441.

94. Though counsel for respondent on dismissal of an appeal of a suite to foreclose a mechanic's lien is entitled to a reasonable fee for his services in the appellate court by Code Civ. Proc., § 1863, such fee must be fixed and allowed by the district court on the return of the remittitur.—Hill v. Cassidy, 24 Mont. 108; 60 Pac. 811.

MINES AND MINERALS.

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I. PUBLIC MINERAL LANDS, 1-256.

A. RESERVATION AND DISPOSAL IN GENERAL, 1-3.
B. LOCATION AND ACQUISITION OF CLAIMS, 4-219.
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A. RESERVATION AND DISPOSAL IN GENERAL, 1-3.

1. The clause in § 1 of the general mining act of 1866, "subject to such regulations as may be prescribed by law," is a reservation of the right by congress to regulate by legal enactments, the manner and conditions under which claims must be worked by miners. The clause in the same section, "subject also, to the local customs or rules of miners in the several mining districts," relates to the rules, customs and regulations of miners regarding the location, user, and forfeiture of mining claims.—Robertson v. Smith, 1 Mont. 410.

2. On an indictment under Comp. Stat., p. 1055, § 1482, making it a misdemeanor to obliterate or destroy any notice placed on a mining claim, the locator testified that he started to run a crosscut, and found "quartz and vein matter," and thereupon put up a location notice which defendant was charged with having destroyed. *Held*, that it not being shown that the "quartz" or "vein matter" contained precious metal, no valid mining claim was shown to exist, and that a verdict of not guilty should have been directed.—Territory v. Mackey, 8 Mont. 168; 19 Pac. 395.

3. Under the right conferred by U. S. R. S., § 2319, and 27 Stat. 348, to explore and occupy for profit public lands containing mineral deposits, including stone, one who takes granite from the public domain is not a trespasser, and by thus taking it and bestowing his labor upon it he becomes the exclusive owner thereof, though he does not acquire the exclusive right to the land from which it was taken.—Sullivan v. Schultz, 22 Mont. 541; 57 Pac. 279.

B. LOCATION AND ACQUISITION OF CLAIMS, 4-219.

1. LANDS AND MINERALS ACQUIRABLE, 4-5.
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3. REQUISITES AND VALIDITY OF LOCATION PROCEEDINGS, 10-127.
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1. Lands and minerals acquirable, 4-5.

4. Where an entire section of public land had been patented by the government to the Northern Pacific Railroad Company, which had conveyed the same to defendant, an entry thereon by complainants for the purpose of making a mining location without defendant's consent, was a trespass on defendant's rights, and was therefore ineffectual for the purpose of initiating a valid mining claim.—Traphagen v. Kirk, 30 Mont. 562; 77 Pac. 58.

5. In order to make a valid mining location under U. S. R. S., § 2319, providing that all mineral deposits in mineral lands belonging to the United States, and the lands containing the same, shall be open to entry, etc., surface ground, including the vein or lode, must be appropriated, and such surface must be the property of the United States.—Id.

2. Persons entitled, 6-9.

6. Act Cong., Jul. 26, 1866, gives to citizens and those who have declared their intention to become such the right to enter upon, explore and possess the mineral lands of the United States. *Held*, that the act does not authorize the forfeiture of the title of aliens to said lands, and that aliens can hold and enjoy the possessory title to said lands within the territory.—Territory v. Lee, 2 Mont. 124.

7. Act June 12, 1872, providing for the "forfeiture to the territory of placer mines held by aliens," interferes with the primary disposal of the public domain within the territory, and is inconsistent with § 6.—Id.

8. In the absence of evidence to the contrary, the locators of a mining claim will be presumed to be citizens of the United States, or to have declared their intention to become such. (See 130 U. S. 290.)—Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. 153.

9. Only citizens, and those who have declared their intention to become such, having the right to locate and purchase mining lands from the United States, the naturalization of an alien during trial will not retroact so as to validate his claim. (Reversed in same case, 152 U. S. 505.)—Wulf v. Manuel, 9 Mont. 276; 23 Pac. 723.

3. Requisites and validity of location proceedings, 10-127.

(a) IN GENERAL, 10.
(b) MINERS' RULES AND CUSTOMS, 11-23.
(c) PERSONAL ATTENTION OF LOCATOR, 24.
(d) CHARACTER OF GROUND, DISCOVERY, AND PRELIMINARY INVESTIGATION, 25-38.
(e) EXTENT, MARKINGS, AND RECORD OF CLAIM, 39-82.
(f) DEVELOPMENT AND ASSESSMENT WORK, 83-95.
(g) ABANDONMENT, FORFEITURE, AND RELOCATION, 96-103.
(h) RIGHTS ACQUIRED, 104-127.

(a) In general, 10.

10. Location consists of a number of distinct acts; all must be performed before the legal location exists.—Gonu v. Russell, 3 Mont. 358.

(b) Miners' rules and customs, 11-23.

11. The mining customs of any particular mining district have the force and effect of laws,

or, in other words, are laws. The local courts in each of the states and territories, where placer mining is prosecuted to any extent, have so recognized them, and finally Congress, by an act in July, 1866, recognized these rules and customs as law.—King v. Edwards, 1 Mont. 235.

12. The customs which point out the manner of locating mining ground are conditions precedent, and a substantial compliance with them is necessary.—Id.

13. The rules and customs of the miners of one district can not be introduced to vary those of another district.—Id.

14. It is presumed that the written laws of a mining district are in force, and any custom that conflicts with them must be clearly proved. —Id.

15. The extent of a mining district may be changed by those who created it, if vested rights are not thereby interfered with.—Id.

16. All mining rules and customs must be reasonable. Those which compel persons to perform labor in the district to represent their mining ground, which can not be profitably worked without running a bedrock flume to it from another district, are unreasonable.—Id.

17. The mining law of a district, which allows those who furnish money and provisions to the discoverers of placer gold mines to hold claims without personally pre-empting them, is not against public policy, and should be upheld.—Boucher v. Mulverhill, 1 Mont. 306.

18. The right to occupy, explore and extract the precious metals in the mineral lands of the United States becomes vested in the party who locates these lands according to the local rules and customs of the mining district in which they are situated.—Robertson v. Smith, 1 Mont. 410.

19. Mining act of 1866, § 9, grants to the proper persons an easement upon the mineral land of the public domain, which they may appropriate according to the local rules and customs of miners in the mining district in which the same may be situated, and thereby legalizes the mining upon the public lands of the United States for the precious metals.—Id.

20. It will be presumed, in the absence of evidence, that the parties in the possession of mining claims hold them according to the local rules and customs of the miners in the district. —Id.

21. Code. Civ. Proc., § 504, provides that "in actions respecting mining claims, proof shall be admitted of customs, usages and regulations established and in force in the mining district embracing such claims, and such customs, usages and regulations, when not in conflict with the laws of this territory, shall govern the decision of the action." *Held*, that a book containing the rules and regulations of the miners of the district in which the mineral land in controversy in the action was located was competent evidence.—Orr v. Haskell, 2 Mont. 225.

22. It is a legal presumption that the miners' rules and customs of a district are in force. (See 9 Otto 261.)—Campbell v. Rankin, 2 Mont. 363.

23. Where a location of a placer claim was made in 1869 in compliance with local rules and customs, and it did not appear that such rules and customs were in conflict with the act of Congress of Jul. 26, 1866, the locator and his grantees acquire an inchoate title and right to the exclusive possession of such claim, and their title is good as against persons who attempt to locate such claim under the law of 1872.—Gropper v. King, 4 Mont. 367; 1 Pac. 755.

(c) Personal attention of locator, 24.

24. An agreement, made between parties, by which some of them prospect for gold and others furnish money and provisions, for which they are to receive an interest in the mining grounds that may be discovered, constituted a prospecting partnership; and those who furnish the money and provisions are entitled to pre-empt and hold mining claims, under the laws of a district which provide that claims shall be allowed the discoverers for their prospecting partners.—Boucher v. Mulverhill, 1 Mont. 306.

(d) Character of ground, discovery, and preliminary investigation, 25-38.

25. A discovery after location of a mining claim which is void for want of previous discovery, can not relate back and make such location valid.—Upton v. Larkin, 5 Mont. 600; 6 Pac. 66.

26. A discovery can not be made by virtue of a shaft sunk on the patented claim of another person.—Id.

27. An instruction on the question of discovery as follows: "It is not necessary that the work by which the vein or lead was discovered and made visible should be done by the locator; it is sufficient if, at the time of location, the vein or lead was exposed to view and its existence known to the locator; for these facts would be equivalent to a discovery," sufficiently states the law when another instruction fully recites the requirements of a valid location of a mining claim.—Wenner v. McNulty, 7 Mont. 30; 14 Pac. 643.

28. Evidence of the value of a vein, disclosed after location, is immaterial to the question of locator's title, as no discovery after location would make that location valid. (See 144 U. S. 19.)—Upton v. Larkin, 7 Mont. 449; 17 Pac. 728.

29. An instruction that, "to make a valid location of a lode mining claim, there must be a discovery, within the limits of a claim, of a vein * * * containing gold, silver, or other valuable mineral deposits," is proper, in connection with other instructions defining and limiting what is meant by a "discovery."—Id.

30. A discovery will sustain a valid location, although a portion of the discovery shaft is upon an adjoining claim.—Id.

31. U. S. R. S., § 2320, provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim." Comp. Stat., Mont., p. 1054, § 1479, provides that, in order to entitle any person to record any lead, lode or ledge, there shall first be discovered thereon a vein or crevice of quartz or ore with at least one well defined wall. *Held*, that these sections did not require the discovery shaft to be located at the shaft which contains the vein upon the discovery of which the locator bases his claim.—O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. 302.

32. Under U. S. R. S., § 2329, providing that "claims usually called 'placers,' including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent under like circumstances and conditions," as vein or lode claims, a stone quarry may be located and patented as a placer claim. —Freezer v. Sweeney, 8 Mont. 508; 21 Pac. 20.

33. U. S. R. S., § 2319, declares that all "valuable" mineral deposits in lands belonging to the United States are free and open to exploration and purchase, and the lands in which they are found to occupation and purchase. Sec. 2322 provides that the locators of all mining locations on any mineral vein, lode or ledge shall have the exclusive right of possession

and enjoyment thereof. Comp. Stat., p. 1054, § 1477, provides that, in order to entitle any person to record any lead, lode or ledge there shall first be discovered thereon a vein or crevice of quartz or ore with at least one well-defined wall. *Held*, that a paying lode or vein need not be discovered to entitle a locator to a valid location, but it is sufficient if the lode contain such indications of minerals that he is willing to spend his time and money in the expectation of finding ore sufficiently valuable to work.—Shreve v. Mining Co., 11 Mont. 309; 28 Pac. 315.

34. Under U. S. R. S., § 2320, providing that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim, it is the finding of mineral in rock in place that constitutes the discovery, and it is not necessary that the vein or lode should contain mineral of such nature that a practical miner, if he encountered it, would feel justified in following it up, with the reasonable expectation of finding paying mineral.—McShane v. Kenkle, 18 Mont. 208; 44 Pac. 979.

35. Nor is it required, under the statute, that the paying mineral necessary to justify the location of the claim should be found at the time and place of the discovery, but it is sufficient if the development of the vein showed that paying mineral exists within the limits of the location.—Id.

36. U. S. R. S., § 2320, provides that no location shall be made until the discovery of the vein or lode within the limits of the claim located. *Held*, that one who had entered on a vacant 20-acre tract, and had begun prospecting shafts, but had made no discovery, could not enjoin a trespass on the tract; he not alleging that the trespass was upon the ground surrounding his shafts, and of which he was in the actual occupancy.—Gemmell v. Swain, 28 Mont. 331; 72 Pac. 662.

37. The fact that he had posted notices of location would not enlarge his rights.—Id.

38. The fact that the trespassers had enjoined him from continuing work, and he had secured a reversal of the decree, was immaterial.—Id.

(e) Extent, markings, and record of claim, 39-82.

39. A record of a quartz claim, which did not specify the number of feet claimed by the locator, *held* admissible in evidence.—Conner v. McPhee, 1 Mont. 73.

40. The meaning of Act Dec. 26, 1864, Code Stat., p. 522, § 3, relative to ascertaining measurement of a lode mining claim, is that the measurement of 50 feet on either side of the lead, allowed for working purposes, should begin from the outer walls of the lead on each side, and not from the center of the lead.—Foote v. Mining Co., 2 Mont. 402.

41. Act approved May 8, 1873, providing that a statement of the discovery shall be made and filed whenever any mining claim upon any vein or lode bearing valuable deposits is discovered, does not refer to a placer mining claim. The discoverer of a placer mining claim is not required to make or file a record of the discovery.—Moxon v. Wilkinson, 2 Mont. 421.

42. The fixing of a location stake does not perfect a location; the marking of the boundaries is essential.—Gonu v. Russell, 3 Mont. 358.

43. A claim of a mining location 2,000 feet long will not protect claimants against intervening claims of other persons for the 500 feet more than the law allows.—Hauswirth v. Butcher, 4 Mont. 299; 1 Pac. 714.

44. A defective record of a mining claim might be cured by stakes or monuments on the ground to identify the claim.—Russell v. Chumasero, 4 Mont. 309; 1 Pac. 713.

45. A description giving other claims for boundaries may be good if those claims are marked on the ground as the law contemplates, and this should be open to proof.—Id.

46. A defective record of a mining claim might be cured by stakes or monuments on the ground to identify the claim.—Id.

47. A mining location is not valid without a declaratory statement "under oath," and possession without a valid location can not affect the rights of others who claim under a valid location. (See 117 U. S. 401.)—Russell v. Hoyt, 4 Mont. 412; 2 Pac. 25.

48. Boundaries of mining claims beyond the maximum limit prescribed by law do not impart notice and are equivalent to no boundaries at all.—Leggatt v. Stewart, 5 Mont. 107; 2 Pac. 320.

49. Where the declaratory statement for the location of a quartz lode is not under oath, as required by law, it is ineffective.—McBurney v. Berry, 5 Mont. 300; 5 Pac. 867.

50. A notice of location which describes the claim by metes and bounds, and as being a certain number of feet south from a well known quartz location, sufficiently complies with the requirements of the law as to description. (See 130 U. S., p. 290.)—Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. 153.

51. Under Rev. Stat., p. 590, § 873, providing that locators of mining claims shall, within 20 days after discovery, make and file for record an affidavit describing such claim in the manner prescribed by the laws of the United States, a party may make the declaration required by the statute upon information supplied by an agent or joint locator, and without having seen or personally discovered the lode, and may sign such agent's name with his own to the affidavit as joint locator.—Wenner v. McNulty, 7 Mont. 30; 14 Pac. 643.

52. U. S. R. S., § 2324, provides that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced." The location in this case was 300 feet wide and 600 feet long, and the stakes were set within the statutory limits, but outside the claim, and upon the corners of adjoining claims. *Held*, a sufficient marking.—Mining Co. v. Mining Co., 7 Mont. 356; 17 Pac. 547.

53. A recorded notice of location of a claim, distinctly marked on the ground, describing the west end corners as marked by pine trees, while they were in reality marked by stakes, the notice, however, referring to a permanent monument, to-wit, "the Gambetta lode claim on the east," is a sufficient compliance with U. S. R. S., § 2324, providing for a description of a claim in the records of mining claims, to be admissible in evidence. (See 144 U. S. 19.)—Upton v. Larkin, 7 Mont. 449; 17 Pac. 728.

54. Comp. Stat., p. 1054, § 1477, providing that the declaratory statement required by United States laws to be filed on locating a mining claim be made on oath, is not an infringement of U. S. R. S., § 1851, which prohibits the passage of any territorial law interfering with the primary disposal of the soil.—O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. 302.

55. Under U. S. R. S., § 2324, requiring that "all records of mining claims shall contain the name or names of the locators, the date of the location, and such description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim," a declaratory statement for record in the county recorder's office need not show the precise boundaries of the claim as marked on the ground, but is sufficient if it contain direc-

tions which, taken in connection with such boundaries, will enable a person of reasonable intelligence to find the claim, and trace its boundaries.—Gamer v. Glenn, 8 Mont. 371; 20 Pac. 654.

56. A description in a declaratory statement referring to "a large bowlder at the west end of the 'Tim' lode," and containing other references directing the inquirer to the very ground staked off by the locators, is good, notwithstanding no such lode as the "Tim" existed. The bowlder may be in itself a natural object, sufficient to identify the claim in that direction.—Id.

57. The fact that, during a period of two years, 33% of the mining locators in only one county of the territory disregarded both laws of congress and of the territory, by omitting to state the date of the location of the mine in the verification of the location notice, is not such a common error as will justify the application of the maxim, "communis error facit jus," to one of these defective notices, especially where there is nothing to show that any considerable number of persons have relied on the alleged common error, or that any valuable property rights are based thereon.—O'Donnell v. Glenn, 9 Mont. 452; 23 Pac. 1018.

58. Where the affidavit to the location notice is not signed by the locators, and there is no jurat showing it to have been subscribed and verified, the notice is insufficient, under Comp. Stat., p. 1054, § 1477, which provides that any person discovering any mining claim shall within 20 days thereafter make and file for record a declaratory statement, in writing, on oath, describing such claim, as provided by the laws of the United States; and evidence aliunde to show that the affidavit was in fact sworn to will not be received.—Metcalf v. Briscoe, 10 Mont. 283; 25 Pac. 1037.

59. Where the location notice for a mining claim refers to a permanent monument, and is recorded in the county in which the claim is actually situated, the fact that the location notice, after giving the coures and distances, which show it to be in one county, describes it as being in another, will not vitiate the description, and the name of the county will be rejected as surplusage.—Id.

60. A location notice described the claim as so many feet long, running easterly and westerly along the vein from the center of the discovery shaft, and so many feet wide, being in a certain mining district, county and territory. It stated that a post and notice were set up at the discovery shaft, and that there was a substantial post and monument at each corner, and that the M H claim was on the south, the N H claim on the southwest, and the St L claim on the north, and that the claim began at the southwest boundary of the M H, ran 200 feet, more or less, bounded on the northwest by the St L lode, to the place of beginning. *Held*, that it could not be said from an inspection of the notice that such description was an impossible or uncertain one, and that therefore the notice was admissible as prima facie evidence of the location.—Dillon v. Bayliss, 11 Mont. 171; 27 Pac. 725.

61. The description in the location notice is not conclusive, but evidence is admissible that one could not take the description therein, and, by referring to the permanent monuments therein mentioned, find the premises claimed.—Id.

62. The declaratory statement which the locator of a mining claim is required, within 20 days, to file and have recorded in the office of the county recorder of the county in which the claim is located, must be under oath.—Mattingly v. Lewisohn, 13 Mont. 508; 35 Pac. 111.

63. When a 160-acre placer claim is located under U. S. R. S., § 2330, by an association of persons, a separate recording of each 20-acre tract therein is not necessary.—McDonald v. Wood Co., 14 Mont. 88; 35 Pac. 668.

64. When a 160-acre placer claim is located under U. S. R. S., § 2330, a separate marking on the ground of each 20-acre tract contained therein is unnecessary.—Id.

65. A location notice, not verified as required by law, is defective and invalid.—Brownfield v. Bier, 15 Mont. 403; 39 Pac. 461.

66. Under Comp. Stat., p. 1054, § 1477, requiring one who discovers a mining claim to file a declaratory statement of such discovery or location, on oath, describing said claim in the manner provided by the laws of the United States, the statement must be of the discovery or location, as well as of the description of the claim, and an affidavit which merely states that "the description of said lode" is true, is fatally defective.—McCowan v. Maclay, 16 Mont. 234; 40 Pac. 602.

67. The statement, in the verification of a location notice, that the locators have "fully complied with the requirements" of law and local customs regulating mining locations, is merely a conclusion of law, and does not verify any fact.—Id.

68. Under Comp. Stat., p. 1054, § 1477, requiring a person making a location of a mining claim to file a declaratory statement thereof under oath, a statement which, on its face, appears to nave been verified a year before the location of the mine, is insufficient, in the absence of proof that the affidavit was wrongly dated by mistake.—Berg v. Koegel, 16 Mont. 266; 40 Pac. 605.

69. A notice of discovery describing a mining claim as bounded by three other claims on three sides thereof locates the claim with reference to permanent monuments, unless it affirmatively appears that such other claims are not permanent monuments.—Riste v. Morton, 20 Mont. 139; 49 Pac. 656.

70. Under U. S. R. S., § 2324, requiring a mining location to be distinctly marked on the ground, so that its boundaries can be readily traced, and all records to contain a description sufficient to identify it; and Pol. Code, §§ 3610, 3612, requiring the locator to post a notice at the point of discovery, giving the length claimed along the vein each way, and its general course, as near as may be, and within 90 days thereafter to file a declaratory statement giving a description of the claim sufficient to identify it,—the locator, having posted the notice stating the general course of the vein, may swing his claim in any direction required to include the vein, within the 90 days, and this though the notice laid the course to the points of the compass, no bad faith being shown.—Sanders v. Noble, 22 Mont. 110; 55 Pac. 1037.

71. Under Comp. Stat., p. 1054, § 1477, which provides that the discoverer of a mining claim shall have 20 days in which to complete the location and make the necessary record, a discoverer who posted in plain view a notice of location and "claim of 1500 feet on this lode, with 20 days for prospecting," if he made it in good faith, and with an intention to complete his location within the prescribed 20 days, thereby acquired a right to all the ground along the lead legitimately covered by his notice; and one locating thereon subsequently to such notice, and prior to the expiration of the 20 days, does not acquire a superior title, though he filed his statement and record within 20 days, and the former did not.—Bramlett v. Flick, 23 Mont. 95; 57 Pac. 869.

72. A notice, posted by the locator of a claim, that he claims 1500 feet on the lode, will be construed to limit his claim to 750 feet along the lode on either side of the point of discovery. —Id.

73. A notice of location of a mining claim, which, by reference to natural objects and monuments erected by the locator, contains descriptions which, taken in connection with such objects, would enable a person of ordinary intelligence to find the claim and trace its boundaries, is sufficient.—Id.

74. Whether or not a claim could be ascertained from such notice and the proof in regard to the surroundings is for the jury.—Id.

75. Under Pol. Code, § 3612, providing that the declaratory statement containing a description of a mining claim filed with the county clerk must contain the location and description of each corner, with the markings thereon, a statement describing a claim by metes and bounds, and giving no description of the corners or the markings thereon, is invalid.—Purdum v. Laddin, 23 Mont. 387; 59 Pac. 153.

76. A declaratory statement described each corner as "a stake four inches square, set at least one foot in the ground, and surrounded with a mound of earth and stone four feet in diameter and two feet high," etc. The corner posts were in fact 4½ feet high. *Held*, that under Pol. Code, §§ 3611, 3612, the description of the corner posts was a substantial compliance with the statute, and not fatally defective for failure to state that the corner posts were 4½ feet high.—Walker v. Pennington, 27 Mont. 369; 71 Pac. 156.

77. Under Pol. Code, § 3612, a statement referring to the discovery shaft only by the statement that the claim extends a certain number of feet north and south of the center of such shaft, and to the corners and markings thereon only by the statement that the location is marked by substantial posts of stone at each corner, is insufficient.—Hahn v. James, 29 Mont. 1; 73 Pac. 965.

78. A locator of a mining claim, who has not filed a declaratory statement as required by Pol. Code, § 3612, and who has not actual possession, can not have judgment in an action under Code Civ. Proc., § 1310, to determine an adverse claim, though defendants have made no valid location.—Id.

79. Under laws 1901, p. 56, authorizing the filing of an amendatory declaration of the location of a mining claim where the original was defective or erroneous, where a locator misdescribed his claim as running easterly and westerly, he was entitled to file an amended declaratory statement that the claim ran in a northerly and southerly direction, to correspond to the staking of the claim on the ground.—Wilson v. Freeman, 29 Mont. 470; 75 Pac. 84.

80. Pol. Code, § 3610 et seq., providing additional requirements for the valid location of mining claims to those required by the acts of congress, are not in violation of U. S. Const., art. 4, § 3, giving congress power to dispose of, and make all needful rules and regulations respecting the territory or other property of the United States.—Mares v. Dillon, 30 Mont. 117; 75 Pac. 963.

81. In the absence of proof tending to impeach the truth of the facts stated in a declaratory statement for a mining claim, it is immaterial to an adverse locator that the declaration was verified on information only.—Id.

82. That the locator of a mining claim verified the declaratory statement on information only, instead of on his personal knowledge, did not render the statement void under Pol. Code, § 3612, requiring such declaratory statement to be verified by the "oath of the locator."—Id.

(f) Development and assessment work, 83-95.

83. Under Act Cong., Mar. 10, 1872, representation by annual performance of labor is constituted one of the muniments of title, and no forfeiture can take place till after the full completion of the year during which, by law, representation may be made. (See 14 Otto 279.)—Belk v. Meagher, 3 Mont. 65.

84. When the original locator and his grantees have failed to represent a claim by doing the work required during any one year, he who first locates the same, after the expiration of the year, acquires the best title thereto.—Id.

85. If A has failed to do his annual labor, and B thereupon enters to relocate and proceeds so far as to put a notice on a stake at the discovery, but before he has marked the boundaries and otherwise completed the relocation, A re-enters and resumes labor in good faith, A saves his location and renders null the prior acts of the relocator.—Gonu v. Russell, 3 Mont. 358.

86. A tenant in common who enters into an agreement with his co-tenant, whereby the latter promises to do the annual work necessary to hold the claim, forfeits his interest in the claim if such representative work be not done. —Saunders v. Mackey, 5 Mont. 523; 6 Pac. 361.

87. The annual work required by U. S. R. S., § 2324, must be done either within the claim, or, if off from it, as a necessary means of developing such claim; and the erection of a cabin without the boundaries of the claim can not be considered as a part of such annual work.—Remmington v. Baudit, 6 Mont. 138; 9 Pac. 819.

88. In 1882 defendants located on the public domain, on unoccupied non-mineral land, a mill site of five acres as appurtenant to a certain validly located quartz lode, not contiguous to the same. The location was regular under U. S. R. S., § 2337. In 1884 plaintiff, as trustee, filed an application for a survey and patent of the townsite of Cooke, including therein said mill site, received a receipt from the land office for said townsite, and proceeded to dispose of lots. In May, 1885, defendants applied for a patent to said lode, and included in their application said mill site. Plaintiff filed his adverse claim and brought this suit to determine his rights to said mill site under the townsite patent. *Held*, that said § 2337, relating to the use and occupation of land for mill site and mining purposes, was sufficiently complied with to entitled defendants to a patent for said mill site.—Hartman v. Smith, 7 Mont. 19; 14 Pac. 648.

89. In an action for the possession of a mining claim it appeared that plaintiff located the claim on Jan. 1, 1888, but did not go on it until May, 1890, when defendants were in possession. On Dec. 20, 1889, plaintiff employed one B to represent the claim for the year 1889. B performed work under the contract from Dec. 22, 1889, until Jan. 12, 1890, for which plaintiff paid him $100. The work done by B consisted in conveying to the premises slabs and lumber of the value of $63, which were never used. B testified that he also "drifted perhaps 5 or 6 feet," but did not haul any dirt from the mine; that he cut "about half a dozen" logs, and put them in the mine; that he carried to the premises a rope, bucket, shovels, and picks, but removed them when he quit work; that there was no windlass on the mine; and that he earned more than $50 by the work done in January. Defendants relocated the claim in April, 1890. *Held*, that plaintiff did not in good faith resume work on the claim for the year 1890, within U. S. R. S., § 2324, which provides that unless $100 worth of work shall be performed or improvements be made each year on a mining claim located before May 10, 1872, until a patent therefor has been issued, such claim shall be open to relocation, provided that the original locators, their heirs, etc., "have not resumed

work upon the claim after failure, and before such location."—Honaker v. Martin, 11 Mont. 91; 27 Pac. 397.

90. The provisions of Comp. Stat., p. 1055, § 1483, requiring the owners of quartz lode claims to perform or cause to be performed the annual labor and to make the improvements required by the laws of the United States to prevent their forfeiture, provides for the filing of "affidavits of the person or persons who performed such labor or made such improvements, showing: * * * Fourth. The actual amount paid for such labor and improvements, and by whom paid, when the same was not done by the owner or owners,"—which affidavits are by § 1486 made "prima facie proof of the facts recited therein," and the provision of § 1483 for the preservation and recording of the prima facie evidence of such labor and improvements, do not relate to the effect of doing the work or making the improvements, but merely to the preservation of prima facie evidence of the fact thereof; and an instruction that it is not necessary, if labor of sufficient value be done on a claim within a given year, that it be paid for, the payment being a matter between the laborer and the owners, is not error.—Coleman v. Curtis, 12 Mont. 301; 30 Pac. 266.

91. It is not necessary that a separate discovery and work should be made and performed on each of the 20-acre tracts contained in a 160-acre placer claim, authorized by U. S. R. S., § 2330, to be located under one location by an association of persons.—McDonald v. Wood Co., 14 Mont. 88; 35 Pac. 668.

92. U. S. R. S., § 2324, authorizing coowners of a mining claim to obtain the interest of another co-owner, who has failed to contribute his proportion of the expenditures for labor and improvements, by publication of a notice addressed to him for a certain time, does not authorize the forfeiture of a co-owner's interest by such publication, when he is not in fact in default in contributing for expenditures.—Brundy v. Mayfield, 15 Mont. 201; 38 Pac. 1067.

93. Under the proviso to U. S. R. S., § 2324, that failure to perform $100 worth of labor in a year on a claim shall not open it to relocation if the locator has resumed work before relocation, he must have resumed work in good faith, and have prosecuted it with reasonable diligence towards the accomplishment of $100 worth of work, and such prosecution is not shown by evidence that, during the first half of the month before, relocation work was done, but none the last half, and that notice was posted soliciting proposals for $500 worth of work, no excuse being shown for the cessation from work, and it not being shown that the efforts to place the $500 contract were before relocation.—Hirschler v. McKendricks, 16 Mont. 211; 40 Pac. 290.

94. An entryman of a mining claim, who makes final entry thereof, and obtains the receiver's receipt therefor, showing he is entitled to a patent, is not relieved of the necessity of doing the annual representation work where such receipt was obtained by fraud.—Murray v. Polglase, 23 Mont. 401; 59 Pac. 439.

95. U. S. R. S., § 2324, provides that the miners in each mining district may make regulations, not in conflict with the laws of the United States, governing the amount of work necessary to hold possession of a mining claim, provided that no less than $100 worth of labor shall be performed or improvements made on each claim during each year. *Held*, that a custom among miners in a certain district that 20 days labor shall constitute $100 worth of work is in conflict with this section, and therefore void, for the test is, not the number of days work performed, but the reasonable value thereof.—Penn v. Oldhauber, 24 Mont. 287; 61 Pac. 649.

(g) Abandonment, forfeiture, and relocation, 96-103.

96. The rules and customs of miners that require locators to do a certain amount of work upon their claims, are conditions subsequent; and the law presumes that such locators forfeited their rights to possess and mine the same by failure to comply therewith, although no penalty is specified in such rules and customs.—King v. Edwards, 1 Mont. 235.

97. When mining ground is forfeited by anyone, it again becomes unappropriated mineral land of the United States. Anyone who relocates it, in accordance with the rules and customs of the district in which the same is situated, has the rights of the government, and may proceed to declare a forfeiture, or may set up the defense of forfeiture in an action against him.—Id.

98. Mining customs should be construed strictly against forfeiture.—Id.

99. The grant evidenced by a valid location continues operative and in full force and effect, so as to protect the ground from a subsequent location, until the title thereby acquired has become forfeited by a failure to do the necessary work or otherwise.—Renshaw v. Switzer, 6 Mont. 464; 13 Pac. 127.

100. Where a receiver's receipt, showing that the entryman of a mining claim is entitled to patent, is subsequently annulled for fraud in obtaining it, and the entryman has failed to do the annual representation work, the claim is subject to relocation.—Murray v. Polglase, 23 Mont. 401; 59 Pac. 439.

101. Where a mining claim on which plaintiff had located was relocated by defendant, but the notice filed by him was defective, and it was shown that, before it was properly remedied by an amended notice, plaintiff had performed work on the mine, it was error to instruct that on a suspension of work the right to resume was lost, where a qualified locator enters and initiates a location, and a resumption of work between the initiatory and final acts of location is of no avail, since the acts required in the location of a claim are distinct, and all must be performed before a legal location exists.—McKay v. McDougall, 25 Mont. 258; 64 Pac. 669.

102. Under Pol. Code, § 3615, where the claim was based on a relocation of an abandoned claim, a declaratory statement, failing to show the dimension and location of the shaft on the abandoned claim at the date of such location, and that it was sunk 10 feet deeper, was invalid.—Wilson v. Freeman, 29 Mont. 470; 75 Pac. 84.

103. Under Pol. Code, §§ 3611, 3612, where a recorded declaratory statement merely recited that the claim was a relocation of the M lode claim, on which the discovery was a shaft 10 feet in depth and 4½ feet in size, but failed to state that such were the dimensions at the date of the relocation, and it contained no reference to a discovery shaft or its equivalent, except the recitals, "from the center of discovery shaft, which is an open cut 10 feet deep," and "beginning at an open cut which is the point of discovery," it was sufficient.—Id.

(h) Rights acquired, 104-127.

104. The grants made by congress in the mining law of 1866 should be liberally construed in favor of the grantee, and the grant of the right to occupy and explore the mineral lands of the United States carries with it the implied

right to extract metals found by the occupant and explorer.—Robertson v. Smith, 1 Mont. 410.

105. The right acquired by a locator of mineral ground on the public domain, acting in accordance with provisions of law and local laws, rules and regulations, is a legal and exclusive right of possession, and so long as this right is kept alive by representation, no one else has the right to enter upon and relocate the same. Such entry and relocation would be void and constitute no foundation to a valid claim or give any right of possession. (See 14 Otto 279.—Belk v. Meagher, 3 Mont. 65.

106. Possession of the surface of a lode claim is possession of all veins, lodes and ledges whose tops or apices are within such surface lines, including such parts of veins as extend on the dip beyond the vertical projection of such lines.—Pardee v. Murray, 4 Mont. 234; 2 Pac. 16.

107. In the case of cross-veins the prior locator is entitled to all the ore or mineral within the space of intersection, but the subsequent locator has the right of way through such place, and if the latter should take ore from such space he is a trespasser.—Id.

108. Title by adverse possession cannot be acquired by going outside of another's ground and striking a vein apexing in such other person's claim by means of a perpendicular shaft, when the working of the lode so struck is unknown to its owners. Adverse possession that could ripen into a title must be open, notorious and under a claim of right.—Id.

109. Mining ground can not be held by possession alone against a valid location. Such location is a condition precedent to a grant from the government. Possession follows and derives its right from a valid location.—Noyes v. Black, 4 Mont. 527; 2 Pac. 769.

110. Possession without a valid location is sufficient to maintain trespass against a mere stranger, but not against one who has the right of possession under a valid location.—Id.

111. Possession of a mining claim without compliance with the law and rules of the mining district, gives no valid title or right of possession, and is valueless against a location made and sustained in compliance with the law.—Hopkins v. Noyes, 4 Mont. 550; 2 Pac. 280.

112. U. S. R. S., § 2323, provides that the owner of a mining tunnel shall have the same right of possession of all veins and lodes within 300 feet from the face of the tunnel, on its line, not before known to exist, discovered in the tunnel, as if they were discovered from the surface; and that locations, on the line, of veins not appearing on the surface, made while the tunnel is in construction, shall be invalid. Sec. 2320 limits vein or lode claims to 1500 feet in length and 300 feet in width on each side of the middle of the vein. Defendant commenced a tunnel outside, but within 300 feet from the exterior sides of, plaintiff's tunnel, as located and staked, found a vein and took ore therefrom; such vein not yet being discovered in plaintiff's tunnel. *Held*, that the defendant's location was valid, though liable to be divested by the subsequent discovery of the same vein in plaintiff's tunnel, if within 300 feet from the middle of and 1500 feet along the vein from the point of plaintiff's discovery.—Hope Min. Co. v. Brown, 7 Mont. 550; 19 Pac. 218.

113. U. S. R. S., § 2322 provides that the locators of mining claims shall have the right to possession and enjoy any vein or lode whose apex lies within the lines of the location, though the lode may, in its downward course or dip, cross the sidelines of the location; but that their right to such outside part shall be confined to the portion of it bounded by vertical planes, drawn downward through the endlines of the location, so continued as to intersect such outside part of the lode. *Held*, that where the vein crosses the sideline of a location both in its strike and its dip, the right to follow the vein on its strike is bounded by a plane drawn vertically through such sideline, and the right to follow it on its dip is bounded by a plane parallel to the endline of the location, drawn vertically through the vein at its point of intersection with said sideline. (Modified, 152 U. S. 222.)—King v. Amy, 9 Mont. 543; 24 Pac. 200.

114. Under U. S. R. S., § 2323, granting rights to tunnel claimants and providing that locations on the line of the tunnel of veins not appearing on the surface, made by others after the commencement and prosecution of the tunnel with reasonable diligence, shall be invalid, proceedings for a patent to a mining claim located after a tunnel location and within the surface boundaries thereof will be restrained while the tunnel claimant is prosecuting his work as required by law, and until it is demonstrated that the vein in the surface location will not be discovered in the tunnel, or until such tunnel rights are abandoned.—Hope M. Co. v. Brown, 11 Mont. 370; 28 Pac. 732.

115. U. S. R. S., § 2322, provides that locators shall have exclusive right to any vein or lode whose apex lies within the lines of the location, throughout its entire depth, though such vein or lode, in its downward course or dip, extend beyond the sidelines of the location, but that the right to the portion outside such lines shall be confined to the portion lying between the points of intersection of the vein or lode with vertical planes dropped from the endlines of the location, or with the continuation of such planes. *Held*, that where the apex of a vein crosses the east endline of a location, and extends to and crosses its south sideline, and thence passes into another location, and the dip is from the apex of the vein in the former location southward crossing the vertical plane of the south sideline, such south sideline will not be considered an endline, but the owners of the former location have the right to all ore found on the dip south of their south sideline, between the intersection of the vein with the vertical plane of their east endline and a parallel plane dropped from the point where the apex crosses their south sideline. (See 171 U. S. 92.)—Fitzgerald v. Clark, 17 Mont. 100; 42 Pac. 273.

116. On an issue as to whether a vein on defendant's location connected in its downward course with a vein on plaintiff's location, it was proper to charge that such connection must be made by a "continuous streak or body of quartz or ore," or by vein matter, and to refuse to charge that it could be made by "such material or indications as a practical miner would follow with the expectation of finding ore."—Id.

117. There can be no right of possession to a mining claim which is not based on a valid location.—Hamilton v. Huson, 21 Mont. 9; 53 Pac. 101.

118. One who has located a claim, filed his notice, and procured a survey thereof by the United States deputy surveyor, as required by law, can not be deprived of his property because the surveyor failed by mistake to include all that was covered by the location notice, where the mistake was cured by a re-survey, under the orders of the interior department, within a few days after the owner discovered it.—Basin M. & C. Co. v. White, 22 Mont. 147; 55 Pac. 1049..

119. In order that a vein may be followed extralaterally, identity throughout is essential, and the vein must be continuous; but the con-

tinuity may be interrupted, provided the interruption does not prevent the tracing of the vein through the fissure as biologically identical.—Butte & B. M. Co. v. Lexington, 23 Mont. 177; 58 Pac. 111.

120. Under U. S. R. S., § 2322, where the apex of a vein was in defendant's location, but he had no right to follow it beyond the vertical plane of its south line, owing to such line being an endline, plaintiff, whose location was situated south of that of defendant, and who had not the apex of the vein within the exterior boundaries of his claim, was entitled as against defendant, to the ores beneath plaintiff's surface, since, it being land that was granted under the statute, he was entitled to the ores beneath the surface by common law right.—Parrot S. & C. Co. v Heinze, 25 Mont. 139; 64 Pac. 326.

121. Under U. S. R. S., § 2322, where two opposite sidelines of a mining claim were crossed by the vein on its course, they thereby became in effect endlines, and hence the locator had no extralateral rights without the vertical planes extended downward in the direction of the original sidelines.—Id.

122. Where the apex of a vein passes through one of the parallel endlines and a sideline, the extralateral rights of the locator are bounded by the vertical plane of such endline and a parallel plane extended downward through the point where the apex crosses the sideline.—Id.

123. Where, prior to the location of a quartz lode mining claim, the surface was occupied by different persons, who agreed that one should locate for all, and that, after patent issued, conveyance should be made, vesting in each full title to the surface occupied by him, but the conveyances were in fact never made, the agreement and continued occupation after the patent issued did not constitute an oral partition, as the location of such claim confers on the locator the right to the exclusive enjoyment of all the surface ground.—Mullins v. Hardware Co., 25 Mont. 525; 65 Pac. 1004.

124. Prior to the location of a quartz lode mining claim the occupants of the surface had but a naked possessory right, and after the location by one of them for all, under an agreement to convey to each the surface occupied, the right was but an equity to hold such person as trustee, and the agreement and continued occupation could not amount to an oral partition.—Id.

125. Where, in an action to determine adverse claims to mining property, it was proved that plaintiff had title to and possession of surface containing the apices of veins with extralateral rights, and the continuity and identity of such veins from the apex to the point in dispute was demonstrated, it necessarily followed that plaintiff had the title and lawful possession of the veins on the dip and strike, and was entitled to the relief demanded, notwithstanding the prima facie presumption in favor of defendant's title to everything beneath its surface.—M. O. P. Co. v. Mining Co., 27 Mont. 410; 71 Pac. 403.

126. Where plaintiff has title to and possession of the surface, containing apices of veins extending under the surface owned by and in possession of defendant, plaintiff, under U. S. R. S., § 2322, must be deemed the owner and in possession of all parts of such veins, notwithstanding the presumption in favor of defendant's title to everything beneath the surface.—M. O. P. Co. v. Mining Co., 27 Mont. 536; 71 Pac. 1005.

127. The owner of a mining claim is entitled prima facie to everything beneath the surface of his claim, and under such title may prevent the intrusion of anyone not showing a paramount right to enter within the planes of his boundaries.—Maloney v. King, 30 Mont. 158; 76 Pac. 4.

4. Transfers, 128-129.

128. An alien can not take and hold the possessory title to an unpatented mining claim, which has been conveyed to him by a citizen who had made a valid location of the same, as against another citizen who has located and demands possession of such claim; such a conveyance has the effect to so restore the claim to the public domain as to authorize its location and possession by a citizen.—Tibbetts v. Ah Tong, 4 Mont. 536; 2 Pac. 759.

129. Where, after notice of location of the L and E mining claims were filed, the owners of the E claim moved the stakes at one end so as to conflict with the L claim, and then conveyed, by separate deeds, their interest in the E claim as described in the notice of location, they were estopped to maintain, under a subsequent purchase of the L claim, that their deeds conveyed no part of the latter, since Comp. Stat., p. 225, § 632, provides that, for the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may be shown; and (§ 633) that the terms of a writing are presumed to have been used in their general acceptation; but evidence is nevertheless admissible that they have a local, technical or otherwise "peculiar signification."—Shreve v. Mining Co., 11 Mont. 309; 28 Pac. 315.

5. Actions, 130-219.

(a) In General, 130-139.
(b) Limitations, Jurisdiction, and Venue, 140-144.
(c) Injunction and Inspection, 145-167.
(d) Pleading, 168-182.
(e) Evidence, 183-207.
(f) Trial, Judgment, and Review, 208-219.

(a) In general, 130-139.

130. Under U. S. R. S., § 2326, actions to determine the right to the possession of mining ground must be according to the forms and practice of the jurisdiction where the suit is begun. In this jurisdiction, a plaintiff in possession should bring suit to quiet title; if out of possession his action should be in the nature of ejectment. (See 119 U. S. 485.)—Wolverton v. Nichols, 5 Mont. 89; 2 Pac. 308.

131. An adverse claimant to a placer mine, who has executed an instrument by which he agrees to convey the premises in dispute, at some future time, to a tenant in possession, may, under the Code of Montana and U. S. R. S., §§ 2325, 2326, maintain an action in the courts of Montana to determine the right to the possession of the premises in dispute.—Id.

132. An action brought under U. S. R. S., § 2326, to determine the right to the possession of a mining claim, must be in accordance with the practice of the state or territory where brought. In Montana the remedy of plaintiff, if in possession, is by action to quiet title; if not in possession, by an action in the nature of ejectment.—Milligan v. Savery, 6 Mont. 129; 9 Pac. 894.

133. Where one enters upon the mining claim of another under claim of title thereto, and mines thereon, and warns such other not to mine thereon, such conduct amounts to an ouster from the territory of the latter claimed by the former.—Bramlett v. Flick, 23 Mont. 95; 57 Pac. 869.

134. In actions to determine adverse claims to patented mining claims, questions concerning conflicting extralateral rights are similar in their nature to those adjudicated in actions to determine adverse claims to surface rights, and are governed by the same principles.—M. O. P. Co. v. Mining Co., 27 Mont. 410; 71 Pac. 403.

135. Where an adverse claimant to a mining location had no right or title thereto, he could not object that the claimant was not entitled to a patent for failure to do the annual representation work thereon.—Wilson v. Freeman, 29 Mont. 470; 75 Pac. 84.

136. The validity of a mining location, in an action to determine an adverse claim before patent issued, must be determined by the law in force at the time the location was made.—Id.

137. In a suit to establish an adverse claim filed against an application for patent to a mining claim, the United States is a quasi party, and if, upon a trial, neither plaintiff nor defendant is entitled to a patent to the ground in controversy, the court must so find.—Id.

138. Since U. S. R. S., § 2326, providing that an adverse claimant to a mining claim, within 30 days after filing his claim, must commence proceedings in a court of competent jurisdiction to determine the right of possession, etc., does not prescribe the form of action, the character of the suit to be tried thereunder depends on state practice.—Mares v. Dillon, 30 Mont. 117; 75 Pac. 963.

139. Under U. S. R. S., § 2326, an action commenced within 30 days proceeds to judgment as other actions, and the court, as in other actions, may permit amendments to the complaint so as to make it state a cause of action, even after the 30 days have expired.—Woody v. Hinds, 30 Mont. 189; 76 Pac. 1.

(b) Limitations, jurisdiction, and venue, 140-144.

140. The general law of limitation of actions for the recovery of real estate is limited by special provisions applicable to placer mines and quartz lodes. The specific and not the general law must control such cases.—Davis v. Clark, 2 Mont. 310.

141. Where the locators of a placer mine apply for a patent, a person who has had possession of a part of the land for 10 years, and before such location, is an adverse claimant, and may bring an action in the state court to determine his rights, even though he does not apply for a patent himself.—Shafer v. Constans, 3 Mont. 369.

142. In an action in support of an adverse claim in an application for patent to a mining claim, an objection that the claimant had not placed on the claim sought to be patented $500 worth of work or improvements could not be considered, such question being within the exclusive jurisdiction of the land office.—Wilson v. Freeman, 29 Mont. 470; 75 Pac. 84.

143. Where the complaint in an action under Code Civ. Proc., § 1310, to determine an adverse claim set up the filing of plaintiff's adverse claim, as provided by § 1322, after defendant had applied for a patent, and prayed that defendant be required to set forth the nature of his claim to the ground, and that all adverse claims of defendant might be determined by the judgment of the court, and the answer denied plaintiff's ownership and possession, and prayed that defendant be adjudged to be the owner and entitled to possession of the premises sued for, the suit was one of equitable cognizance, and not an action at law.—Mares v. Dillon, 30 Mont. 117; 75 Pac. 963.

144. Where, in an action in support of an adverse claim, the only part of the surface of the ground of plaintiff's location affected by the suit was that part which was in conflict with the surface of defendant's location, for which a patent had been applied for, the court's jurisdiction was limited to the extent of the conflict, and hence it was error for the court to render judgment determining the validity of a portion of plaintiff's location outside of the points of conflict.—Mares v. Dillon, 30 Mont. 144; 75 Pac. 969.

(c) Injunction and inspection, 145-167.

145. Comp. Stat., p. 162, § 376, giving district courts power to make an order for an inspection or survey of a mining claim whenever any person shall have any right to or interest in any lead, lode or mining claim which is in the possession of another, and an inspection or survey shall be necessary for the protection of such rights or interest, is not unconstitutional, as being unjust and oppressive, though the interest of petitioner is not defined, and though the order may be issued without requiring bond, and before suit, and no provision is made for appeal, as the order may be reviewed on certiorari.—St. Louis, etc. Co. v. Montana, etc. Co., 9 Mont. 288; 23 Pac. 510.

146. Plaintiff, under U. S. R. S., § 2322, which gives the owner of a vein or lode, whose apex lies upon the surface of his own location, the right to follow it within the lands of others, was mining upon lands owned by defendants, and obtained an injunction, pending litigation, to prevent them from interfering with it. On motion of defendants, the injunction was modified so as to allow them to enter and inspect, within the compass of their own lands, the tunnels and galleries of plaintiff, and to prosecute certain development work therein, in order to obtain a knowledge of the character and identity of the veins, for use at the trial. *Held*, that notwithstanding the statute, the plaintiff was prima facie a trespasser, and there was no abuse of discretion in making the modification.—Blue Bird v. Murray, 9 Mont. 468; 23 Pac. 1022.

147. Where, in an action by the owners of a mining claim to restrain the removal of ore by defendants, who owned an adjoining claim, and had entered by undersigned workings on plaintiff's claim, there was much evidence that the apex of the vein was in defendants' claim, but there was some evidence to the contrary, and the development had not progressed far enough to identify the vein in defendants' claim with that in plaintiff's claim, nor to show with certainty the location of the apex of the vein in controversy, the evidence authorized granting an injunction pendente lite.—Maloney v. King, 25 Mont. 188; 64 Pac. 351.

148. Relators were the owners of the patented claims Anaconda, St. Lawrence, Smoke Stack and Rob Roy, and subsequently defendant located the Copper Trust mine on a discovery near the eastern corners of the Smoke Stack and St. Lawrence, alleging that the vein there discovered passed, on its strike through the Smoke Stack, the St. Lawrence, and into the Anaconda. Defendant's claim was so located as to include within its lines most of the space included within the Smoke Stack and St. Lawrence, and also a space to the southwest of these claims and to the east of the Anaconda not included in the surface rights of the three claims through which the vein passed, nor subject their extralateral rights, but which was within the surface of the Rob Roy. Defendant did not claim any right to follow the vein to such space, but that it belonged to him by appropriation. *Held*, that the ores in such space belonged prima facie to the relators, as owners of the Rob Roy, by virtue of common law rights, though no part of the apex was within

its bounds, and therefore it was error, in an action by the defendant against the relators for removing ores from such space, to grant him an order for the inspection of relators' mines, under Code Civ. Proc., §§ 1314, 1315, providing that such order may be made "for good cause shown" pending an action for the recovery of a mine.—State v. District Court, 25 Mont. 504; 65 Pac. 1020.

149. Under Code Civ. Proc., § 1314, allowing an inspection order to be made at any time pending an action to determine mining claims, the order may be granted before the issues are framed.—State v. District Court, 26 Mont. 416; 68 Pac. 794, 946.

150. Under Code Civ. Proc., § 1314, the fact that a temporary injunction has been issued does not preclude the issuance of an inspection order, as such provision makes no distinction as to the character of relief sought.—Id.

151. Where, in a suit to determine a mining claim, operations are continued pending the action, the court may properly designate employees of an adverse party to make weekly inspection of the premises under reasonable restrictions.—Id.

152. Where, in a suit to determine ownership of certain ore bodies, the parties base their respective claims on the asserted ownership of the apex of a vein, to determine which will necessitate a following of the vein from the surface, an order requiring the owner of the surface openings to allow the other party to enter such openings for the purpose of surveying beneath the surface should be limited to those openings alone an inspection of which is necessary to determine the issues, though examination should be allowed of all the workings made in pursuit of the vein in the direction of the strike, to determine the continuity of its direction as well as the angle of the dip.—Id.

153. Under Code Civ. Proc., § 1314, where the respective parties assert title to certain ore bodies, each basing his claim on an asserted ownership of the apex of the vein, to determine which will necessitate a following of the vein from the surface, the court may properly grant an order requiring the owner of the surface openings to allow the other party to enter such openings for the purpose of surveying beneath the surface, though the latter party had complete maps up to the commencement of the suit, after which it was excluded, and work of removing the ores rapidly pushed.—Id.

154. Code Civ. Proc., § 1317, is not applicable where petitioner asserts no interest in the property of which inspection is sought, or through which entry is necessary to inspect adjoining property.—State v. District Court, 26 Mont. 433; 68 Pac. 797.

155. Code Civ. Proc., § 1314, authorizes on good cause shown an order for the inspection of a mining claim involved in litigation, even though entry must be made through lands of the adverse party. Plaintiff and defendant claimed adjoining premises under placer patents, and in an action for trespass plaintiff moved for an inspection. It appeared that plaintiff had no openings in his property, and therefore no means of ascertaining the conditions beneath the surface; that defendants were mining on their own premises, and through drifts, some of them in the direction of plaintiff's premises, and that blasting could be heard, and the concussion felt by persons residing on the premises in the same relative position of plaintiff's premises; that defendants had been removing large amounts of ore through their shaft for months, and had refused to admit anyone thereto, or even to the enclosure about it; that they denied that plaintiff had any right to the minerals beneath their surface. The surface had been platted as an addition to a city, the respective parties owning certain lots and blocks, and claiming the mineral rights to the middle of the adjacent streets and alleys, so that prima facie they had no extralateral rights. *Held*, not an abuse of discretion to grant the order, subject to the limitation that the inspection should extend to no other workings than those made in the direction of plaintiff's property.—State v. District Court, 26 Mont. 483; 68 Pac. 861.

156. Under Code Civ. Proc. § 1314, the right of inspection in an action to determine extralateral rights was not limited to openings made on the lode itself, and to the ascertainment of the physical and geological facts to be found there, but a survey of the surrounding tunnels, shafts and drifts necessary to disclose all the facts with reference to the location was authorized.—State v. District Court, 28 Mont. 528; 73 Pac. 230.

157. Where, in an action to establish extralateral rights, plaintiff alleged that the vein in controversy dipped beneath defendant's claim at an angle varying at different points along the strike from 85° at the extreme west to 30° near the shaft, and after the vein left the territory of plaintiff's claim it was exposed in three of defendant's claims at and below the 1,000-foot level, it was error for the court to authorize an inspection of all of defendant's claims and a survey of all of the underground workings thereof, but such inspectors should have been limited to such of defendants' workings as generally lay along the strike of the vein as shown by the apex found in plaintiff's location.—Id.

158. Where, in an action to determine extralateral rights of the owner of a mining claim, it appeared that most of the workings in one of defendants' claims could be reached and inspected through plaintiff's shaft, it was error for the court, in granting an order for the inspection of defendants' claims, to require defendants to allow plaintiff access to their workings exclusively through their shafts and by means of their appliances.—Id.

159. Where it is made to appear from the allegations of the petition, either alone or by reference to the complaint, in an action to determine the extent of extralateral rights of the owners of a mining claim, that an examination of the property will aid the parties in the presentation of their case, it is sufficient, under Code Civ. Proc., § 1314, to justify an order granting such inspection, without regard to whether the complaint is technically sufficient.—Id.

160. Under Code Civ. Proc., § 1317, it was error to allow an inspection of defendants' workings, requiring defendants to use their appliances to lower and raise plaintiff's agents in making such inspection, without providing for the payment by plaintiff of the expenses incident thereto.—Id.

161. In a suit to determine the ownership of veins depending on asserted ownership of the apex, an order granting an inspection and survey of the workings will not be disturbed because no necessity existed therefor, and the adverse party already had knowledge of the existence of the conditions necessary to its defense, where it appeared that developments were continually taking place, and that the initial points from which surveys of underground workings were made shifted their position, and to make a complete survey it was necessary to review the former surveys to determine with accuracy the relative position of the new openings made.—State v. District Court, 29 Mont. 105; 74 Pac. 132.

162. In a suit to determine the ownership of veins depending on the asserted ownership of the apex, an order granting an inspection and survey of the workings will not be disturbed as covering matters not in contro-

versy because the vein in dispute was described by plaintiff's witnesses as passing out of plaintiff's claim on its dip at a certain level, and the workings below that level were on veins not in controversy, as defendant should be permitted to examine the workings, and determine for itself whether or not such conditions existed.—Id.

163. Where, in suit to determine the ownership of veins, it appears that plaintiff's shaft is the only means of access to the workings in controversy, the court, in permitting defendants to inspect and survey the workings, may allow ingress and egress by means of plaintiff's machinery and appliances.—Id.

164. Under Code Civ. Proc., § 1317, an order granting an inspection, which fails to provide for the compensation for such nspection, is defective.—Id.

165. An order granting inspection of underground workings should determine and fix the means of access, and strictly limit the examination to the workings of which it is necessary for plaintiff to have knowledge in order to make surveys and maps to elucidate the issues in controversy.—State v. District Court, 30 Mont. 206; 76 Pac. 206.

166. Where an action was brought to have defendant declared a trustee for the benefit of plaintiff of an interest in a mining claim, and, after an aplication for inspection had been filed, plaintiff amended his complaint, without changing the theory if the cause of action or the issues, except that the particulars of the negotiations and the resulting agreements by which plaintiff acquired rights in the property were in some respects different from those stated in the original complaint, the amendment did not necessitate that the proceeding for inspection should be begun de novo.—Id.

167. Under Code Civ. Proc. § 1317, an order granting an inspection of underground workings, and arbitrarily fixing the amount to be paid by plaintiff to defendant for lowering and hoisting plaintiff's agents engaged in such inspection at a certain sum, without hearing any evidence as to the actual cost, was erroneous.—Id.

(d) Pleading, 168-182.

168. Where a suit is brought by the possessor of a mill-site, as adverse claimant to an application for a placer patent by defendants, who are not in possession, defendants must show that they have complied with the local customs and regulations; and if they do not the plaintiff in possession will recover judgment without showing that the land is non-mineral, as is apparently requisite for mill-sites.—Shafer v. Constans, 3 Mont. 369.

169. Where plaintiffs in their petition assert claim to a certain tract, and defendants in their answer admit that they have applied for a patent for the same tract, the conflict as to the right of possession sufficiently appears. (See 119 U. S. 485.)—Wolverton v. Nichols, 5 Mont. 89.

170. In an action to quiet title to a mining claim, where the plaintiff's ownership and possession are put in issue, it devolves upon him to show affirmatively upon trial that he had complied fully with the requirements of the act of congress and the local rules and regulations relative to the location of mining claims, and had made a valid location. (See 130 U. S. 290.)—Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. 153.

171. In an action of ejectment to recover a mining claim it is sufficient for the claimant to show a prior valid location. He need not also set out that he has done the work necessary to represent the claim, but the failure to do such work should be shown by the other party. The grant evidenced by a valid location continues operative and in full force, so as to protect the ground from subsequent location, until the title thereby acquired has become forfeited by a failure to do the necessary work or otherwise; and such matters of forfeiture, by which the claim is to be defeated, must be set forth in the complaint or answer.—Renshaw v. Switzer, 6 Mont. 464; 13 Pac. 127.

172. A complaint in an action by one owner of a mining tunnel to enjoin another from working a location on the line of the plaintiff's tunnel, such location being invalid under U. S. R. S., § 2323, which alleged that the trend of the vein being worked by defendant appears to be across the location of plaintiff's tunnel, without a positive averment that it will cross, or that plaintiff believes it will, is sufficient on demurrer.—Hope Mining Co. v. Brown, 7 Mont. 550; 19 Pac. 218.

173. A complaint in an action under U. S. R. S., § 2326, to contest an application for a patent for mining land, which fails to show that plaintiff has filed his adverse claim within the period prescribed by § 2325, and brought the action within the time thereafter allowed by § 2326, is defective.—Mattingly v. Lewisohn, 8 Mont. 259; 19 Pac. 310.

174. In a contest to determine the right to a patent, defendant can not object that the title under which plaintiff claims was forfeited by a conveyance to an alien from whom plaintiff purchased, where he does not specially plead such forfeiture.—Wulf v. Manuel, 9 Mont. 276; 23 Pac. 723.

175. In an action to determine who is entitled to a patent of a claim described by courses and distances, it is immaterial that in the complaint the course of the last line is stated to be in the southwest instead of in the southeast, where the terminus is the place of beginning.—Hoffman v. Beecher, 12 Mont. 489; 31 Pac. 92.

176. In an action to determine who is entitled to a patent of a mining claim described by courses and distances, where it appears that defendants' claim, which is described in the complaint as wholly within the boundaries of plaintiff's claim, it is immaterial that in the description of the latter there are discrepancies of a few feet in both the length and width.—Id.

177. In an action to determine the right of possession to a mining claim, plaintiff need not prove compliance with the law requiring performance of annual work, where no showing as to the performance of such work is raised by the pleadings.—Mattingly v. Lewisohn, 13 Mont. 508; 35 Pac. 111.

178. Under Comp. Stat., p. 1054, § 1477, requiring locators of mining claims to make and file for record with the county clerk a declaratory statement thereof on oath, it is not sufficient for defendants, claiming under a location after an alleged forfeiture by plaintiffs, to allege simply that they have caused a record notice of their location to be made, for this is a mere conclusion, and does not suggest that the notice was ever verified, or put on record in the proper county.—Power v. Sla, 24 Mont. 243; 61 Pac. 468.

179. Since U. S. R. S., § 2324, authorizes the expenditure required to be made on lode mining claims to be either in work and labor or improvements, it is not sufficient for defendants, claiming under a location after an alleged forfeiture by plaintiffs, to allege as such forfeiture that plaintiffs failed during certain years to perform $100 worth of work and labor on the claim, but they must also negative the expenditure of that amount in improvements. —Id.

180. U. S. R. S., § 2325, limits the time for

filing an adverse claim to 60 days after the publication of notice of application for patent, and § 2326 requires the persons filing an adverse claim to commence proceedings to try the title within 30 days thereafter. Code Civ. Proc., § 1322, declares that in an action to determine the rights of claimants to a mining claim it is immaterial which party is in possession, and it is sufficient to confer jurisdiction if it appears from the pleadings that the application for patent has been made, and an adverse claim filed and allowed in the proper land office, etc. *Held*, that the failure of a complaint to determine an adverse claim to allege that suit was brought within the time required by § 2326, was not a jurisdictional defect, but could be taken advantage of only by demurrer.—Hopkins v. Copper Co., 29 Mont. 390; 74 Pac. 1081.

181. An allegation in a complaint under U. S. R. S., § 2326, providing that adverse claimants of mineral land shall, within 30 days after filing "a claim," sue to determine the right of possession, is not bad for uncertainty or ambiguity, when it states that a "protest" was also filed.—Woody v. Hinds, 30 Mont. 189; 76 Pac. 1.

182. U. S. R. S., § 2326, provides that an adverse claimant shall, within 30 days after filing his claim, commence proceedings in a competent court to determine the right of possession. Code Civ. Proc., § 1310, provides that actions may be brought to determine adverse claims in real property, and § 1311 provides that in actions under U. S. R. S., § 2326, plaintiff shall recover costs if defendant does not relinquish his claim within 20 days. Code Civ. Proc., § 1322, provides that in actions to determine mining claims it is sufficient that the pleadings show that application for patent has been made and an adverse claim filed and allowed in the proper land office. *Held*, that a complaint under U. S. R. S., § 2326, showing possession under claim of title in plaintiff, and application for patent by defendant, the filing and allowance of an adverse claim in the land office, and that action was commenced within 30 days after the allowance, is sufficient, whether the action be treated as one under § 1310 or § 1322. It is not necessary in either case that plaintiff particularly set forth the nature of defendant's claim, but that duty devolves on defendant.—Id.

(e) Evidence, 183-207.

183. To perfect a right to the possession of placer mining ground plaintiff offered evidence to prove that he dug a ditch, after the filing of his adverse claim, to mine the ground, and that he occupied a dwelling house and blacksmith shop upon the ground. *Held*, that the evidence is not admissible and does not tend to prove that plaintiff possessed the ground as a miner or that it is mineral land.—Moxon v. Wilkinson, 2 Mont. 421.

184. The mere evidence of staking boundaries is not proof of possession, but it is proof of the extent of possession; and in the absence of a complete transcript, the court will presume sufficient evidence of plaintiff's possession was given.—Boardman v. Thompson, 3 Mont. 387.

185. Admissions as to the supposed course or dip of an undeveloped lode are mere matters of speculation, and are not estopping evidence. —Pardee v. Murray, 4 Mont. 234; 2 Pac. 16.

186. Where defendants claim by virtue of two locations made from a single discovery, where only one could be valid, it was error for the court to charge that plaintiff in ejectment, claiming the premises by virtue of a re-location, should bear the burden of proving which one of the two locations was invalid.—McKinstry v. Clark, 4 Mont. 370; 1 Pac. 759.

187. In an action to recover ore, plaintiffs proved title, by occupancy, to a certain claim, and that the ore was taken from within its boundaries. Defendants' evidence was that the apex of the vein from which the ore was taken lay outside plaintiffs' boundary lines, and within another claim. It did not appear that the "discovery" of either claim was on the vein in question. *Held*, that it was proper rebuttal testimony for plaintiffs to show that the apex of the vein was within their lines.—Driscoll v. Dunwoody, 7 Mont. 394; 16 Pac. 726.

188. On the issue whether the plaintiff's discovery had been made within the patented lines of an adjoining claim, plaintiff, in order to fix the place of discovery, may testify that it was 100 feet south of the old lines of such claim, and defendant could then show, on cross examination or in defense, that the patented lines of the claim were south of the old lines, and took in the discovery (See 144 U. S. 19.)—Upton v. Larkin, 7 Mont. 449; 17 Pac. 728.

189. Parol testimony is admissible to show that a monument referred to in a location notice is of a permanent character.—Metcalf v. Briscoe, 10 Mont. 283; 25 Pac. 1037.

190. In an action to determine the right to the possession of mining premises, the only issue was whether plaintiff had discovered within the boundaries of his claim a vein of valuable ore prior to the location of defendant's claim. It appeared from the testimony of plaintiff and his witnesses that there was quartz in place in the discovery shaft and in a cut connecting therewith and run after the location; that two of the witneses had assayed some quartz taken from the discovery and found silver. Thirteen witnesses, whose testimony for defendant was not rebutted, testified to the fact that there was no vein in plaintiff's discovery shaft at the time of defendant's location, and that if there had been, those making defendant's location were positive they would have seen it: that plaintiff's discovery shaft was in the top rock and not in place. The jury found for defendant after an inspection of the premises. *Held*, that the verdict was supported by the testimony, and the granting of a new trial was an abuse of discretion.—Ormund v. Mining Co., 11 Mont. 303; 28 Pac. 289.

191. It appeared that, the day before the location of a claim, it had been surveyed. The locator testified that the vein showed very plainly on the surface, and was a good looking vein, and described its strike and width, but that he did not make any assays at the time, but that assays made after the location proved the value of the vein. *Held*, that, in the absence of evidence that the vein was not a good one, there was sufficient evidence of a discovery of a mineral vein before the location. —Davidson v. Bordeaux, 15 Mont. 245; 38 Pac. 1075.

192. In an action to try title, plaintiffs testified that on Sept. 15, 1890, they discovered in a shaft they were sinking, at a depth of about 50 feet, a lead of manganese, carrying outcroppings of silver and lead, and that by the last of September they quit work, owing to the unsafe condition of the shaft. At the time of the alleged discovery plaintiffs located a claim. Several other witneses testified that in the following April, soon after plaintiffs resumed work, they went down the shaft and saw the lead. There was no evidence to contradict this evidence. *Held*, that a finding by the jury that plaintiffs did not discover the lead on Sept. 15, 1890, should be set aside as unsupported by the evidence.—Walsh v. Mueller, 16 Mont. 180; 40 Pac. 292.

193. The finding of a jury that plaintiffs had not done the $100 worth of labor required by U. S. R. S., § 2324, each year on a mining

claim, will not be disturbed where, under plaintiff's evidence, it barely reaches that amount, and the evidence of defendant makes it considerably less.—Hirschler v. McKendricks, 16 Mont. 211; 40 Pac. 290.

194. Evidence of the cost of sharpening picks used in the work on a mining claim, offered on the issue of whether $100 worth of work had been done on the claim in a year, was properly rejected, where counsel refused to inform the court whether he wished to show that they had been sharpened on the premises or before they had been taken there.—Id.

195. The existence of a fault in a vein on a location in suit can not be shown by evidence of faults in a vein which witness states is a continuation of the vein in suit, in the absence of evidence of continuity of the fault. (See 171 U. S. 92.)—Fitzgerald v. Clark, 17 Mont. 100; 42 Pac. 273.

196. A miner who had in 1887 assisted in surveying the boundaries of a mining claim which was discovered in 1882, was competent to testify whether he knew what purported to be, and what was indicated by marks and monuments as, the discovery of the claim, and, if so, what was the mark indicating the point of discovery.—Strasburger v. Beecher, 20 Mont. 143; 49 Pac. 740.

197. On an issue as to the forfeiture by plaintiffs of the L S claim for failure to do representation work in 1883 and 1884, the fact that the work was done in 1883 was fully shown. Plaintiff S testified that he did the work in 1884, and the mineral surveyor testified that he saw S there in 1884. An experienced miner said that he saw digging on the claim that had not been done when he was there in 1883. Several witnesses for defendant, who were on adjoining premises in 1884, testified that they did not see S on the L S claim, or any mining improvements done there in 1884; that if he had been there, and the work done, they would have known it; but one of them testified on cross examination as to certain improvements, and it was shown that two witnesses who gave the most material testimony for defendant had previously testified differently as to the same facts. *Held*, that the evidence to support a finding of forfeiture was not of that clear character essential in such cases.—Id.

198. The burden of proof is upon the party alleging a forfeiture of a mining claim for non-representation.—Id.

199. In an action to determine adverse claims, a notice of location which described a claim as being situated in a certain county, a certain distance from another claim, and defined by courses marked by substantial monuments, readily identified by marks thereon, taken in connection with evidence that the locator discovered gold bearing quartz, and made a monument at the place of discovery, upon which he posted his notice of claim, shows prima facie ownership of such claim.—Bramlett v. Flick, 23 Mont. 95; 57 Pac. 869.

200. Where one mining claim encroaches upon another, it is not error to permit the engineer, who has made a plat thereof, to point out the exterior boundaries of the encroaching claim, as it tends to enlighten the jury as to the controversy.—Id.

201. Where a receiver's receipt, under which plaintiff is seeking to establish an adverse claim, is shown to have been cancelled, evidence of defendant's adverse location and publication of notice are admissible in evidence.—Murray v. Polglase, 23 Mont. 401; 59 Pac. 439.

202. Where defendant in ejectment for a claim patented to plaintiff claims under a prior claim purchased from one who received a certificate of purchase therefor, he may show that plaintiff's patent was wrongfully procured, though his vendor did not resist the issuance thereof.—Murray v. Mining Co., 25 Mont. 14; 63 Pac. 719.

203. Where ejectment is brought to recover a mining claim which has been abandoned to plaintiff, defendant may show as a defense thereto that he had purchased a prior claim thereto, and was entitled to a patent therefor, but that his vendor afterwards wrongfully conveyed the same property to a third person, who relinquished the claim to the government, which enabled plaintiff to obtain title to the property.—Id.

204. In an action by the owners to restrain the removal of ore by defendants, who owned an adjoining claim, and had entered by underground workings on plaintiff's claim, the burden was on defendants to show that the vein they were mining in plaintiff's claim had its apex in their claim.—Maloney v. King, 25 Mont. 188; 64 Pac. 351.

205. Plaintiff located a claim on ground which a third person had located a year before. Subsequently defendant entered and filed a notice of location on the same claim, but owing to defects therein he afterwards filed an amended notice, and meanwhile plaintiff had resumed work. *Held*, that as there was a question as to whether the claim by the third person was a valid and subsisting claim when plaintiff entered, in which case plaintiff's location was void and defendant's title was good, the amended notice filed by defendant was admissible in evidence.—McKay v. McDougall, 25 Mont. 258; 64 Pac. 669.

206. Where plaintiff in an action to determine an adverse claim had located the claim in 1893, and defendant claimed to have located it in 1896, and the court found that defendant made no valid location of the claim, errors, if any, in ruling on the admissibility of evidence as to a location and working of the claim by a third party prior to plaintiff's location, were immaterial.—Reins v. King, 27 Mont. 511; 71 Pac. 763.

207. The presumption that the owner of the surface is also the owner of ores found beneath the surface is not overcome by the opinion of an engineer that, if a vein having its apex in ground owned by another continues to dip at the same angle as it dips where it is exposed in upper levels, it will reach the point where the owner of the surface is conducting operations.—Heinze v. Mining Co., 30 Mont. 484; 77 Pac. 421.

(f) Trial, judgment, and review, 208-219.

208. A party in possession of mining ground under a title subsequently determined in court to be invalid may, without fraud, relocate such ground and thereafter perfect such title in accordance with the laws of the United States.—Meyendorf v. Frohner, 3 Mont. 282.

209. What are or what are not permanent objects or monuemnts, as contemplated by U. S. R. S., § 2324, is properly matter of proof for a jury, and can not be decided by the court by simple reference to the declaratory statement.—Russell v. Chumasero, 4 Mont. 309; 1 Pac. 713.

210. Where a notice of location states that the claim "is situated in S mining district, S county, M territory, * * * on the northerly side, about one-fourth of a mile from P canon," and that the boundaries, the courses and distances of which are described, are marked by substantial posts or monuments of stone at each corner of the claim, and that the copy of the notice is posted at the discovery shaft, the sufficiency of the description, by reference to the natural objects or permanent monuments,

as required by the federal and territorial laws, is for the jury.—Flavin v. Mattingly, 8 Mont. 242; 19 Pac. 384.

211. U. S. R. S., § 2324, requires records of mining claims to contain a description of the claim located "by reference to some natural object or permanent monument as will identify the claim." *Held*, that the question whether a reference to a stake, in a particular case, is sufficient, is for the jury to determine, with proper instructions as to the meaning of the statute. —O'Donnell v. Glenn, 8 Mont. 248; 19 Pac. 302.

212. U. S. R. S., § 2324, prescribes what the record of a lode location shall contain when a record is required by local law. Comp. Stat., Mont., p. 1054, § 1477, requires that such record shall describe the claim in the manner provided by the laws of the United States. *Held*, that an instruction that the recorded notice of a lode prima facie establishes the facts and matters therein stated, and they can only be controverted by a preponderance of testimony, is erroneous, where the record offered in evidence contains statements not required by the United States statute; and judgment will be reversed for such error, though correct instructions on the subject were also given.—Flick v. Mining Co., 8 Mont. 298; 20 Pac. 807.

213. Whether the declaratory statement as to the location of a mining claim is sufficiently precise, taken with the marked boundaries on the ground, to enable a reasonably intelligent person to find the claim, is a question for the jury.—Gamer v. Glenn, 8 Mont. 371; 20 Pac. 654.

214. On an issue as to the doing of $100 worth of work on a mining claim, an instruction that "it depends entirely on whether or not the work or improvement was reasonably worth $100," is proper, and does not require the jury to find that the value of the claim was enhanced to the extent of $100 by the work done.—Mattingly v. Lewisohn, 13 Mont. 508; 35 Pac. 111.

215. Code Civ. Proc., § 1732, authorizing a stay of execution pending an appeal from a judgment directing the delivery of possession of real estate, applies in case of an appeal by defendant in ejectment involving an unpatented mining claim.—State v. District Court, 24 Mont. 330; 61 Pac. 882.

216. Plaintiff based his title to a mining claim on a location made in 1877, and there was evidence that a third person had located the ground in 1876; but he testified that he never did any work thereon except "to represent the gulch," and there was no other evidence that he ever did any work after his location, while there was some evidence that work had been done on the ground in 1869, but that none was done thereafter until plaintiff located the claim. The court instructed that, if such person located the claim at the time stated, plaintiff could acquire no title by his location, unless such person had abandoned the claim. *Held*, that this was misleading, since there might have been a forfeiture found by reason of such person's failure to represent the claim. —McKay v. McDougall, 25 Mont. 258; 64 Pac. 669.

217. Under Code Civ. Proc., § 1866, expenses paid for models, surveys and development work done in preparation for trial of an action to determine adverse claims to mining property, can not be taxed as costs.—M. O. P. Co. v. Mining Co., 27 Mont. 410; 71 Pac. 403.

218. U. S. R. S., § 2326, as amended by 21 Stat. 505, providing that, if title to the ground in controversy in an action to establish an adverse claim shall not be established by either party, the jury shall so find, does not require that such finding should be by a jury, where the suit to determine the adverse claim is in equity.—Mares v. Dillon, 30 Mont. 117; 75 Pac. 963.

219. Disbursements for filing an adverse claim in the land office for surveying, the making of a plat, and for an abstract of title for use in the land office, were not taxable as costs under Code Civ. Proc., § 1866, authorizing taxation of disbursements for matters to be used in the trial of the cause.—Mares v. Dillon, 30 Mont. 144; 75 Pac. 969.

C. PATENTS, 220-256.

1. In General, 220-222.
2. Adverse Claims, 223-230.
3. Cancellation of Receipts, 231.
4. Validity, 232-236.
5. Construction and Operation, 237-254.
6. Cancellation and Annulment, 255-256.

1. In general, 220-222.

220. The owner of a placer claim not being required by any law to designate in his application for a patent the particular use or character of his claim, the fact that he designated it in his application as a "placer mining or stone quarry claim," does not limit him to the stone quarry found within the claim, but he is entitled to all mineral deposits found therein.—Freezer v. Sweeney, 8 Mont. 508; 21 Pac. 20

221. In order to entitle a locator of a mining claim to a patent, it is not necessary that there be a record that one to whom he had sold an interest has lost title by his failure to contribute his share of work and expenses to represent the claim for certain years, and that the locator advertised the vendee out by publication, as provided by U. S. R. S., § 2324.—Riste v. Morton, 20 Mont. 139; 49 Pac. 656.

222. All but one of the co-owners of a mining claim applied for a patent, presenting to the land office where the entry was made abstracts of title showing their interest, and also that of their co-owner. On appeal to the department at Washington patent was obtained; no mention being made therein of the co-party, who had meanwhile parted with all his interest to one of the other parties to the patent. *Held*, that fraud for not including him in the application at the time of the original entry, and irregularity for lack of proof of his transfer of interest at the time of the final application, were alike harmless to him hereafter.—Wetzstein v. Largey, 27 Mont. 212; 70 Pac. 717.

2. Adverse claims, 223-230.

223. The prior patentee of a lode claim need not, in order to preserve his title, file a protest or adverse claim to the application of another for the property embraced in his patent. (See 127 U. S. 348.)—Mantle v. Noyes, 5 Mont. 274; 5 Pac. 856.

224. An adverse claim can not be maintained unless filed within the period of publication prescribed by law. (See 132 U. S. 260.)—Raunheim v. Dahl, 6 Mont. 167; 9 Pac. 892.

225. Claimants claiming title, under a townsite patent, to the surface ground of a mining claim over which the townsite is extended, are not relieved by such townsite patent from setting up their adverse claim on notice of application for a patent to the mining claim, and their failure to sue the other claimant before such patent is issued, bars them from doing so thereafter.—Smoke House Lode Cases, 6 Mont. 397; 12 Pac. 858.

226. U. S. R. S., § 2326, relating to min-

eral lands, provides that where an adverse claim is filed it shall show the nature and extent of such claim, and all proceedings shall be stayed until the controversy shall have been settled by a court of competent jurisdiction; and the adverse claimant must, within 30 days after filing his claim, commence proceedings to determine the question of possession. Rule 86 of the general land office requires that, in support of an adverse claim, a "plat must be made from an actual survey by a United States deputy surveyor, who will officially certify thereon to its correctness," etc. *Held*, that the rule is sufficiently complied with to give the court jurisdiction where the complaint and accompanying plats and affidavits show the location of plaintiff's prior claim; that defendant's claim, as described in his application for a patent, is wholly within its boundaries; and that because of the climate and great depth of snow in the vicinity, an actual survey of the claim is impossible between December 1 and July, which would be long after the expiration of the 30 days in which it should be filed.—Hoffman v. Beecher, 12 Mont. 489; 31 Pac. 92.

227. Plaintiff, by a void deed, conveyed an undivided interest in a mining claim to its cotenants, who applied for and obtained a patent. In a suit against them and their grantee to quiet title it was not pleaded or shown that plaintiff was an owner or claimant when the patent was applied for. *Held*, that plaintiff was not estopped, under U. S. R. S., § 2326, because it did not file an adverse claim to the application.—Butte Hardware Co. v. Cobban, 13 Mont. 351; 34 Pac. 24.

228. U. S. R. S., § 2332, providing that evidence of the possession and working of a mining claim for a period equal to the statute of limitations of the state shall establish a right to a patent, in the absence of any adverse claim, merely authorizes a patent to issue to an applicant who has held for such period, provided no one files an adverse claim in the land office; and does not give one a right to the claim merely because he has worked it for the statutory time without adverse claim being made.—McCowan v. Maclay, 16 Mont. 234; 40 Pac. 602.

229. U. S. R. S., § 2326, an Act Cong., Mar. 3, 1881, amendatory thereof, allow 60 days from the filing of an application for a patent to a mining claim for the filing of adverse claims, and require suits to establish such adverse claims to be brought within 30 days thereafter. Code Civ. Proc., § 1322, provides that it is sufficient to confer jurisdiction upon the court, in an action to establish an adverse claim for patent to a mining claim, if it appears from the pleadings that the application for patent has been made, and the adverse claim filed and allowed in the proper land office. *Held*, that one who has not filed his adverse claim under the statute can not intervene in an action to determine adverse claims to a location, though he claims an interest in the premises adverse to both plaintiff and defendant.—Murray v. Polglase, 23 Mont. 401; 59 Pac. 439.

230. U. S. R. S., § 2332 declares that nothing in the chapter of the Revised Statutes relative to the locating, holding, or procuring of titles to mining claims and to adverse claims, etc., shall be deemed to impair any lien which may have attached in any way to any mining claim prior to the issuance of the patent. *Held*, that a judgment creditor having a lien on an unpatented mining claim was not obliged to adverse the claim of the locator under the United States statutes providing for the filing of adverse claims against one seeking a patent for a mining claim on the public domain.—Butte Hardware Co. v. Frank, 25 Mont. 344; 65 Pac. 1.

3. Cancellation of receipts, 231.

231. In an action to determine the right to proceed in the United States land office for patent on certain mineral land, plaintiff having offered in evidence the receiver's receipt for entry thereon, which by Comp. Stat., p. 202, § 542, is declared prima facie evidence of title to the land, defendant may give in evidence decisions of the land department, made on a protest against issuance of patent to plaintiff, cancelling the receipt for fraud in obtaining it. Such a decision can not be excluded on the ground that the reasons therefor therein contained are not admissible, and that a part of it can not be admitted alone.—Murray v. Polglase, 17 Mont. 455; 43 Pac. 505.

4. Validity, 232-236.

232. A patent to a mining claim takes effect as of the date of the location, and the rights of the patentee are not affected by a subsequent townsite patent based on a mere occupancy antedating the location of the mining claim, though the mining patent excepts such rights, as such exception is unauthorized.—Talbott v. King, 6 Mont. 76; 9 Pac. 434.

233. A valid location of a quartz lode mining claim on the public mineral lands is a grant from the government to the locator thereof, and carries with it the right, by a compliance with the law, of obtaining a full and complete title to all the lands included within the boundaries of the claim, which by the location are withdrawn from sale or pre-emption; and the patent, when issued, relates back to the location, and is not a distinct grant, but the consummation of a grant which had its inception in the location of the claim; and, therefore, the officers of the land department have no right to insert in a patent any exceptions diminishing or curtailing the rights acquired by the location—Smoke House Lode Cases, 6 Mont. 397; 12 Pac. 858.

234. There is no law authorizing the United States land office to exclude from a mining claim patent the right to surface ground; and a reservation in such a patent, excluding therefrom the right to all lots, blocks, streets, alleys, houses and municipal improvements on the surface of the claim, is necessarily void.—Id.

235. No exceptions can be introduced into mining patents, reserving the right to the surface ground; and such exceptions being void, will not be a limitation on the full rights of the patentee.—King v. Thomas, 6 Mont. 409; 12 Pac. 865.

236. A patent to ground, designated therein as a "placer claim," is valid as a mineral patent, though the application for patent designated the claim as a "placer mining or stone quarry claim."—Freezer v. Sweeney, 8 Mont. 508; 21 Pac. 20.

5. Construction and operation, 237-254.

237. A patent to a placer claim, issued under U. S. R. S., § 2333, passes no title to a previously located quartz or lode claim included within its boundaries; and whether or not the placer applicant knew of the existence of such lode or quartz claim is immaterial. (See Noyes v. Mantle, 127 U. S. 348.)—Mantle v. Noyes, 5 Mont. 274; 5 Pac. 856.

238. The action of the land department of the United States in issuing a patent for public lands, subject to sale by pre-emption or otherwise, when acting within the scope of its authority, is conclusive upon the legal title; but a patent for lands which have been previously sold by the government is void, and may be collaterally attacked in an action at law.—Id.

239. The patentee of a mining claim, claiming under a prior location, is entitled to the

exclusive possession and enjoyment of all the surface ground thereof.—Silver Bow B. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. 570.

240. A patent for a mining claim relates back to the time of the location, and is the consummation of the purchase then made.—Id.

241. A patent to a mining claim relates back to the location and takes effect as of the date of such location.—Talbott v. King, 6 Mont. 76; 9 Pac. 434.

242. A patent to a mining claim is conclusive proof of discovery and location according to law.—Id.

243. A claimant to a placer mining location is entitled to the possession of a quartz lode within its boundaries, if such lode was not known to exist at the time of the application for the patent.

Montana Copper Co. v. Dahl, 6 Mont. 131; 9 Pac. 894.
(See 132 U. S. 264.)
Raunheim v. Dahl, 6 Mont. 167; 9 Pac. 892.
(See 132 U. S. 260.)

244. The issuance of a patent to a quartz lode mining claim is conclusive, as to the title to the land within its limits, upon the court in an action at law.—Smoke House Lode Cases, 6 Mont. 397; 12 Pac. 858.

245. In ejectment by a claimant under a placer patent against a quartz lode claimant, defendant's evidence was that when application for the placer patent was made the lode claim was known to exist; that the patentees had exposed the vein in digging a ditch, and had located and named the vein, and afterwards sold it, and that it had been worked. Several witnesses for plaintiff testified that they had frequently been over the ground, and that they did not know of any vein thereon which would justify working as a quartz mine. One of the patentees of the placer claim, who was one of the locators of the lode claim, testified that no work was done on the latter claim because it was considered valueless; that the location was abandoned; and that the only indication of a quartz lead was that exposed by the ditch, and that it was not worth exploiting or developing. *Held*, that a finding that there was no lode which would be exempt from the placer patent under U. S. R. S., § 2333, would not be disturbed.—Brownfield v. Bier, 15 Mont. 403; 39 Pac. 461.

246. A known lode, to be excepted from a placer patent of the ground, must be of such value as to justify exploration; hence, in a controversy as to whether the lode was included in the placer patent, testimony that at the time of the application for the placer patent the land was more valuable for placer mining than for quartz lode mining is admissible to show that the quartz lode was not such as would be exempted from the grant of the placer patent.—Id.

247. A lode or vein, to come within U. S. R. S., § 2333, exempting it from the grant of a placer patent if its existence was known at the time of the application for such patent, must be of such extent as to render the land more valuable, and of such value as to justify exploitation and development.—Id.

248. Where the jury found, from conflicting evidence, that no veins or lodes existed on the lands in controversy at the time of application for placer patents, as claimed by defendants under the quartz location, the rights acquired by plaintiff under such patent will not be disturbed.—Butte & B. M. Co. v. Sloan, 16 Mont. 97; 40 Pac. 217.

249. The granting by the United States of a patent to a mining claim is conclusive of the sufficiency of the location notice.—Chambers v. Jones, 17 Mont. 156; 42 Pac. 758.

250. A "known" vein, within U. S. R. S., § 2333, excepting from the operation of a placer patent veins or lodes known to exist at the time of the application for the patent, is one which has been clearly ascertained at the date of the patent, and is of such extent and value as to justify exploration.—Casey v. Thieviege, 19 Mont. 341; 48 Pac. 394.

251. Evidence that at the date of an application for a placer patent, made after the property had been worked as a placer mine for several years, there were some surface indications of veins of mineral bearing rock, but that they had not been examined with a definite view to working them, and that no assays had been made, and testimony of a witness who had sunk on some of them that they "played out," and of another witness that there were no veins with clearly defined walls, negatives a claim that there were "known" veins, within U. S. R. S., § 2333, excluding such veins from the operation of a placer patent.—Id.

252. Where a quartz lode claim is located within a placer claim, which lies in a town or city or in a townsite, after an application for a patent to the placer claim has been made, there is a strong presumption in favor of the placer patent.—Id.

253. Where the area of a quartz claim as located was, except as to 2.98 acres thereof, embraced in a conflicting location, which was expressly excepted from the grant in the patent thereto, such patent was void in so far as it attempted to convey the lode on its strike independently of the granted surface of 2.98 acres, as the mining statutes contain no authority for the conveyance of the lodes or veins embraced in such claim independently of the surface ground connected with and containing or overlying them.—M. O. P. Co. v. Mining Co., 20 Mont. 336; 51 Pac. 159.

254. After patent has issued to the entryman, mere strangers will not be heard to question the validity of the proceedings by which the patent was obtained. In such cases the government only can contest its validity.—Power v. Sla, 24 Mont. 243; 61 Pac. 468.

c. Cancellation and annulment, 255-256.

255. Under U. S. R. S., § 2325, requiring a claimant for a mining patent to file a certificate of the surveyor general that $500 in labor or improvements have been expended on the land, the certificate is conclusive evidence of the fact, and in an action to annul a patent for want of such labor or improvements, it is error to strike out of the answer an averment that the surveyor general had decided that such requirements had been complied with.—United States v. King, 9 Mont. 75; 22 Pac. 498.

256. Where it appears in an action to annul a patent, that another has filed an adverse claim on the land, and that a quartz vein had been discovered thereon, and a claim filed, and there is a substantial conflict in the testimony as to whether the patentees discovered any mineral lead or vein, the evidence is not so clear and convincing that no such discovery was made as to authorize the cancellation of the patent.—Id.

II. TITLE, CONVEYANCES, AND CONTRACTS, 257-293.

A. Rights and Remedies of Owners, 257-271.
B. Conveyances in General, 272-284.
C. Leases, Licenses, and Contracts, 285-293.

A. RIGHTS AND REMEDIES OF OWNERS, 257-271.

257. By the statute law of this territory all claims on quartz lodes or mineral are made real estate, and it provides that they shall descend to their heirs and assigns; and such lodes are to be governed by the rules applicable to the descent and distribution of realty.—Carrhart v. Montana etc. Co., 1 Mont. 245.

258. In an action to recover the value of ore taken by defendants on the dip of a vein having its apex within plaintiff's location, defendants being entitled to allowance for the cost of mining, a charge that the value should be determined by the "market value" of the ore on the dump of the claim, deducting the cost of mining and hoisting, is not objectionable as not allowing for the expense of smelting and reducing the ore. The words "market value" indicate that smelting and reducing charges are to be allowed defendants. (See 171 U. S. 92.) —Fitzgerald v. Clark, 17 Mont. 100; 42 Pac. 273.

259. On a hearing to show cause why defendants should not be enjoined pendente lite from working a mine, plaintiff's evidence tended to show a valid location. There was evidence that the required annual labor, or notice in lieu thereof, was made for the years following the location. Defendants' evidence tended to show that the claim was not located as required by law, and that the annual labor had not been performed. *Held*, that it was not an abuse of discretion to grant the injunction.—Boyd v. Desrozier, 20 Mont. 444; 52 Pac. 53.

260. In determining whether defendants should be enjoined from working a mine pending a suit to establish title thereto, the question as to defendants' solvency is immaterial.—Id.

261. Plaintiff sued to establish her title to a mining claim, and defendants were enjoined from working it. There was evidence tending to show that defendants located a portion of the ground in controversy in May, 1894, and in August, 1897, posted a notice of location, and that plaintiff saw defendants working on the claim in 1894, and did not request them to stop. *Held*, a sufficient showing to entitle defendants, as a matter of right, to the privilege of perfecting their alleged location.—Id.

262. A charge that veins are permanently separated, and can not be followed as the same vein, when, in order to connect them, it is necessary to pass through a considerable distance of rock showing no elements of a vein, where there are neither minerals, walls nor seams, it is not erroneous, as being practically a charge that the jury must reach a certain conclusion as to the continuity of the vein.—Butte & B. M. Co. v. Lexington, 23 Mont. 177; 58 Pac. 111.

263. In a charge that, if no evidence of a vein appear for any considerable distance, the veins are not identical, the use of the word "considerable" is not objectionable as being indefinite.—Id.

264. Where the court, in a charge, has correctly defined a vein, and indicated that, in order that the vein may be followed extralaterally, it must be the identical vein throughout, it is not error to place stress on the physical continuity, and to neglect to charge as fully in regard to the other elements of identity, when no charge is requested.—Id.

265. Code Civ. Proc., § 494, providing that no action for the recovery of mining claims, lode claims excepted, or for the recovery or possession thereof, shall be maintained, unless it appears that the plaintiff or his assignees were seized or possesed of such mining claims within one year before the commencement of such action, is not applicable to real estate patented as placer ground, and hence adverse possession of such land for one year after the issuance of the patent is not sufficient to divest the owner of title.—Horst v. Shea, 23 Mont. 390; 59 Pac. 364.

266. Laws 1899, p. 134, authorizes a non-joining co-tenant of mining property to recover his share of the net profits of the mine, or his proportionate share of all ores on the dump, on payment or tender of the costs of mining the same in a miner-like manner. *Held*, that where defendant, a co-tenant, wrongfully worked a mine through a shaft from another mine, in which plaintiff had no interest and to which he had no right of access, plaintiff was entitled to an injunction pendente lite, restraining defendant from continuing to work such mine, though he failed to tender his proportionate share of the cost of mining the ore extracted therefrom, since such tender was excused by plaintiff's inability to ascertain what ores it was entitled to in order to estimate the amount of such tender.—Butte & B. C. M. Co. v. M. O. P. Co., 24 Mont. 125; 60 Pac. 1039.

267. A co-tenant not joining in the operation of the mine, and suing for damages for the removal of ore therefrom through another mine, owned by his tenant in common, to which plaintiff had no right of access, was entitled to an injunction pendente lite to restrain such removal, though defendant offered to account for ore extracted therefrom.—Id.

268. A complaint alleged that plaintiff had a docketed judgment against R, and that certain unpatented mining claims were conveyed by deed absolute from D to R, who on the same day gave a quitclaim deed to F, and that the property was sold to plaintiff at judgment sale. F was in possession of the property at the time the quitclaim deed was made. *Held*, that there being neither an allegation that R ever owned any of the property, nor that F ever got any property or title from him, and there being no implication of doubt as to the title from R, owing to his having given a quitclaim deed to one in possession, the complaint was sufficient to sustain a suit on the theory that the judgment sale of the land to plaintiff transferred to him title to the claims.—Butte Hardware Co. v. Frank, 25 Mont. 344; 65 Pac. 1.

269. In an action attacking a claim to mining property based on a lost deed of defendants' predecessor in title, evidence was introduced tending to show that the prior owner, from whom both parties claim, in fear of an adverse decision in former litigation, which occurred subsequent to the alleged deed, relocated the claim and redeeded to defendants' predecessor the same interest therein as defendants claimed under the lost deed. *Held*, that though the subsequent location was abandoned, the evidence was admissible, as showing the understanding of the former owner in regard to the claim of defendants' predecessor.—Wetzstein v. Largey, 27 Mont. 212; 70 Pac. 717.

270. In an action to secure title to an interest in a mining claim, evidence examined, and *held* to justify a finding that the former owner conveyed the interest to defendants' predecessor in title prior to the execution of the quitclaim deed from the same owner under which plaintiff claimed.—Id.

271. In an action for damages sustained by plaintiffs owing to the removal of ores from their mining location, plaintiffs having shown prima facie the amount taken, it was then incumbent on defendants to show that they took a less quantity than plaintiffs' proof tended to show.—Maloney v. King, 30 Mont. 158; 76 Pac. 4.

B. CONVEYANCES IN GENERAL, 272-284.

272. In an action to rescind a conveyance of an interest in a mine on the ground of inadequacy of consideration, and fraud, in which

it was alleged that defendant was assisted by his brother-in-law, L, the answer admitted that defendant, on information sent him by L that he could purchase the property, went to the place where plaintiff was, and procured L to bring him and plaintiff together. There was evidence that on the day the deed was executed L found plaintiff drinking in a saloon, and invited him to his house "to see the folks;" that L seemed surprised to find defendant there; that defendant, on learning of an arrangement between plaintiff and L to go prospecting, desired to accompany them; that defendant and L then retired to another room together; that on their return L mentioned the mine in question, stating that he had bought a one-fourth interest therein from plaintiff, whereupon defendant offered $1,000 for the interest of each; that L accepted the offer, and upon his advice plaintiff did the same. *Held*, that these facts showed a conspiracy, and formed a proper predicate for the introduction of evidence that two days previous L had entered into a partnership with plaintiff to prospect for mines, and had induced him to drink freely, and while drunk had procured from him a one-fourth interest in the mine.—Maloy v. Berkin, 11 Mont. 138; 27 Pac. 442.

273. In an action to rescind a conveyance of an interest in a mine, on the ground of inadequacy of consideration, and fraud, plaintiff testified that he had not been in the locality of the mine for 18 months, and knew nothing of its development. Defendant testified that the mine "was in everybody's mouth;" that he, "like a good many others, was excited about the property;" that many were hunting for plaintiff, and that a man offered him $300 if he could find plaintiff; that plaintiff had been advertised for; and that he (defendant) had heard it rumored that a certain person (of whom he borrowed the purchase money) had sold an eighth interest for $4,000 or $5,000. *Held*, sufficient to support a finding that a purchase at this time by defendant of a one-fourth interest in the mine for $1,020 was made with knowledge of its real value, and that defendant had reason to believe plaintiff was ignorant thereof.—Id.

274. In an action to rescind a conveyance of an interest in a mine, on the ground of inadequacy of consideration, and fraud, evidence that the mine was developed, and had produced valuable ores, and that one-eighth thereof had been sold for $5,300, a one-fourth interest for $10,000, and contracts to pay proportionate sums for other interests were made, is sufficient to support a finding that the mine was worth $40,000.—Id.

275. Where a person has entered into a written agreement that he will convey to another a half interest in certain mining claims in consideration of the performance of certain conditions, he can not, after the conditions have been performed, deny the existence of the claims or the validity of his title to them.—Largey v. Bartlett, 18 Mont. 265; 44 Pac. 962.

276. A bond for a title to a part of a valid mining claim executed before patent has issued, to settle a controversy between the owner of the claim and an adjoining owner, is not against public policy.—Montana M. Co. v. Milling Co., 20 Mont. 394; 51 Pac. 824.

277. The record title to a mine held by the occupants of the surface was of undivided interests, without reference to any claim for separate and distinct surface right, and one of such owners conveyed an undivided interest to M by deed recorded in 1880. M conveyed to H by deed recorded in 1882. H conveyed to D by deed recorded in 1889. In 1885 the same owner conveyed another undivided interest to N by a deed purporting also to convey a distinct surface right thereon. *Held*, that the record deeds to M and H were sufficient to protect D and his grantees from a claim that they had notice of the claim to a distinct portion of the surface.—Mullins v. Hardware Co., 25 Mont. 525; 65 Pac. 1004.

278. The co-tenancy of the lot by N, as his grantor's lessee, for a year and a half before his purchase, and his continued occupancy, was not notice of the separate claim to surface rights.—Id.

279. Even if M and H were chargeable with notice of N's claim, the title of D and his grantees was superior.—Id.

280. Where at the time of the execution of a deed to mining property, the grantee knew that another was in possession of the property and claiming under an adverse, unrecorded deed, the grantee was not an innocent purchaser.—Wetzstein v. Largey, 27 Mont. 212; 70 Pac. 717.

281. A deed to a patented lode mining claim, or a definite portion thereof, embracing an apex or apices as such, in the absence of words of express reservation, will be presumed to convey whatever substantial property rights are attached to that species of property; and, since extralateral rights are not a mere incident or appurtenance, but a substantial part of such property itself, the grantee in such deed is vested with such rights upon vein or veins, extralaterally, as belong to the apex or apices embraced within the boundaries of the conveyed property.—M. O. P. Co. v. Mining Co., 27 Mont. 410; 71 Pac. 403.

282. Where a portion of a patented lode mining claim is conveyed by metes and bounds, and the endlines of the conveyed portion are not parallel with the endlines of the claim as patented, such extralateral rights, and such only, are conveyed as appertain to the portion of the apex embraced within the boundaries of the conveyed portion, bounded by planes parallel with the endlines of the claim as patented.—Id.

283. Where plaintiffs gave an option to purchase their mining property by the payment of the price in installments at certain dates, time being of the essence, they were not required, on declaring a forfeiture for failure to pay the price as required, to return an installment paid.—Merk v. Mining Co., 31 Mont. 298; 78 Pac. 519.

284. Time is of the essence of an option to purchase mining property.—Id.

C. LEASES, LICENSES, AND CONTRACTS, 285-293.

285. A waiver by a lessor of a mining claim of one stipulation in the lease is not a waiver of other independent stipulations.—Murray v. Heinze, 17 Mont. 353; 42 Pac. 1057; 43 Pac. 714.

286. A mining lease provided that there should be no ores stoped, except at the 300-foot level. Testimony of those familiar with technical mining terms showed that everything below the 200-foot level and above the 300-foot level is called the "300-foot level." *Held*, that stoping ore from the bottom of a 60-foot winze sunk from the 200-foot level was not a violation of the lease.—Cambers v. Lowry, 21 Mont. 478; 54 Pac. 816.

287. Comp. Stat., p. 1058, § 1497, authorizing a mine owner to petition for a right to construct a ditch over another's claim if the right "shall not have been acquired by an agreement," requires the mine owner to make an unsuccessful attempt to come to an agreement before filing his petition.—Glass v. Basin M. & C. Co., 22 Mont. 151; 55 Pac. 1047.

288. A petition by a mine owner, under

Compiled Statutes, for a right to construct a ditch over another's claim, does not show that he attempted to agree with him and failed, by alleging that there never was an agreement, and that plaintiff offered to do a certain act to allay defendant's apprehensions of damage to him in case the ditch was constructed.—Id.

289. Where plaintiff purchased ore of one who obtained it of the lessees of a mine, his title was not affected by a forfeiture of the lease after the ore had been mined, in the absence of evidence that such forfeiture carried with it the right to ore previously mined.—Yank v. Bordeaux, 23 Mont. 205; 58 Pac. 42.

290. A contract leasing and giving an option to purchase mining property provided for the payment of royalties and the price in installments if the option should be exercised, and declared that, if the lessee should not perform all the conditions, the agreement should be "void ab initio." An extension of time for the payment of installments was given, the supplemental agreement granting it providing that, if the lessee should fail to comply with the contract as modified, such failure should cause a forfeiture. *Held*, that this modified the provision of the original contract that failure to perform should render it void ab initio.—Merk v. Mining Co., 31 Mont. 298; 78 Pac. 519.

291. Where a lease of mining property for royalties gave the lessee an option to purchase by paying in installments, and the time for payment of some installments was extended by an agreement which provided that the extension applied only to the payments for purchase, and did not affect the original contract in any other respect, the lease was not extended.—Id.

292. A verbal agreement by which defendants were authorized to enter into a mining claim and extract ore therefrom during plaintiff's will and pleasure, and with the understanding that the privilege should terminate whenever plaintiff might desire, created in defendants merely a license revocable at plaintiff's pleasure, and gave defendants no interest or right in the realty, but merely a property in the ore which they actually took from the mine.—Clark v. Wall, 32 Mont. 219; 79 Pac. 1052.

293. Where a license to extract ores from a mining claim was revoked, and the licensees, who were insolvent and unable to respond in damages, nevertheless refused to surrender possession of the claim, and continued and threatened to continue the mining of the ore, thereby destroying the substance of the licensor's estate in the claim, the latter was entitled to an injunction restraining the further continuance by the licensees of their wrongful acts.—Id.

III. OPERATION OF MINES AND QUARRIES, 294-327.

A. MINING PARTNERSHIPS, COMPANIES, AND TENANCIES IN COMMON, 294-306.

B. RIGHTS AND LIABILITIES INCIDENT TO WORKING, 307-327.

A. MINING PARTNERSHIPS, COMPANIES, AND TENANCIES IN COMMON, 294-306.

294. Each member of a mining partnership may bind the other members for what is essential and necessary in their undertaking, unless there is an express agreement to the contrary, of which the party contracting with the members of the firm had notice.—Nolan v. Lovelock, 1 Mont. 224.

295. Mining prospecting partnerships are not governed by the technical rules of law relating to commercial partnerships.—Boucher v. Mulverhill, 1 Mont. 306.

296. A, B and C entered into a verbal contract of copartnership to prospect for, locate, record, pre-empt, develop and mine quartz lodes, and each was to have the same interest in the property. The S lode was discovered by the parties, but was recorded in the name of B and C. Afterward all the parties worked upon and developed the property. After the lode had been recorded D located and pre-empted a part of the S lode under the name of the B lode, but the conflict of title was settled by a conveyance by D to B and C of 1350 feet of the B lode, which had been included in the S lode. B and C refused to give A any interest in the lode, or to account for the proceeds thereof. *Held*, that the conveyance from D to B and C did not impair the rights of A.—Hirbour v. Reeding, 3 Mont. 15.

297. The verbal conveyance of an interest in a mining claim by a party who retains the balance, the purchaser agreeing to pay the price therefore out of the profits of the mine, the working together of the parties interested in developing the mine, a time book being kept in which were entered the wages accruing to each party, and the payment of sums of money by the purchaser in accordance with the contract, are facts sufficient to make out a mining partnership.—Southmayd v. Southmayd, 4 Mont. 100; 5 Pac. 318.

298. In an action by former owners of mining property to recover part of a sum of money paid a co-owner as additional consideration for the sale of the property, the complaint alleged that plaintiffs and defendant had formed a mining partnership, the expenses, profits, etc., to be shared in proportion to their respective interests; but there was no allegation that there was a partnership for the purpose of selling the property. It appeared that before they agreed to sell the property a settlement of their affairs had been made, and there was no contract for further mining. *Held*, that plaintiffs could not recover, they and defendants being merely tenants in common of the mining property.—Harris v. Lloyd, 11 Mont. 390; 28 Pac. 736.

299. In the absence of a special contract, there is no relation of trust between tenants in common of mining property, who are partners only for the purpose of developing the same, which prevents one from receiving a higher sum for his interest than is paid to his co-owners.—Id.

300. To constitute a mining partnership, under the provisions of Civ. Code, §§ 3350-3359, two or more persons must not only own or acquire a mining claim for the purpose of working it, but must actually engage in working the the same; and the fact that one part owner of a claim is charged by another with wrongfully extracting ore from a portion of a vein, the apex of which is alleged to be within the claim, does not create the relationship of mining partners between the parties.—Anaconda C. M. Co. v. Mining Co., 17 Mont. 519; 43 Pac. 924.

301. In an action on a note against the signer and others alleged to be his partners, in which defendants claimed that the partnership, if any, was a mining partnership, and introduced evidence to that effect, it was error to charge that where several persons associate themselves together, and agree to contribute funds for, and to bear losses and share profits of, the business, "such an association constitutes a general partnership," whether or not the business is mining, since such elements are found also in a mining partnership.—Congdon v. Olds, 18 Mont. 487; 46 Pac. 261.

302. Comp. Stat., p. 741, §§ 492, 494, providing that the officers of a mining corporation shall have no power "to sell * * * or other-

wise dispose of" the whole or part of its mining grounds, mills, and plant, without such transfer being first approved by the holders of two-thirds of the stock, at a meeting at which at least three-fourths of the stock is represented, and that, if such sale be of the entire property of the corporation, the corporation shall be dissolved, is merely a limitation of the common law powers of directors and majority stockholders of corporations, and does not authorize two-thirds of the stockholders of a prosperous corporation to sell all of its property against the protest of any other stockholder.—Forrester v. Mining Co., 21 Mont. 544; 55 Pac. 229, 353.

303. Conceding that said provisions enable a prosperous corporation to sell all its property without the unanimous consent of the stockholders, they do not authorize either a disposal thereof without a pecuniary consideration, or an exchange.—Id.

304. A transfer of all the property of a corporation to a foreign corporation organized by the directors of the former to acquire its property, in consideration of the latter assuming the liabilities of the former, and agreeing to deliver to it its entire capital stock, stockholders of the former to exchange their stock for shares in the new corporation, or in lieu thereof to receive a fixed sum per share for surrendering them, is neither a sale nor an exchange, within said provisions, conceding a sale or exchange to be authorized thereby.—Id.

305. The lessees of a mine agreed with plaintiff's assignor to operate the mine, in consideration of plaintiff's assignor furnishing all necessary supplies, the net proceeds of the ore, after smelting, to be equally divided between the lessees and plaintiff's assignor. *Held*, that in determining the net proceeds only the cost of smelting and not the cost of mining, hoisting and handling the ore, should be deducted from the gross proceeds.—Yank v. Bordeaux, 23 Mont. 205; 58 Pac. 42.

306. Under Civ. Code §§ 1012, 1013, a proposition by the president of a mining corporation, that on deposit of a specified sum as the purchase price the corporation will at once proceed to obtain the requisite consent of its stockholders for selling, and will then sell and convey a specified portion of its mining claim, and the acceptance of such proposition and deposit of the money, do not give the proposed purchaser an equitable title to the mine, or right to extract ore therefrom.—Anaconda C. M. Co. v. Heinze, 27 Mont. 161; 69 Pac. 909.

B. RIGHTS AND LIABILITIES INCIDENT TO WORKING, 307-327.

1. LIENS, 307-318.
2. LIABILITIES FOR INJURIES, 319-327.

1. Liens, 307-318.

307. Under a contract to perform labor by plaintiff for defendant upon defendant's quartz lode and mill, the time during which the labor was to be performed was not stated. Plaintiff worked under it 21 months. Sec. 6 of the act to secure liens to mechanics for their labor, makes it the duty of a person wishing to avail himself of the act to file with the county recorder within 60 days after said labor shall have been performed an account of his demand. *Held*, that plaintiff was not required to file said account within 60 days after the end of the first year to secure a lien for the sum due from defendant under the contract. (See 4 Otto 545.)—Alvord v. Hendrie, 2 Mont. 115.

308. Plaintiff contracted with defendant to perform labor at the rate of $2,500 per annum, and work one-half of his time upon defendant's quartz lode and the other half upon defendant's mill, in which the quartz taken from the lode was to be worked. *Held*, that plaintiff could secure payment for the labor by filing and enforcing in the same action one lien upon the lode or mill, or two separate liens upon said property.—Id.

309. The mechanics' lien law does not give a lien for the salary of an agent of a mining company.—Smallhouse v. Mining Co., 2 Mont. 443.

310. Under Laws 1887, p. 71, giving a lien for labor on a mine for only 45 days after such labor was performed, a complaint to enforce such a lien, which shows that the account for such labor was not filed with the county clerk as required by law until 46 days after the labor had ceased, is demurrable.—Alesina v. Stock, 8 Mont. 416; 20 Pac. 642.

311. In an action to enforce a lien for labor against a mine, a contract between the owner of the mine and a third person, which provides that the latter is to do certain development, the nature of which is not specifically set forth, using the owner's machinery and timber, and may then mine so much of the ore as he may desire, in a designated manner, and to receive as full compensation for such development a certain percentage of the net returns of the ore, and which also provides that the failure to keep said mine in active operation for a space of five days in any one month shall operate as an abandonment of the contract at the option of the owner, and that all liabilities incurred in any one month shall be discharged before the 15th of the ensuing month, the contract being limited to a year, is a lease, and being such, no lien is created against the mine in favor of one who labors for the lessee, as under the provisions of Laws 1887, p. 71, the interests of owners in leased premises can not be charged with liens for labor performed for the benefit of lessees.—Pelton v. Mining Co., 11 Mont. 281; 28 Pac. 310.

312. A statement showing the performance of work on a mining claim, at a certain rate, for so many days, between certain dates, and amounting in all to a fixed sum, no part of which it is stated has ben paid, is sufficient for a mechanic's lien, under Comp. Stat., p. 1029, § 1371, declaring merely that the account shall be a "just and true" one after deducting all credits, and that no error or mistake shall affect the validity of the lien, without a showing also as to the items or nature of the work.—Smith v. Sherman, 12 Mont. 524; 31 Pac. 72.

313. The act of the first legislative assembly restricting a mechanic's lien to one acre of the land on which any building, structure or improvement was situated, if outside of any town, did not apply to work done on a mining claim, but Comp. Stat., p. 1029, § 1370, which alone supplied the omission as to such claim; and without mention of any such restriction, alone applies; and the description, therefore, of the property required by § 1371 does not demand a designation of the boundaries, so as to ascertain the extent included in the lien, if the property "may be identified" merely by name.—Id.

314. The owner of a mine granted K possession thereof for a limited period, with privilege to purchase and to mine ores, but providing certain conditions for conducting the work, for which K should pay. The owner was to receive a certain per cent of the ore extracted, which should be applied to the purchase, if that option were exercised; otherwise to be retained by him. *Held*, that persons performing labor or furnishing material for K have no lien upon said mine, under Laws 1887, p. 71, providing "that the lien given by § 820 of this chapter shall extend to the lot or land upon which any such building, improvement or structure is situated. * * * if the land belongs

to the person who caused said building to be constructed, altered or repaired," and "every person, * * * not tenants or lessees, * * * shall be deemed the owners or proprietors thereof for the purposes of this act."—Block v. Murray, 12 Mont. 545; 31 Pac. 550.

315. Where the lessees of a mine, which the lease provides should be worked continuously, or the lease be forfeited, assigned an undivided interest in the lease to O, on condition that he comply with the terms of the lease, and afterwards assigned their remaining undivided interest to B, O doing all the work on the premises, is entitled to a lien on the interest of B for his share of the work and expenditures necessary to preserve the lease.—Beck v. O'Connor, 21 Mont. 109; 53 Pac. 94.

316. A written agreement for the purchase of certain machinery at a certain price, and also all castings required, in addition, at a certain figure, had reference only to the castings required for the machinery mentioned, and no mechanic's lien based on such an agreemnt could be enforced for other purposes.—Holter v. Mining Co., 24 Mont. 184; 61 Pac. 3.

317. Where plaintiff sold mining supplies to defendant from time to time, and monthly bills were rendered therefor, and interest charged thereon, with the understanding that defendant was to be carried till he could make payment by shipping ore, such purchase did not constitute a continuing running account, but each was made under a separate contract, payment for which was due at the end of the month, from which time the 90 days required by Code Civ. Proc., § 2131, for filing a statement of lien began to run.—Id.

318. Illuminating oil, mica grease, lubricating oil, and gasoline for fuel used in a mining plant did not enhance the value nor become a part of the machinery, and hence was not lienable, within Code Civ. Proc., § 2130, providing that every person furnishing material for any machinery, fixture or building shall have a lien therefor.—Id.

2. Liabilities for injuries, 319-327.

319. The first locators of mining ground have no right, by custom or otherwise, to allow tailings to run free in the gulch and render valueless the mining claims of subsequent locators below them.—Lincoln v. Rodgers, 1 Mont. 217.

320. Miners are entitled to the free use of the channel of a creek, so that the water will flow from their ground, but they have no right to fill the channel with tailings that will flow down upon the claim of other miners.—Nelson v. O'Neal, 1 Mont. 284.

321. It is not an abuse of discretion for a court to refuse to enjoin parties from building a dam upon their mining ground, to prevent tailings from injuring their property.—Id.

322. In placer mining the operator has no right to deposit tailings, etc., in a running stream to such an extent as to cause his neighbor's land to be flooded with them, and thereby to substantially impair its usefulness; and if he does so he is liable in damages, regardless of the question of his negligence, or of the question whether his mine can be operated successfully without such result, or of the question of priority of appropriation of the waters of the stream.—Fitzpatrick v. Montgomery, 20 Mont. 181; 50 Pac. 416.

323. Under Code Civ. Proc., § 592, providing that, if any person shall assume exclusive ownership over any property held by tenants in common, the party aggrieved shall have his action for his injury as though such tenancy in common did not exist, the owners of an undivided interest in a lode claim may enjoin the owner of the other half and another defendant from constructing a permanent tramway over the surface of the claim, to be used by them exclusively, in removing ore from other claims to their smelter.—Connole v. Mining Co., 20 Mont. 523; 52 Pac. 263.

324. The granting of an injunction pendente lite restraining defendants from constructing and maintaining a permanent tramway over the surface of a lode claim to be used by them to remove ore from other claims to their smelter, to the exclusion of a co-tenant, is not an abuse of the court's discretion.—Id.

325. In an action involving the title to ore lying underneath plaintiff's lots, and through or near which defendant has constructed levels, which it uses to run cars carrying the ore and by means of which the ore might be removed, it is not an abuse of discretion to grant an injunction pendente lite restraining defendant from using its cars along the levels.—Id.

326. Where, in an action to restrain defendants from taking ore from beneath the surface of plaintiff's ground, defendants had introduced evidence that the apex of the vein was in their ground, and that it could be traced to the point where they were working, evidence by plaintiff tending to show that the vein was not continuous, was proper rebuttal.—Anaconda C. M. Co. v. Heinze, 27 Mont. 161; 69 Pac. 909.

327. In an action to restrain defendants, who were engaged in removing ores from beneath the surface of plaintiff's ground, the burden is on defendants to show that they are not trespassers, and that they have a right to follow the vein into plaintiff's territory; and in case of doubt the injunction should be granted.—Id.

MONEY LENT.

1. The mere fact that money alleged to have been loaned and advanced to defendant was paid to creditors of defendant, by his express direction, supports an allegation that such money was so loaned and advanced to defendant.—Clarkson v. Kennett, 17 Mont. 563; 44 Pac. 88.

2. In an action to recover for money alleged to have been loaned and advanced by plaintiff to defendant, but which defendant claimed was loaned and advanced to a copartnership of which he was manager, it was error to order a nonsuit where there was evidence tending to show that such money was loaned and advanced to defendant.—Id.

3. Where, in an action for money loaned, there was no evidence that plaintiff had any knowledge that defendant intended to loan the money to N, or that plaintiff had agreed to accept N's notes in payment of the loan to defendant, the notes executed by N, some of which were made payable to defendant, and some to plaintiff by direction of defendant's trustee, without authority from plaintiff, were admissible.—Tague v. John Caplice Co., 28 Mont. 51; 72 Pac. 297.

MONEY PAID.

1. In an action against a mining corporation to recover money alleged to have been advanced by plaintiff in payment of services of certain employees of defendant, testimony of plaintiff that he turned over certain concentrates to the secretary of defendant, and that he advanced the money with the understanding that he should be reimbursed therefor from the proceeds of the concentrates, conclusively limited his recovery to the amount realized from the sale of the concentrates.—Farrell v. Mining Co., 32 Mont. 416; 80 Pac. 1027.

2. Plaintiff was not entitled to recover in the

absence of evidence showing that the concentrates were sold and a sum sufficient to reimburse him received therefor.—Id.

3. In an action against a mining corporation to recover money alleged to have been advanced by plaintiff in payment of services of certain employees of defendant, a written contract between plaintiff and defendant, providing that plaintiff should at no time during the continuance of the agreement incur any indebtedness in excess of the value of the result of the operations which should create any liability against the company, and limiting plaintiff's compensation to 20% of the net proceeds of the mining operations, was admissible as a part of the cross examination of plaintiff.—Farrell v. Mining Co., 32 Mont. 416; 80 Pac. 1027.

MONOPOLIES.

1. The grant by the city council of the exclusive right of selling to the city all the water required by it for sewerage and fire purposes for a period of 20 years, at a minimum rate fixed in the contract, is a monopoly, and this though the grant does not prevent other people from selling water to private citizens.—Davenport v. Kleinschmidt, 6 Mont. 502; 13 Pac. 249.

2. A city council has no authority to grant to any person a monopoly, even where express provision is found in the charter or other acts of the legislature.—Id.

3. Const., art. 15, treats restrictively of the rights and powers of corporations in general, absolutely prohibiting the combination and consolidation of certain ones, such as competing railroads or telegraph and telephone companies, and in reference to other combinations provides, in § 20, that no corporation shall combine or form a trust, or make a contract with any person, corporation, etc., "for the purpose of fixing the price, or regulating the production of any article of commerce, or of the product of the soil, for consumption by the people." Pen. Code, § 321, follows literally the language quoted, making some additions of the same general nature, and prescribes a penalty for its violation. *Held*, that to bring a combination within the provisions of Const., art. 15, § 20, and to subject it and its promoters to the penalty provided by Pen. Code, § 321, there must be shown a specific intent, or necessary tendency to accomplish the prohibited result or regulation of price or production.—MacGinnis v. Mining Co., 29 Mont. 428; 75 Pac. 89.

4. So far as the participation of a corporation and its officers in an unlawful combination to create a monopoly subjects its property and franchises to forfeiture, and thus imperils the property rights of a minority stockholder, he may, through the medium of equity, compel it and them to abandon such unlawful connection, and return to a performance of their charter obligations, to-wit, the accomplishment by lawful means of the purposes for which the corporation was formed.—Id.

5. Evidence *held* not to show an intent or necessary tendency of combining corporations to fix the price or regulate the production of copper, as such is prohibited by Const., art. 15, § 20, and Pen. Code, § 321.—Id.

6. In cases involving the provisions of Const., art. 15, and Pen. Code, § 321, the nature of the arrangement or combination is a question of fact to be determined by the court from the evidence before it or from the vice inherent in the contract of combination itself.—Id.

7. A private citizen can not, as such, and through the medium of a civil action, try the issue whether a combination formed by a foreign corporation through its officers and the stockholders of a domestic corporation is a monopoly in violation of the Penal Code, rendering such domestic corporation liable to punishment and forfeiture of its franchises and property, as such question must be determined by and on behalf of the state through the attorney general.—Id.

MORTGAGES.

I. Requisites and Validity, 1-8.
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III. Construction and Operation, 10-23.
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I. REQUISITES AND VALIDITY, 1-8.

1. Where a mortgage is defective because the mortgagee is described only by her initials instead of her full Christian name, on foreclosure such defect may be cured by a proper averment in pleading or proof on the trial.—Curtis v. Valiton,, 3 Mont. 153.

2. Defendant conveyed land to plaintiffs, and by contemporaneous agreement they stipulated to reconvey, on payment of a stated sum within one year. Two days thereafter they leased the land to him for one year, at a stated rental. The agreement to reconvey was signed by plaintiffs only. Defendant did not agree to pay the amount therein named. No loan was referred to. There was no evidence showing the value of the land, nor contradicting the presumption that the lease was executed at the time of its date. *Held*, that the transaction was not a mortgage. (See 149 U. S. 17.)—Gassert v. Bogk, 7 Mont. 585; 19 Pac. 281.

3. A power of sale in a mortgage is not prohibited by Comp. Stat., p. 161, § 371, declaring that "a mortgage of realty shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the land without foreclosure and sale," and is valid. (See 156 U. S. 470.)—First Nat'l Bank v. Mining Co., 8 Mont. 32; 19 Pac. 403.

4. The description of mortgaged premises as "16 feet of the north end of lots 1 and 2 in block 44" in a given town, county and state, is not so uncertain as to render the mortgage void.—Vaughn v. Schmalsle, 10 Mont. 186; 25 Pac. 102.

5. Under Comp. Stat., p. 139, § 307, declaring that a judgment shall become a lien on the

real property owned by the judgment debtor from the time it is docketed, and Comp. Stat., p. 661, § 260, providing that every conveyance of real estate not recorded shall be deemed void as against subsequent purchasers, in good faith, and for a valuable consideration, an unrecorded mortgage, declared by § 258 to be valid as between the parties without recording, has priority of an after-docketed judgment.—Id.

6. No conveyance absolute on its face can be a mortgage unless made to secure the payment of a debt or the performance of a duty.—Morrison v. Jones, 31 Mont. 154; 77 Pac. 507.

7. A lease and option to purchase was assigned to secure a debt, the assignee to collect and account for the rents. Later the assignor deeded to the assignee, for a consideration much larger than the original debt, all of her right and title to the property, the assignee agreeing to reassign if the owner should pay him the consideration expressed in the deed before exercise of the option, and to reassign thereafter on payment of a larger sum. *Held*, that the deed was not a mortgage, there being no debt secured.—Id.

8. Where a deed absolute on its face is given as security for a debt, and the grantee gives bond for a reconveyance on payment of the debt, the transaction is a mortgage, which the debtor is entitled, on payment of the debt, to have released by reconveyance.—Grogan v. Trading Co., 30 Mont. 229; 76 Pac. 211.

II. RECORDING, 9.

9. A mortgage is a conveyance within the meaning of Civ. Code, §§ 1640-1642, relative to the recording of conveyances.—Cornish v. Woolverton, 32 Mont. 456; 81 Pac. 4.

III. CONSTRUCTION AND OPERATION, 10-23.

10. If a mortgagee fails to take immediate possession of the property, or does not endeavor to do so, at the expiration of the period limited by the mortgage itself, he loses his lien thereon, as against a purchaser in good faith from the mortgagor in possession, after maturity, although the mortgage debt is good and valid for one year after it is recorded.—Travis v. McCormick, 1 Mont. 148.

11. A mortgagee of personal property, who makes no effort to obtain the posession thereof within a month after the maturity of his debt, does not use the diligence that is required by law.—Travis v. McCormick, 1 Mont. 347.

12. The doctrine of estoppel does not apply to prevent a mortgagee from purchasing the mortgaged premises or a portion thereof, when sold under the foreclosure of mechanics' liens, nor to prevent his taking possession of such premises under a writ of assistance when the time of redemption under such sale has expired, nor are the rights thus acquired lost or merged in his subsequent foreclosure of his mortgage.—Vantilburgh v. Black, 2 Mont. 371.

13. An application by a junior mortgagee to set aside a prior mortgage as void, and for a sale of the property and payment of his claim, is within the jurisdiction of equity.—Leopold v. Silverman, 7 Mont. 266; 16 Pac. 580.

14. Under Comp. Stat., p. 161, § 371, which declares that a mortgage of real property is not a conveyance which will enable the owner to take possession without foreclosure and sale, the instrument is not an interest in land, but security only, and subject to the doctrines of equity.—Holland v. Silver Bow, 15 Mont. 460; 39 Pac. 575.

15. Where a chattel mortgage is valid on its face, evidence that the mortgagor retained posession is material only as bearing on the issue of good faith.—Heilbronner v. Lloyd, 17 Mont. 299; 42 Pac. 853.

16. A chattel mortgage on a stock of merchandise which provides that the mortgagor may remain in possession, but prohibits him from disposing of the goods, is prima facie valid.—Id.

17. Retention of possession of chattels and their sale, for the purpose of applying the proceeds to the mortgage, do not make the mortgage void.—Id.

18. Evidence that the mortgagee of a stock of merchandise went to the mortgagor's store where the goods were, remaining but a short time, but did not notify the employees of the transaction, nor post any sign, is insufficient to show change of possession.—Id.

19. A mortgage on land was unrecorded. The mortgagor conveyed the land, and the grantee recorded the deed, and gave another mortgage, which was recorded, and assigned for a valuable consideration to a purchaser claiming to be without notice. *Held*, that a purchase made in good faith would be presumed, and the burden of proving notice would be on the holder of the unrecorded mortgage.—Hull v. Diehl, 21 Mont. 71; 52 Pac. 782.

20. Where the money was lent, and a deed to secure the same executed in blank and deposited in escrow, to be filled in with the name of mortgagor, and delivered to him on payment of the loan, it was admissible in evidence, as bearing on the question whether the transfer was a mortgage or an absolute sale.—Gregg v. Kommers, 22 Mont. 511; 57 Pac. 92.

21. Where a second mortgage of church property did not purport to be the deed of the corporation, but was executed by the president and secretary of the trustees individually, and duly recorded, it was not necessary to make the second mortgagees parties to an action to foreclose a prior mortgage on the church property, since the second mortgage was not constructive notice that it was on such church porperty.—Shackleton v. Church, 25 Mont. 421; 65 Pac. 428.

22. Civ. Code, § 1642, declares that the term "conveyance" embraces every instrument in writing by which any property is mortgaged, etc. *Held*, that while a mortgage is a conveyance, it is a conveyance of a mere chattel interest.—Miller v. Reukes, 31 Mont. 100; 77 Pac. 512.

23. Civ. Code, § 3810, declares that a mortgage is a contract by which specific property is hypothecated for the performance of an act without the necessity for a change of possession. *Held*, that a mortgage itself does not create or alienate an estate in real property, but is a mere security.—Id.

IV. RIGHTS AND LIABILITIES OF PARTIES, 24-33.

24. K mortgaged to F certain crops "now growing and standing" in a field, Aug. 12, 1871. On the following day the sheriff levied upon the property under a writ of attachment in favor of a creditor of K, and afterwards sold it under an execution. On Aug. 12, 1871, the grain had been cut and half of it had been threshed before the officer levied thereon. *Held*, that the mortgage does not include, as against third parties, the grain which had been cut or threshed.—Ford v. Sutherlin, 2 Mont. 440.

25. Although Rev. Stat., p. 111, § 359, provides that a "mortgage of realty shall not be deemed a conveyance, whatever its terms, so as to enable the mortgagee to recover possession of the realty without foreclosure and sale,"

yet when the mortgagor, after the maturity of the mortgage, gives the mortgagee permission to enter, the mortgagee may rightfully do so and hold possession until the debt is paid.—Fee v. Swingly, 6 Mont. 596; 13 Pac. 375.

26. Under Rev. Stat., p. 111, § 359, providing that a mortgage of realty shall not be deemed a conveyance, whatever its terms, so as to enable the mortgagee to recover possession without foreclosure and sale, a conveyance in trust to secure a mortgage giving the trustee full power to convey the property to the cestui que trust or mortgagee, upon default in payment of the debt, does not entitle the cestui que trust or mortgagee to the possession of the land without foreclosure and sale.—Id.

27. A mortgagor may be enjoined by the mortgagee from acts which will result in injury to the mortgaged premises.—Dutro v. Kennedy, 9 Mont. 101; 22 Pac. 763.

28. A mortgagee may maintain an action against the mortgagor for damages, where injury has resulted to the mortgaged premises by reason of the mortgagor's acts.—Id.

29. A complaint for damages for unlawfully withholding and detaining the personal property covered by a mortgage of real estate entitles plaintiff to damages for the use of the property of which he has been deprived only, and not to damages for the expense of replacing the fixtures, but such damages could be recovered under proper pleadings.—Id.

30. Where a note was secured by a second mortgage, which has become of no value because of foreclosure of the first mortgage and expiration of the time of redemption, the complaint in an action on such note need not refer to such mortgage or loss of security, the action not being to enforce such security under Code Civ. Proc., § 1290, which action must be in accord with the provisions of that chapter relating to mortgage foreclosures.—Brophy v. Downey, 26 Mont. 252; 67 Pac. 312.

31. Under Code Civ. Proc., § 1290, the holder of a note secured by a second mortgage is not required to foreclose during the period of redemption after the first mortgage has been foreclosed and the property sold thereunder, but he may wait till such period has expired and his lien is determined, and then sue on the note.—Id.

32. Where, in an action on a note, the court had admitted evidence that the note was secured by a mortgage, it was error to refuse to receive evidence that the mortgage was second to another, which had been foreclosed, that the property had been sold, and the time of redemption from such sale had expired.—Id.

33. Where, in an action to foreclose a first mortgage, the mortgagee in a second mortgage is made a defendant and defaults, such action does not defeat the right of his assignee of the note to recover thereon after the time of redemption of the premises from foreclosure has expired.—Id.

V. ASSIGNMENT OF MORTGAGE OR DEBT, 34-41.

34. It is not essential that the assignment of a mortgage should be under seal.—Rader v. Ervin, 1 Mont. 632.

35. An assignment of a mortgage without the assignment of the debt it was intended to secure is a nullity.—Id.

36. Where a co-tenant and co-mortgagor has conveyed his interest in the land expressly subjected to the mortgage, and the other co-tenant has been obliged, in protecting his interest, to pay and take an assignment of the note and mortgage, the latter's payment does not extinguish the mortgage, but he may foreclose it on the other's interest.—Lang v. Caldwell, 13 Mont. 458; 34 Pac. 957.

37. Where a note secured by mortgage is assigned by a mortgagee, and payment by the mortgagor, without knowledge of the assignment, is made to one whom he believes to be agent of the original mortgagee, before the mortgage is due, and without production of the note or mortgage by such agent, it is not binding on the assignee of the mortgage, where neither the original mortgagee nor the agent to whom payment is made is shown to be the agent of such assignee.—Dodge v. Birkenfeld, 20 Mont. 115; 49 Pac. 590.

38. An assignment of a recorded mortgage on land was made prior to the recording of a prior mortgage. The assignment was not recorded. *Held*, that the assignment was not an instrument to be recorded, under Comp. Stat., p. 656, § 237, and by which an interest in real estate is created, as defined by § 270; hence the subsequent recording of the prior mortgage did not affect the assignee's claim for protection as an innocent purchaser.—Hull v. Diehl, 21 Mont. 71; 52 Pac. 782.

39. An assignor of a duly recorded mortgage had notice of a prior unrecorded mortgage, but his assignee did not, and purchased in good faith, paying a valuable consideration. *Held*, that the assignor's interest did not affect the assignee, and that the assignee succeeded to all the protection afforded by the prior recorded mortgage.—Id.

40. The mere fact that a company acted as the agent of the owner of the mortgage in collecting interest was not sufficient to show authority to collect the principal and discharge the mortgage.—Cornish v. Woolverton, 32 Mont. 456; 81 Pac. 4.

41. The record of the assignment of a mortgage is notice to a purchaser from the mortgagor, under Civ. Code, §§ 1640, 3823, 3824, so that payments by him to the assignor are at his own risk, especially in the absence of any showing that when the payments were made the assignor was in possession of the note which the mortgage secured.—Id.

VI. TRANSFER OF PROPERTY MORTGAGED OR OF EQUITY OF REDEMPTION, 42-44.

42. A grantee of land expressly described as subject to a mortgage, does not assume the debt, so as to be liable to a personal judgment thereon.—Lang v. Caldwell, 13 Mont. 458; 34 Pac. 957.

43. A tenant in common, who has been obliged to take up a mortgage, and sues to enforce contribution thereon against his co-tenant's interest, can not, as part of the decree, be allowed attorney's fees stipulated in the mortgage in case of suit thereon for the benefit of the mortgagee, but not paid by plaintiff in taking up the mortgage.—Id.

44. Under Civ. Code, §§ 3752, 3817, the purchaser of mortgaged real estate does not thereby become liable for the indebtedness.—Miller v. Reukes, 31 Mont. 100; 77 Pac. 512.

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION, 45-52.

45. Where a complaint alleged that a deed was given as security for a debt with certain chattel mortgages, and bond given for reconveyance on payment of the debt, that the transaction was a mortgage, and that the debt had been paid, and asked that the mortgage be cancelled and satisfied by reconveyance of the property, a decree requiring a reconveyance was not a

departure from the theory of the complaint, as awarding specific performance of the bond, since the bond merely constituted a part of the transaction with the other instruments.—Grogan v. Trading Co., 30 Mont. 229; 76 Pac. 211.

46. The words "deed of release," as used in Civ. Code, § 3845, mean simply the release of the mortgaged property from the lien of the mortgage.—Swain v. McMillan, 30 Mont. 433; 76 Pac. 943.

47. A mortgage may be cancelled or released by the mortgagee at any time without consideration, and with or without the consent of the mortgagor.—Mueller v. Lohse, 31 Mont. 100; 77 Pac. 512.

48. Under the express provisions of Civ. Code, § 3845, a mortgage may be discharged by an entry in the margin of the record, signed by the mortgagee or his representatives, acknowledging satisfaction, in the presence of the county clerk or his deputy who shall subscribe the same as a witness.—Id.

49. A party is not entitled to a writ of attachment until he has made an affidavit stating the amount of his claim, and that payment has not been secured by any mortgage, lien or pledge, or, if originally secured, that the security has, without any act of the plaintiff or the person to whom it was given, become valueless. One who had a mortgage on lands securing his debt discharged the same of record, and subsequently sued at law on the note which was secured by the mortgage, attached the land which had been mortgaged, and purchased it at judicial sale, the land, before the discharge of the mortgage, having been conveyed by the mortgagor to a third person. *Held*, in a suit by such person to quiet title, that a finding that the mortgage was not a lien on the property at the time the suit to quiet title was commenced was warranted.—Id.

50. When a mortgage is released, a bona fide purchaser holds the premises free of the mortgage, whether the purchase was made prior or subsequent to the release.—Id.

51. Under Civ. Code, § 2170, one attacking the release of a mortgage, which was given to him and released by himself, assumed the burden of showing the existence of facts sufficient to warrant a court of equity in setting it aside.—Id.

52. Where, after the assignment of a mortgage had been recorded, a purchaser from the mortgagor paid the debt to the assignor, which executed a release, a subsequent purchaser from the person who paid the mortgage was charged with notice that the assignor had no power to execute the release, and hence was not a purchaser for value free from encumbrances.—Cornish v. Woolverton, 32 Mont. 456; 81 Pac. 4.

VIII. FORECLOSURE BY EXERCISE OF POWER OF SALE. 53-56.

53. Under a power of sale in a mortgage requiring "30 days notice * * * by publishing the same once a week for three weeks successively," it is sufficient if publication is begun, though not completed, 30 days before sale. (See 156 U. S. 470.)—First Nat'l Bank v. Mining Co., 8 Mont. 32; 19 Pac. 403.

54. Under Code Civ. Proc., § 2603, a trustee in a trust deed, given as security for the payment of a debt, and authorizing him to sell the property after default, may, after the death of the grantor, exercise the power of sale with reference to the administration of the grantor's estate.—Muth v. Goddard, 28 Mont. 237; 72 Pac. 621.

55. Where a trust deed, given as security for a debt, conveys to him the legal title to the property therein described, and authorizes him to sell the same after default, the death of the grantor does not affect the trustee's right to exercise the power of sale.—Id.

56. A trust deed, given as security for a debt, and containing a stipulation authorizing the trustee to sell the property after default, authorizes the trustee to exercise the power after the death of the grantor, it being a power coupled with an interest, and therefore not revoked by the grantor's death.—Id.

IX. FORECLOSURE BY ACTION, 56a-83.

A. Right to Foreclose, and Defenses, 56a-58.
B. Parties, 59.
C. Pleading and Evidence, 60-63.
D. Trial and Judgment, 64-69.
E. Sale, 70-75.
F. Deficiency and Personal Liability, 76-79.
G. Review, 80-81.
H. Fees and Costs, 82-83.

A. RIGHT TO FORECLOSE, AND DEFENSES, 56-58.

56a. When a mortgage is given to indemnify a party against the payment of several distinct notes, and he is compelled to pay but one of them, he can not foreclose his mortgage to satisfy the amount of all the notes.—Collier v. Ervin, 2 Mont. 335.

57. In a mortgage foreclosure suit a counterclaim founded upon a tort can not be set off against one founded on the mortgage, unless it arises out of the transaction set up in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action.—Collier v. Ervin, 3 Mont. 142.

58. A complaint on foreclosure of a mortgage alleged default in the payment of interest, and that the mortgage provided for foreclosure for principal and interest in case of such default. The answer alleged that plaintiff and defendants were partners when the note and mortgage were given, and that they were still partners, but that the business had entirely ceased; that the note and mortgage were given to raise funds to carry on the business; that the partnership agreement provided that each partner should contribute his labor, skill and services, and should defray expenses in proportion to his interest; that services which should have been rendered by plaintiff were rendered by defendants, and that advances were made by them, whereby plaintiff was indebted to the partnership and defendants in a certain sum; and that there had been no settlement or accounting of the partnership affairs. *Held*, that the answer alleged sufficient facts to entitle defendants to an accounting, the indebtedness alleged being a proper matter of defense.—Gassert v. Black, 11 Mont. 185; 27 Pac. 791.

B. PARTIES, 59.

59. In an action to foreclose a mortgage appellant intervened, claiming title to certain lots included in the mortgage, which he claimed were, prior to the mortgage, conveyed to him, and the deed recorded, and demanded that the mortgagor be compelled to file the plat called for in the deed, but which had not been filed. *Held*, that after the mortgagee had amended his complaint so as to exclude therefrom the land claimed by intervenor, the appellant no longer had an interest in the matter in litigation, and therefore his complaint in intervention was properly dismissed.—Murphy v. Cannon, 18 Mont. 348; 45 Pac. 216.

C. PLEADING AND EVIDENCE, 60-63.

60. The condition of a mortgage was that upon the payment by the mortgagors of $16,000 and interest, according to the tenor of a certain promissory note, and upon the payment by the mortgagors upon said $16,000 of the sum of $4,000, at certain times, the mortgage and note should be void. In the foreclosure suit the complaint alleged that the mortgage was given to secure the payment of $16,000, and that over $12,000 had been paid thereon. The mortgagors defaulted, and the only defendant to answer alleged that more than $23,000 had been paid on the mortgage, and contended that the note for $16,000 was a penalty to secure the payment of $4,000. *Held*, that the parties had interpreted the contract by their acts, and the note and mortgage were security for the payment of $16,000, and that this interpretation was binding on the defendant.—Largey v. Sedman, 3 Mont. 472.

61. The question whether a water ditch upon certain premises is appurtenant thereto can not be considered in an action for the foreclosure of a mortgage on the land, when the ditch is not mentioned in the mortgage, nor in any of the pleadings except the replication.—Bass v. Buker, 6 Mont. 442; 12 Pac. 922.

62. In an action to foreclose a mortgage, and for a deficiency judgment, an answer alleging that defendant purchased the property subject to the mortgage, and that a covenant to assume such mortgage was fraudulently inserted in the deed by his grantor, is sufficient, without tender of a deed back to his grantor.—Sweetzer v. Diehl, 14 Mont. 498; 37 Pac. 10.

63. Where a mortgage provided that, in case of default for 30 days in the payment of the notes or interest secured by it, the mortgagee could consider the whole principal due and payable, a complaint which alleged the nonpayment of one of the principal notes within the time prescribed would support a judgment for the full amount secured, though all accrued interest had been paid.—Caplice v. Cassidy, 25 Mont. 81; 63 Pac. 799.

D. TRIAL AND JUDGMENT, 64-69.

64. Under a statute providing that the judgment debtor or redemptioner may redeem by paying the purchaser the amount of his purchase, a decree in a mortgage foreclosure, which orders a sale of mortgaged premises to satisfy the aggregate amount of several mortgages on separate parcels of property made to secure the payment of distinct debts of different sums due at different times, and which does not preserve the rights of redemptioners, is void, as the decree should have been so drawn as to preserve the rights of redemptioners to each and every parcel of property included in the decree.—Rader v. Ervin, 1 Mont. 632.

65. In a foreclosure action, a decree which ordered a sale of the mortgaged premises to satisfy the aggregate amount of several mortgages on separate parcels of property, made to secure the payment of distinct debts of different sums, due at different times, and bearing different rates of interest, is erroneous, as it does not ascertain the amount secured by each or either of the mortgages.—Id.

66. Under the statute providing that the judgment debtor or redemptioner may redeem by paying the purchaser the amount of his purchase, a decree in a mortgage foreclosure which orders a sale of mortgaged premises to satisfy the aggregate amount of several mortgages on separate parcels of property made to secure the payment of distinct debts of different sums due at different times, and which does not preserve the rights of redemptioners, is void, as the decree should have been so drawn as to preserve the rights of redemptioners to each and every parcel of property included in the decree.—Id.

67. Where the foreclosure of several mortgages is sought, and embraced in a single action, the decree should find the amount due on each, the priority or order in which each is to be paid, and only such property as is embraced in a particular mortgage should be sold to satisfy the debt secured thereby.—Collier v. Ervin, 2 Mont. 335.

68. In a foreclosure suit the judge may submit a part of the issues to a jury and determine part of them himself.—Clark v. Nichols, 3 Mont. 372.

69. In a foreclosure suit, the mortgage, as set forth in the complaint, embraced property located in section 10. At the trial it was proved that the property of the mortgagor was located in sections 10, 11, 12, 13 and 14, and a judgment was rendered authorizing the sale of the property in all of such sections. *Held*, that a judgment authorizing the sale of any property not contained in section 10 was erroneous.—Largey v. Sedman, 3 Mont. 472.

E. SALE, 70-75.

70. The sale of property under execution to satisfy a judgment of foreclosure after a judgment creditor has released one-half of the property from the mortgage and received one-half of the judgment is fraudulent, and will be set aside.—Collier v. Field, 1 Mont. 612.

71. A trustee under a foreclosure sale of mortgaged property who receives the rents of the property which have been delivered to him by his debtor, and does not apply the same upon the judgments according to his agreement, and causes the property to be sold under an execution in excess of the judgment, after allowing the proper credits, and becomes the purchaser, is faithless in the performance of his trust, and the sale will be set aside upon the motion of the debtor. (See 14 Otto 142.)—Roush v. Fort, 2 Mont. 482.

72. In an action to foreclose a mortgage which has been destroyed, where no issue is raised as to the right of the mortgagee to sell fixtures which were attached to the real estate after the execution of the mortgage, and the decree is silent on that question, the right must be governed by the general rule that the mortgagee may sell such fixtures.—Dutro v. Kennedy, 9 Mont. 101; 22 Pac. 763.

73. An attorney at law representing the mortgagees at a sheriff's sale has no implied power to authorize the sheriff to accept credit bids. (See 150 U. S. 128.)—Maddox v. Rader, 9 Mont. 126; 22 Pac. 386.

74. In an action to set aside a sale on foreclosure, it appeared that the proceeding up to the sale was regular, and that the sale was made in the presence of plaintiff. Plaintiff alleged that while the sale was taking place it was asserted that the "sale was a mere formality," and that plaintiff and others were deceived thereby; that there was a rumor that plaintiff's title was defective, and that the property sold for an inadequate price. There was no allegation from whom the assertions emanated, nor of any attempt on the part of plaintiff to investigate or contradict them. Plaintiff also alleged that, prior to the expiration of the period for redemption, he asked the sheriff for a list of his land which had been sold, and was subject to redemption, and that the sheriff gave him a list which omitted the land in question; but it did not appear that plaintiff made any inquiries in regard to the omission. *Held*, that plaintiff failed to make a proper showing

for relief.—Russell v. Pew, 12 Mont. 509; 31 Pac. 75.

75. A sheriff to whom a chattel mortgage is delivered for the purpose of executing the power of sale therein is authorized to sell only for cash, and the mortgagee is not bound by a sale on credit under an arrangement made by his agent and the sheriff and bidder, without the knowledge, consent or subsequent ratification of such mortgagee.—Maddox v. Teague, 18 Mont. 512; 46 Pac. 535.

P. DEFICIENCY AND PERSONAL LIABILITY, 76-79.

76. In an equitable action to foreclose a mortgage, a court can not render a personal judgment against the creditors and decree a sale of the mortgaged premises to satisfy such judgment. (Modified in Creighton v. Hershfield, 2 Mont. 386.)—Creighton v. Hershfield, 1 Mont. 639.

77. The law requires a judgment for a deficiency on the sale of mortgaged premises to be docketed, to become a lien and notify third persons.—Creighton v. Hershfield, 2 Mont. 386.

78. A decree need not contain what the law requires to be done without it, and the act of the clerk in such cases is in no sense a judgment, nor is it final nor decisive.—Id.

79. Under Comp. Stat., p. 153, § 358, authorizing the court, in an action for foreclosure of a mortgage, to enter a deficiency judgment for the balance due against defendant liable for the debt, a deficiency judgment may be entered against a grantee in a deed of trust given to secure the debt, independent of any provision in the deed.—First Nat'l Bank v. Pardee, 16 Mont. 390; 41 Pac. 77.

Q. REVIEW, 80-81.

80. Where plaintiff recovers judgment in an action to foreclose a mortgage, and a deficiency judgment against the mortgagor, he failing to answer, he is an interested and necessary party to an appeal taken by other defendants, who claim liens on the mortgaged premises superior to the mortgage, and if notice of such appeal is not served on him, as required by Code Civ. Proc., § 1724, the appeal will be dismissed.—Power v. Murphy, 26 Mont. 387; 68 Pac. 411.

81. The fact that such mortgagor was adjudged a bankrupt after the appeal was taken will have no effect on a motion to dismiss the appeal.—Id.

R. FEES AND COSTS, 82-83.

82. On the foreclosure of a mortgage it is in the discretion of the judge, sitting as a chancellor, to submit special findings to a jury, and, after the findings of the jury have been returned into court, to hear proof as to the reasonable value of an attorney's services; and it is not error to render judgment thereon and include the same in the final decree.—Clark v. Nichols, 3 Mont. 372.

83. In a foreclosure suit it is within the province of the court to hear proof as to the reasonable value of an attorney's services, after the findings of the jury have been returned, and to include in the decree a reasonable sum for such services.—Id.

X. REDEMPTION, 84-86.

84. A grantor can not maintain a suit in equity for the sole purpose of having a deed absolute on its face declared a mortgage, but must also offer to redeem the property, and place himself wholly within the jurisdiction of the court to settle the whole controversy between him and his grantee.—Mack v. Hill, 28 Mont. 99; 72 Pac. 307.

85. Under Civ. Code, § 3780, where no proceedings were ever instituted for foreclosure of a mortgage, the mortgagor, in bringing an action to redeem four years after the mortgagee went into possession, was not guilty of such laches as to deprive him of the right to relief.—Grogan v. Trading Co., 30 Mont. 229; 76 Pac. 211.

86. Where a deed absolute on its face was given as security for a debt, in an action to redeem a court of equity will determine plaintiff's right of possession, where defendant makes no claim to possession except under the deed.—Id.

MOTIONS.

1. It is competent for the district court to take motions under advisement from one term to another.—Anderson v. O'Laughlin, 1 Mont. 81.

2. A substituted motion can be entertained only when an original has been filed in time, and can not be produced.—Magee v. Fogerty, 6 Mont. 237; 11 Pac. 668.

3. Under Comp. Stat., p. 188, § 482, providing that an application for an order is a motion, a motion can not be made by simply filing a statement of it in writing, but the attention of the court must be called to it.—Wallace v. Lewis, 9 Mont. 399; 24 Pac. 22.

4. One who attacks an erroneous order within a reasonable time after knowledge of its existence is not guilty of laches, where the adverse party is not prejudiced.—Beach v. Water Co., 21 Mont. 184; 53 Pac. 493.

5. Under district court rule 3, requiring that affidavits and papers to be used in support of a motion shall be served on the attorneys of the parties at the time notice of motion is served, it was not error for the court to have refused to consider affidavits of the moving party served two days after the notice and three days before the hearing of a motion, such affidavits not referring to matters coming to the attention of the movants after the notice was served.—State v. District Court, 25 Mont. 202; 64 Pac. 352.

6. By the express provisions of Code Civ. Proc., § 774, the trial court can not relieve a party from an order entered against him by his inadvertence, etc., unless application is made within six months.—State v. District Court, 32 Mont. 20; 79 Pac. 410.

MUNICIPAL CORPORATIONS.

I. Creation, 1.
II. Legislative Control of Municipal Acts, Rights, and Liabilities, 2-4.
III. Proceedings of Council or Other Governing Body, 5-7.
IV. Officers, Agents, and Employees, 8-16.
V. Contracts in General, 17-25.
VI. Public Improvements, 26-35.
VII. Police Power and Regulations, 36-37.
VIII. Use and Regulation of Public Places, Property, and Works, 38-45.
IX. Torts, 46-73.

X. Fiscal Management, Public Debt, Secureties, and Taxation, 74-96.
- A. Power to incur indebtedness and expenditures, 74-88.
- B. Taxes and other revenues, and application thereof, 89-94.
- C. Rights and Remedies of taxpayers, 95-96.

I. CREATION, 1.

1. A townsite plat made under the authority of the probate judge, trustee, and duly approved by the county commissioners, is admissible in evidence, though incomplete in not being accompanied by any field notes.—Ming v. Foote, 9 Mont. 201; 23 Pac. 515.

II. LEGISLATIVE CONTROL OF MUNICIPAL ACTS, RIGHTS, AND LIABILITIES, 2-4.

2. An Act of the legislature requiring county commissioners of a county to issue warrants to certain persons for labor done, materials furnished and moneys expended in the construction of a certain highway in said county, was *held* to be valid where it apears that the person's money was expended for a municipal purpose, that its expenditure was beneficial to the people of the county and his demand was properly established.—Wilcox v. Deer Lodge, 2 Mont. 574.

3. Pol. Code, § 4800, subd. 64, providing that no municipality having a water supply furnished by private persons shall erect any water plant to be operated by itself, but, if it desires to acquire such plant, shall purchase or condemn that owned by such private persons, is in conflict with Const., art. 12, § 4, prohibiting the legislative assembly from levying taxes for municipal purposes.—Helena C. W. Co. v. Steele, 20 Mont. 1; 49 Pac. 382.

4. As applied to municipalities having contracts with private persons for water supply at the enactment of the statute, it also violates Const., art. 15, § 13, forbidding the legislative assembly to impose on the people of any municipality a new liability in respect to past transactions or considerations.—Id.

III. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY, 5-7.

5. Under Comp. Stat., p. 708, § 407, providing that, in a suit "for the recovery of any fine or penalty under any ordinance of a city," it shall be sufficient to state in the complaint "the title of the ordinance, without reciting the same at length," a complaint is defective which does not recite any part of the ordinance, or state its title.—Miles City v. Kern, 12 Mont. 119; 29 Pac. 720.

6. A city council consisted of a mayor and eight aldermen, all of whom were present when the roll was called on the confirmation of a city officer. Four of the aldermen voted for the confirmation, while four did not vote, and the mayor then voted in the affirmative. *Held*, that the officer was legally confirmed.—State v. Yates, 19 Mont. 239; 47 Pac. 1004.

7. Laws 1893, p. 130, § 19, provides that the "corporate authority of cities shall be vested in a mayor and board of aldermen to be denominated the city council;" § 13 gives the mayor the right to vote in case of a tie; and § 347 requires a majority vote of all members constituting the city council to confirm appointments of city officers. *Held*, that the mayor is a constituent part of the city council, and is entitled to give the casting vote in case of a tie vote of the aldermen on the confirmation of an officer.—Id.

IV. OFFICERS, AGENTS, AND EMPLOYEES, 8-16.

8. A complaint alleged that a city treasurer failed to pay over according to law money which came into his hands as treasurer. Plaintiff offered books kept by the treasurer which showed parties indebted to the city who had in fact paid the treasurer; also an ordinance providing that the treasurer shall keep a true account of all moneys received by him. Defendant's offered § 8, providing that the city treasurer shall receive one-sixth of all moneys collected by him. Defendants also offered the treasurer's books, which showed the amount collected and turned into the city, and that on this amount the treasurer had received only 10 per cent. *Held*, that the additional 6 2-3% should have been considered in bar of recovery against the sureties, under a general denial of the complaint.—Butte v. Cohen, 9 Mont. 435; 24 Pac. 206.

9. A city ordinance providing for a building inspector, and requiring him to inspect buildings in the course of erection, and to "see" that the buildings are erected as provided by the ordinance, imposes on him the duty of requiring the buildings to be properly constructed, and renders him liable to persons damaged by the non performance of his duty.—Merritt v. McNally, 14 Mont. 228; 36 Pac. 44.

10. Pol. Code, § 4017, requires taxes assessed before that statute took effect to be collected under the laws in force when the assessment was made. Sec. 4872 requires city councils, on the second Monday in August in each year, to determine the amount of taxes to be levied by the city for the current year, and the city council to certify to the city treasurer a copy of the same, and the city treasurer to collect the taxes as in the article provided. Sec. 4862 makes the county assessment the basis of taxation for cities. Secs. 4867, 4868, require the county clerk to make a duplicate copy of the corrected assessment book for each city, in a book provided by the city clerk, so that the city treasurer may extend the same, and collect the taxes. *Held*, the duty of the city treasurer, and not of the county clerk, to extend on the tax list taxes of a city, the assessment of which was completed Aug. 12, 1895.—State v. Johnson, 16 Mont. 570; 41 Pac. 706.

11. Under Pol. Code, § 4749, which requires the mayor of a city to be a "taxpaying freeholder," a person who, at the time of his election, owned and paid taxes on personalty, and owned realty on which he was not liable for taxes for that year because acquired since the date of assessment, is eligible.—Mayer v. Sweeney, 22 Mont. 103; 55 Pac. 913.

12. Pol. Code, § 4753, providing that no person shall be eligible to the office of alderman, unless a resident of the ward where elected "for at least one year preceding such election," means one year next preceding the election.—Dowty v. Pittwood, 23 Mont. 113; 57 Pac. 727.

13. An information against a policeman, charging that he refused to proceed to a place where alleged offenders were to be found, was insufficient, under Laws 1903, p. 207, § 1, which enjoins but one duty, which was to make an arrest, failure to perform which was the gist of the officer's offense.—State v. King, 28 Mont. 268; 72 Pac. 657.

14. The official bond of a city treasurer, as contemplated by the Political Code, is within the purview of art. 9 thereof, and must be conditioned in accordance with § 1057 of such article.

—Philipsburg v. Degenhart, 30 Mont. 299; 76 Pac 694.

15. Pol. Code, § 4788, makes it the duty of the city treasurer to present a statement each month of moneys received and disbursed by him during the preceding month, and also to give every person paying him money as treasurer a receipt therefor, specifying the date, amount, and for what paid. The city treasurer receipted for moneys collected by officers and agents of the city from gambling houses and brothels, and also included such receipts in his monthly reports to the council. *Held*, that the money so received was received by the treasurer by virtue of his office, and his failure to pay over the money to his successor was a breach of his official bond, for which his sureties were liable, though the money was collected illegally and without authority.—Id.

16. Reports of a city treasurer to the city council of moneys received and disbursed during the month, which he is required to make by Pol. Code, § 4788, may be given in evidence against the sureties on his official bond, and are prima facie true, and, when not contradicted by the sureties, are binding on them.—Id.

V. CONTRACTS IN GENERAL, 17-25.

17. An ordinance or contract by a city council, agreeing to take water from the contractor for 20 years, which is made without previously advertising for bids, is void as being in contravention of the city charter, which requires that all contracts over $100 shall be advertised for bids.—Davenport v. Kleinschmidt, 6 Mont. 502; 13 Pac. 249.

18. Comp. Stat., p. 692, § 345, forbidding the mayor to be interested directly or indirectly in the profits of any city contract entered into while he is in office, does not apply to a mayor who was not interested in a contract made with the city, but who agreed, after the contract was accepted and filed with the proper official, to take stock in a corporation succeeding to the rights of the original contractors.—State v. Great Falls, 19 Mont. 518; 49 Pac. 15.

19. A city, in contracting for water works to supply itself and its inhabitants with water, exercises its business or proprietary powers, as distinguished from its legislative powers; and hence the fact that the contract is to run for a long term of years does not render it void, as restricting the future legislative powers of the city council.—Id.

20. Where contractors with a city for a water supply did not file their acceptance within the time prescribed by the ordinance, but the city, without objecting, allowed them to erect the works and supply water for several years according to contract, it waived any defect in acceptance.—Id.

21. A city granted an exclusive right to supply water for a term of 15 years, at fixed hydrant rates. The grantees erected water works, issued and sold bonds, and supplied the city with water according to contract for seven years, when the city repudiated that part of the contract fixing rates, and insisted on a continued supply at lower rates. *Held*, on mandamus by the grantees to compel the levy of a tax to pay contract rates overdue, that the city could not be heard to say that the contract was void because the grant was exclusive, or for an unreasonable length of time at fixed rates, or unwise on the part of the city.—Id.

22. Where a city repudiates a contract with a water company providing for payment of hydrant rentals semi-annually, but still uses the water furnished by the company, and insists that the supply be continued regardless of the contract, a command in a writ of mandamus, that the city levy sufficient taxes to pay, not only the six months water rentals already due, but also those that will become due for the remaining six months of the year, is proper.—Id.

23. Laws 1889, amending Comp. Stat., p. 711, § 415, so as to provide that the amount of taxes to be levied in any one year in any city or town for water purposes shall not exceed one-half of one per cent, etc., became part of an ordinance contract for a water supply, made and accepted while it was in force, so that the contractors had a right to insist that, so far as necessary to pay rentals due them according to contract, a special tax should be levied annually, not to exceed the specified limit.—Id.

24. Under a contract by a city with a water company by which the latter has to furnish and keep in working order 15 fire hydrants for a period of 10 years at a rental of $112 per annum, the city to have the right at any time within 10 years "to take any additional number of fire hydrants at the annual rental of $100 each," the city, ordering additional hydrants, is liable for their rent for the remainder of the period of 10 years, and not merely until the order is rescinded.—State v. Philipsburg, 23 Mont. 16; 57 Pac. 405.

25. Where the liability of a city under a contract is general, and not special, if there is no limit to the amount for which the city can become indebted for the failure of the city to meet its obligations under the contract as they fall due, the other party can recover a general judgment against the city, and have a mandamus for the levy and collection of a tax to pay it.—State v. Helena, 24 Mont. 521; 63 Pac. 99.

VI. PUBLIC IMPROVEMENTS, 26-35.

26. Taxes under a special assessment, paid under protest and an expressed intention to sue to recover them back, before the penalty for non-payment became due, there being no actual seizure or immediate danger of actual seizure of the property, can not be recovered back in an action of assumpsit, on the ground that the payment was compulsory.—Hopkins v. Butte, 16 Mont. 103; 40 Pac. 171.

27. One who pays taxes, under a special assessment for sewers, where the assessment was not set aside, and the sewers were built, and the general power of the city to make such assessment under valid ordinances was not disputed, can not recover them back.—Id.

28. A paving contract required the contractor to furnish all material and labor, and entitled him to warrants on monthly estimates, and provided that, before the final estimate should be allowed, he should sign a certificate on such estimate that he accepted it in full of all claims, and should satisfy the council that all bids for labor and material were paid. On Nov. 29, 1895, the city engineer made a final estimate showing the price to be $8,003. The council allowed the estimate subject to the conditions that no warrants be issued in payment until the contractor filed a receipted payroll, and "that the balance due, after said labor has been paid, shall be applied in payment of bills for materials." *Held*, that the city could withhold warrants until it was satisfied that the claims for materials were paid.—State v. Webster, 20 Mont. 219; 50 Pac. 558.

29. Where a certain tract of land was not a part of a city, and the owner was not entitled to the privileges of an owner of city lots, he was under no obligation to pay special assessments for a sewer constructed by the city in the street in front of such land.—Farlin v. Hill, 27 Mont. 27; 69 Pac. 237.

30. In the absence of fraud, or such gross mistake as to preclude sound judgment, the determination of a city council as to what prop-

erty is specially benefitted by an improvement order, is conclusive for the purpose of assessment to pay for it.—Beck v. Holland, 29 Mont. 234; 74 Pac. 410.

31. Under the provisions of Code Civ. Proc., § 3266, subd. 15, it is presumed, in the absence of any showing to the contrary, that city officials did not certify an assessment prematurely to the county officials, but performed their duty regularly.—Id.

32. One can not set aside an assesment against him to pay for opening an alley on the ground that the land does not belong to the city, when he claims no right or interest in it. —Id.

33. Though Comp. Stat., p. 715, § 428, provides for levy on property specially benefitted to pay for an improvement, an allegation in the complaint, in an action to enjoin a sale for the collection of an assessment, that the council adopted the frontage rule in making the levy, is insufficient, unless it also states that the benefit to plaintiffs' property is not proportional to their tax.—Id.

34. An alleged protest to street opening, filed by abutting owners, stating the reasons why they did not desire the opening done during the year 1898, and stating that they were willing to have the street opened during 1900, and that payment therefor should be required in three annual intsallments, was not an unqualified protest to the opening required by Laws 1897, p. 219, § 31, providing that if, at the hearing, objections are made to the making of the improvement by owners or agents, representing more than one-half the area of all the property that would be assessed, the improvement shall not be made at that time.—McMillan v. Butte, 30 Mont. 220; 76 Pac. 203.

35. Where a certain lot was assessed for municipal improvements for its entire area, the fact that only half of such lot was included in the description in the resolution creating the assessment district was immaterial.—Id.

VII. POLICE POWER AND REGULATIONS, 36-37.

36. Under Pen. Code, § 2680, providing that in a criminal complaint before a justice a city ordinance may be referred to by its title and section, an ordinance is sufficiently pleaded by reference to its title, section and subdivision, and chapter of the codified ordinances of the city.—Philipsburg v. Weinstein, 21 Mont. 146; 53 Pac. 272.

37. Under Const., art. 8, § 27, and Pol. Code, § 4912, a prosecution for violation of a city ordinance, which violation does not constitute either a felony or a misdemeanor under the laws of the state, is properly prosecuted in the name of the city; art. 8, § 27, referring only to criminal actions prosecuted before tribunals provided for by that article for violation of state laws.—Helena v. Kent, 32 Mont. 279; 80 Pac. 258.

VIII. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS, 38-45.

38. An ordinance providing that cabs shall not stand on certain parts of certain streets, and that any violation thereof shall be a misdemeanor, does not make a person standing a cab elsewhere than as provided guilty of a misdemeanor.—Helena v. Gray, 7 Mont. 486; 17 Pac. 564.

39. A petition to enjoin defendants from erecting telephone poles in a street, alleged that plaintiffs' predecessors in interest, who were the original occupants in a government townsite on certain lots fronting on M street, which were subsequently conveyed to them by the townsite trustee, "since the entry of said townsite," and while they were the owners and possessed of the premises, cut off from their "lot 10 feet in front thereof, and adjacent to M street," for a street for the benefit of their property. *Held*, that the complaint did not warrant the assumption that plaintiffs' predecessors ever obtained title in fee to the 10 feet cut off, there being no allegation showing that such cut off was made after the conveyance to them by the trustee, and did not show any additional easement placed on plaintiffs' property.—Hershfield v. Telephone Co., 12 Mont. 102; 29 Pac. 883.

40. The grant in a city charter authorizing the council "to license, tax and regulate" telephone companies "and all other branches of business" carries with it the power to grant such companies the right to erect poles in the streets. —Id.

41. Defendant company, under contract to furnish electric light for a city, set one of its poles in the center of the sidewalk in an alley in the rear of plaintiff's saloon, about 20 feet from the rear entrance thereto. A city ordinance regulating the location of such poles made the use of the alley necessary, and the situation of the city hall made the other side unavailable. It was shown that the location of the pole in no way inconvenienced plaintiff or injured his property. *Held*, not an interference with plaintiff's rights, nor an unreasonable use of his easement in the alley, against which injunction would lie.—Loeber v. Electric Co., 16 Mont. 1; 39 Pac. 912.

42. A guy wire running from a telegraph pole across a street to a post five feet above the ground, and two feet from the sidewalk, is an obstruction to the street.—Lundeen v. Light Co., 17 Mont. 32; 41 Pac. 995.

43. Comp. Stat., p 681, § 325, and p. 712, § 419, authorize city councils to establish and improve streets, and to regulate their use, etc.; p. 1170, §§ 1852-1854, provide for the raising of funds to repair streets; and p. 718, § 435, declares that no part of the streets of any city shall be in any road district established by the county commissioners, nor be under the control of any county officers. *Held*, that where a city extends its limits so as to include a bridge previously purchased by the county from a private corporation, such bridge becomes a part of the street, and the city is liable for repairs.—Cascade v. Great Falls, 18 Mont. 537; 46 Pac. 437.

44. That a city is charged with the duty of keeping its streets in repair, and that the cost of maintaining them is raised by public taxation within the city, does not give it jurisdiction over them exclusve of that of the legislative assembly.—State v. Mayor, 30 Mont. 338; 76 Pac. 758.

45. Under Pol. Code, §§ 4700, 4703, 4800, and Laws 1897, p. 203, an ordinance making it the duty of the "occupant" of premises to keep the sidewalk free from ice and snow, and imposing penalty for failure to comply with the ordinance, is valid.—Helena v. Kent, 32 Mont. 279; 80 Pac. 258.

IX. TORTS, 46-73.

46. The city of Helena, which was chartered by the territory of Montana, passed an ordinance expressly assuming for itself "the care and responsibility of streets, avenues and alleys," and thereafter issued a permit to certain private persons to make an excavation in a street, by the negligent performance whereof, and while Montana was still a territory, plaintiff was injured. *Held*, that the city was liable in damages therefor, since, in 1862, and prior

to the passage of such ordinance, the principle of municipal liability in such cases was established by the supreme ocurt of the United States in Nebraska City v. Campbell, 67 U. S. 590, which arose in the territory of Nebraska, and was therefore binding upon the courts of this territory at the time of the injury.—Sullivan v. Helena, 10 Mont. 134; 25 Pac. 94.

47. Where a city knows that trap doors which it permits to exist in a sidewalk are dangerous whenever used in the manner in which they were built to be used, and ordinarily are used, and an injury occurs through such dangerous use, it need not be shown that the city knew that the doors were being used at the time of the accident, in order to render it liable for the injuries.—Sweeney v. Butte, 15 Mont. 274; 39 Pac. 286.

48. In a suit for injuries received in walking into an unguarded opening in a sidewalk, where there was evidence that plaintiff was nearsighted, it was proper to refuse to charge that if the defect or sight, coupled with the exposure to danger, caused the injury, which otherwise would not have occurred, the jury might find plaintiff guilty of contributory negligence.—Id.

49. In a suit against a city for injuries received from walking into an opening in a sidewalk, it appeared that there were double trapdoors in the walk, occupying about 7-10 of its width, and a cellar beneath; that the doors were so constructed that, when opened, they lay back flat upon the walk, unless other appliances were used to hold them upright; that the city knew that fact, it having control over the walk, but did not know that the doors were open at the time of the accident; and that plaintiff could not see the hole, on account of the darkness. *Held*, that the case was one for the jury.—Id.

50. A pedestrian who stumbles while walking at night along a sidewalk which is in good repair, and falls into an uncovered cellar, is not guilty of contributory negligence, as a matter of law, though he had previous knowledge of the excavation and its dangerous condition.—Cannon v. Lewis, 18 Mont. 402; 45 Pac. 572.

51. Where the owner of a lot on which a cellar was being excavated passed the premises daily, it was for the jury to determine whether he was negligent in not knowing that the rail between the cellar and the sidewalk had been removed prior to the accident.—Id.

52. Where the receiver of a water company continues employees of the company who have formerly made and negligently filled an excavation in the street, and who attempted to remedy the defect after his appointment, their knowledge of the defect, or of facts sufficient to impart notice thereof, constitutes notice to the receiver.—Robinson v. Mills, 25 Mont. 391; 65 Pac. 114.

53. Under Pol. Code, § 4800, subd. 73, a water company authorized to make an excavation is liable to an individual for injuries received through its negligence in failing in its duty to restore the street to its former safe condition.—Id.

54. Under Pol. Code, § 4800, subd. 73, requiring a city street excavated by the permission of the city authorities to be placed in as good condition as it was formerly by the person making the excavation, a water company authorized to make an excavation is negligent in failing to use the highest degree of care to fill the excavation in such a manner that it will not be rendered dangerous by the action of rain, frost, etc. —Id.

55. An instruction, in an action for injuries received by reason of the defective filling of an excavation in a city street by a water company authorized to make the excavation, that it is liable for injuries resulting from its failure to put the street in its former condition, as required by Pol. Code, § 4800, subd. 73, is not erroneous in imposing the liability of an insurer, when considered in connection with other instructions only requiring the exercise of the highest degree of care.—Id.

56. An instruction, in an action for injuries received by reason of the defective filling of an excavation in a street by a water company authorized to make the excavation, and required by Pol. Code, § 4800, subd. 73, to place the street in as good condition as before the excavation, that it is incumbent on the company to restore the street to as good condition as before the excavation, is not erroneous on the ground that the exact restoration of the street is impossible, but it is to be construed as only requiring its restoration to its former safe condition.—Id.

57. Where four blocks in a cement sidewalk differed from the others, and were so slippery that 100 people had fallen thereon within a year, and 25 within two months,—one of them being seriously hurt, and another being helped up by a policeman,—and the place had grown so notorious that it caused amusement among the passers when persons fell there, the question whether the city had notice, actual or constructive, was for the jury.—Leonard v. Butte, 25 Mont. 410; 65 Pac. 425.

58. The question whether the walk was defective and in a dangerous condition was for the jury.—Id.

59. A city, under Comp. Stat., p. 674, c. 22, being authorized to provide by ordinance for taxation to improve its streets, and by § 325 to establish and improve streets, and by § 435 given exclusive control of its streets, is responsible for damages occasioned by reason of its negligently permitting its streets to become and remain in a dangerous condition.—Snook v. Anaconda, 26 Mont. 128; 66 Pac. 756.

60. In an action for damages occasioned by a defective stret it appeared that the city had knowledge of the defect and failed to repair the same. Plaintiff, while lawfully riding in the street, and without knowledge of the defect, was injured thereby. *Held*, that plaintiff need not allege that the proximate cause of the injury was not his own act.—Id.

61. Where, in an action against a city for damages resulting from a defective street, the complaint, after alleging defendant's negligence, alleges that the injury was received "without fault or negligence on plaintiff's part," contributory negligence is a matter of defense.—Id.

62. In an action against a city for injuries resulting from a defective street, questions asked defendant's overseer of streets as to its rules in relation to doing street work on Sunday were properly excluded.—Id.

63. The fact that Pol. Code, § 5036, declares that every city is responsible for injuries to property within its limits by mobs or riots, does not indicate a legislative intent to exempt cities from liability for all other torts.—May v. Anaconda, 26 Pac. 140; 66 Pac. 759.

64. A city is liable for injuries resulting from its negligently permitting its streets to be and remain in a dangerous condition.—Id.

65. Under Comp. Stat., p. 679, § 320, providing that the fee of streets shown on a city plat shall be vested in the city for the use of the public, a city which by ordinance has accepted and has improved such a street, when sued for injury resulting from a defect in the street, can not escape liability by denying that the locality is a street.—Id.

66. Where a boulder remains in a city street for many months, constituting a dangerous obstruction, a finding that the city was negligent

in so permitting the obstruction to continue is justified.—Id.

67. Where plaintiff was injured by collision with a boulder in an unlighted city street, which had been used and traveled for years, while he was driving slowly along the center of the street on a dark night,—he having no knowledge of the boulder,—such act was not contributory negligence.—Id.

68. Where a sidewalk at a certain place was about five inches higher than the ordinary grade of the sidewalk, and plaintiff was injured in stepping down from such elevated portion in the night time, in an action against the city for the injury, defendant sought a non-suit on the hypothesis that, the sidewalk having been constructed by the city officials, it was to be presumed that it was constructed on a general plan adopted by the city, and that plaintiff must show that the elevation actually constituted a defect. *Held*, that there could be no such presumption in the absence of any evidence to show that the sidewalk at that point was built on a general plan.—Metz v. Butte, 27 Mont. 506; 71 Pac. 761.

69. Where the court instructed that if the city, by its officers, had notice of the defect, which was a dangerous one, the city was liable for any damages on account thereof, such instruction was not erroneous on the ground that it eliminated contributory negligence, where other instructions clearly told the jury that contributory negligence would preclude recovery.—Id.

70. A city is liable where, without any negligence on the part of the driver his horse takes fright and runs away and comes in contact with a defect in the street which the city negligently failed to repair, if injuries would not have been sustained but for the defect.—Meisner v. Dillon, 29 Mont. 116; 74 Pac. 130.

71. Where it was shown that one of the principal streets of a city was about 60 feet wide, and there was nothing indicating that it was not open to public travel throughout its entire width, the question whether the portion of the street in repair was of sufficient width to render it reasonably safe was for the jury.—Id.

72. Instructions that a city was bound to use all reasonable care to keep its streets in a safe condition for travel, and if it failed to do so it was liable for the injuries sustained in consequence thereof if the party injured exercised reasonable care, but the city was not an insurer of the safety of its streets, properly presented the question whether the city was required to keep the entire width of a street in repair.—Id.

73. Pol. Code, §§ 4811, 4812, requiring all accounts and demands against a city to be presented to the council, itemized and accompanied by affidavit with necessary vouchers, etc., within one year from the date same accrued, and barring claims not so presented, do not apply to the claim for damages arising from personal injuries.—Dawes v. Great Falls, 31 Mont. 9; 77 Pac. 309.

X FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION 74-96.

A. Power to Incur Indebtedness and Expenditures, 74-88.
B. Taxes and Other Revenues, and Application Thereof, 89-94.
C. Rights and Remedies of Taxpayers, 95-96.

A. POWER TO INCUR INDEBTEDNESS AND EXPENDITURES, 74-88.

74. In proceedings for an injunction to restrain a city council from carrying out a contract, it appeared that the city had a population of 10,000 and an assessed valuation of $5,000,000; that it was chartered 5 years previously; that its bonded indebtedness was $19,500; that its floating debt was $15,000; that 4% of its taxable property would amount to $200,000; that the taxing power, if exercised to the limit allowed by the charter, would be $15,000 per annum. *Held*, that an ordinance confirming a contract by which the city bound itself for the period of 20 years to take all the water it required for fire and sewerage purposes from the contractor at a rent of $15,000 a year for the first 150 hydrants, with obligations to erect more hydrants as the mains were extended, was unreasonable and ultra vires.—Davenport v. Kleinschmidt, 6 Mont. 502; 13 Pac. 249.

75. Such contract can not be considered as falling within the act of congress of July 30, 1886 (24 Stat. 171), prohibiting municipal corporations in the territories from becoming indebted to an amount exceeding 4% of the valuation.—Id.

76. Where, in defense to an action to enjoin a city from carrying out a contract for paving, on the ground that it is in violation of Const., art. 13, § 6, limiting the indebtedness of a city, defendants set up that the cost of the paving is payable out of a specific fund assessed against the abutting land, and did not constitute a liability of the city, defendants must show that proper steps have been taken to assess the abutting lots for the paving, and that the contractor has expressly agreed to accept the fund raised by such assessment, and has waived all right to hold the city liable for the cost of the paving.—Atkinson v. Great Falls, 16 Mont. 372; 40 Pac. 877.

77. Const., art. 13, § 6, and Pol. Code, § 4800, subd. 64, forbidding municipal corporations to incur an indebtedness exceeding 3% of the assessed valuation of the taxable property therein, unless an increase is "necessary to construct a sewerage system, or to secure a supply of water," and is authorized by a vote of the taxpayers affected thereby, do not authorize cities which had sewerage systems at the time the constitution was adopted to create an indebtedness beyond the 3% limit.—Palmer v. Helena, 19 Mont. 61; 47 Pac. 209.

78. Issuing new bonds to fund a like amount of outstanding bonds and warrants does not create an "indebtedness," within Const., art. 13, § 6, limiting the amount of indebtedness which a city may incur.—Id.

79. Under laws 1889, p. 185, § 16, amending Comp. Stat., p. 711, § 415, so as to provide that the amount of taxes to be levied by a municipality for water purposes shall not exceed a certain per cent, etc., and thereby making liabilities of municipal corporations for water rentals under contracts with water companies payable out of a special fund, such liabilities are not debts, within the constitutional limitation.—State v. Great Falls, 19 Mont. 518; 49 Pac. 15.

80. An agreement of a city in a contract with a water company to pay to the company's bondholders the money due or to become due from hydrant rentals, or as much as necessary to pay interest on the bonds, and the signing on behalf of the city of a certificate to that effect on the back of the bonds, is not a loan of credit by the city in violation of act congress Jul. 30, 1886.—Id.

81. A city had already exceeded the constitutional limit of indebtedness. A water company furnished it with water for fire, sewerage and

other municipal purposes under an ordinance providing for the obtaining of water for such purposes for a certain period, at a certain price, payable monthly, appropriating out of the city's yearly revenues sufficient money to pay for it, and ordering the city council for such term to levy annual taxes sufficient to meet the appropriation, under the Political Code, authorizing the levy of taxes for general purposes. *Held*, that the company could not recover for water so furnished, under Const., art 13, § 6, providing that no city shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding 3% of the taxable property therein, since, as the liability of the city would be general and not special thereunder, the contract entered into created, and the amount due for water furnished thereunder constitutes, an indebtedness within the prohibition of the constitution.—State v. Helena, 24 Mont. 521; 63 Pac. 99.

82. Where the powers of a city to incur indebtedness are limited, it is the duty of one who makes a contract with such a city, whereby an indebtedness is created, to take notice of the financial condition of the city, and to determine whether the proposed indebtedness exceeds the constitutional limitation, and not having done so, he can not recover where the city is already indebted beyond that limit.—Id.

83. The fact that the city council, in accordance with Pol. Code, § 4874, providing that the city council must, at a certain time, pass an annual appropriation ordinance sufficient to defray the expenses or liabilities of the city for the ensuing year, specifying the amount for each object, appropriated a sum to pay for water furnished under such contract, does not make the city liable therefor, since the contract out of which the liability arose is void, and no lawful authority to pay it exists.—Id.

84. Const., art 13, § 6, forbids the contracting of municipal debts "to an amount including existing indebtedness, in the aggregate exceeding 3 % of the value of the taxable property." *Held*, that "indebtedness," as used therein, meant what a city owed, irrespective of demands which it might hold against others.—Jordan v. Andrus, 27 Mont. 22; 69 Pac. 118.

85. Pol. Code, § 4811, requires all demands against cities to be submitted to the council, and, if found correct, allowed, and an order made that the demand be paid on a warrant on the treasury, specifying the purpose, by what authority it is issued, and out of what fund it is to be paid. Sec. 4812 declares that all such accounts shall be itemized and verified by affidavit, and that the council shall have no authority to allow any claim or demand not so presented. *Held*, that where a city had exceeded its debt limit prescribed by Const., art. 13, § 6, it could not incur an indebtedness not payable from a specially authorized tax, but payable from funds previously appropriated, under an agreement that the claimants should accept warrants in payment of their claims, and that if, for any reason, the warrant should not be paid the city should not be liable therefor.—Helena Water Works Co. v. Helena, 27 Mont. 205; 70 Pac. 513.

86. The payment of such claims on the theory that the appropriation by ordinance was an assignment of the funds so appropriated for the payment of the claims was unauthorized.—Id.

87. Under laws 1903, p. 42, the determination of what is current expense is for the courts, but the determination of the city council as to whether a particular current expense is reasonable and necessary is not subject to review by the courts in the absence of fraud or abuse of discretion.—Helena W. W. Co. v. Helena, 31 Mont. 243; 78 Pac. 220.

88. Laws 1903, p. 42, was passed immediately after a holding by the supreme court that a city which had reached the constitutional limit of indebtedness had no power to pay out funds for any purpose, and provided that, even after a city had reached the constitutional limit of indebtedness, it should still have power to manage and conduct its affairs on a cash basis, and pay its reasonable and necessary current expenses. *Held*, that an expenditure to install and operate a water system to belong to the city is not for current expenses, and not authorized by the statute.—Id.

B. TAXES AND OTHER REVENUES, AND APPLICATION THEREOF, 89-94.

89. Under the provisions of Const., art 12, the municipal authorities of a city may elect to take the assessment made by the county and state assessing authorities as the assessment for the levy of municipal taxes within the city, and a levy for municipal purposes according to provisions of the charter and ordinances of the city is a legal levy.—Lockey v. Walker, 12 Mont. 577; 31 Pac. 639.

90. Laws 1885, p. 187, § 1, provides that the city council of Helena may levy and collect ad valorem taxes for city purposes upon all taxable property, real, personal and mixed, and may enforce the payment of such taxes in any manner that may be prescribed by ordinance, not repugnant to the constitution of the United States or the Organic Act of the territory. *Held*, that the city council has power to pursue the usual method as to the enforcement of the general taxes authorized to be levied, by causing the real estate to be sold after public notice, providing the proceedings prescribed by ordinance in that regard are not repugnant to the provisions of the Constitution and general statutes of the state.—Id.

91. Municipal taxes, levied by resolution of the council after the taking effect of Codes of 1895, are not affected by Comp. Stat., p. 1170, §§ 1852, 1854, requiring that provision be made for the taxpayers to work out such taxes if they so elect.—White Sulphur Springs v. Pierce, 21 Mont. 130; 53 Pac. 103.

92. The only basis on which special taxation of special assessments can be sustained is that the property subject to taxation or assessment will be enhanced in value to the extent of the burden imposed.—Butte v. School District, 29 Mont. 336; 74 Pac. 869.

93. Const., art. 11, § 3, provides what shall constitute the school fund, and further provides that it shall forever remain inviolate. By constitutional and legislative provisions, money raised by taxation for school purposes becomes a part of the school fund of the district within which it is raised, and the district trustees are, by Pol. Code, § 1943, personally liable if they sanction the expenditure of the fund for any other than educational purposes, although a part of the fund may be expended for purposes of building and improvements. *Held*, that school district property can not be specially assessed to pay the cost of sprinkling streets on which it abuts.—Id.

94. In an action by a city against a school district to recover a special assessment to pay the cost of street sprinkling, where the complaint was silent on the subject, it will be presumed that the sprinkling done was the ordinary street sprinkling, and that the property assessed was for educational purposes.—Id.

C. RIGHTS AND REMEDIES OF TAXPAYERS, 95-96.

95. Where a city has already reached the limit of indebtedness permitted by its charter,

and its council has passed an ordinance confirming a contract which may render it liable to the payment of an additional annual sum equal to three-fourths of the limit of its indebtedness as fixed by its charter, and directing that warrants shall be issued to pay such sum monthly when the terms of the contract are fulfilled, an injunction restraining the city council from carrying out the contract can not be considered as improvidently or prematurely issued. —Davenport v. Kleinschmidt, 6 Mont. 502; 13 Pac. 249.

96. Any taxpayer, on behalf of himself and others, has the right to institute proceedings in a court of equity to prevent the misapplication of public funds by municipal officers, on the ground that the threatened illegal corporate act will incerase the burden of taxation and thus burden the plaintiffs.—Id.

NAMES.

1. A party can be designated in a pleading by a known and accepted abbreviation of his Christian name.—Kemp v. McCormick, 1 Mont. 420.

2. Identity of names is prima facie evidence of the identity of persons.—Stapleton v. Pease, 2 Mont. 550.

NEGLIGENCE.

I. Acts or Omissions Constituting, 1.
II. Proximate Cause of Injury, 2.
III. Contributory Negligence, 3.
IV. Actions, 4-24.
A. Right of action, preliminary proceedings, and pleading, 4-12.
B. Evidence, 13-20.
C. Trial, 21-24.

I. ACTS OR OMISSIONS CONSTITUTING, 1.

1. In an action for injuries to an infant trespassing on defendant's premises, the complaint alleged that for some time immediately preceding the injury the infant, being five years of age, and attracted thereby, had, to defendant's knowledge, been playing around defendant's machinery, and that, notwithstanding such knowledge, defendant and his agents wholly failed to warn such infant against dangers incident to his so doing, or to request him to cease playing about the machinery, and to leave the premises. *Held*, that defendant not being legally bound to keep a constant lookout to guard persons trespassing on his premises from injury, such allegation was insufficient to show a breach in legal duty on defendant's part.—Driscoll v. Clark, 32 Mont. 172; 80 Pac. 1; 80 Pac. 373.

II. PROXIMATE CAUSE OF INJURY, 2.

2. Where defendant negligently ran a guy wire from a telegraph pole across the street, and a stranger's horse, becoming frightened, ran into and broke the wire, causing it to strike and injure plaintiff, defendant's negligence was the proximate cause of the injury.—Lundeen v. Light Co., 17 Mont. 32; 41 Pac. 995.

III. CONTRIBUTORY NEGLIGENCE, 3.

3. The negligence of the owner and driver of a private conveyance is imputable to one who is voluntarily riding with him, and the latter can not recover damages against a city for injuries caused by its negligence, where the negligence of such driver contributed thereto.—Whittaker v. Helena, 14 Mont. 124; 35 Pac. 904.

IV. ACTIONS, 4-24.

A. Right of Action, Preliminary Proceedings, and Pleading, 4-12.
B. Evidence, 13-20.
C. Trial, 21-24.

A. RIGHT OF ACTION, PRELIMINARY PROCEEDINGS, AND PLEADING, 4-12.

4. In an action for damages for injury of person, the plaintiff need not allege or prove that such injury occurred without his fault or contributing neglect.—Higley v. Gilmer, 3 Mont. 90.

5. Though, in actions for injuries, the absence of contributory negligence need not be pleaded, if the complaint shows that plaintiff's own act was a proximate cause of the injury, it must also state his freedom from negligence in doing such act.—Cummings v. Reduction Co., 26 Mont. 434; 68 Pac. 852.

6. Under Code Civ. Proc., § 720, failure to reply in a personal injury case does not admit allegations of contributory negligence.—Coleman v. Perry, 28 Mont. 1; 72 Pac. 42.

7. The defense of contributory negligence in a personal injury action must be specially pleaded.—Meisner v. Dillon, 29 Mont. 116; 74 Pac. 130.

8. The existence of contributory negligence is a matter of defense, and the absence of contributory negligence need not be averred by plaintiff.—Ball v. Gussenhoven, 29 Mont. 321; 74 Pac. 871.

9. The act of God is a defense which must be pleaded, to be available.—Orient Ins. Co. v. Northern Pacific, 31 Mont. 502; 78 Pac. 1036.

10. Contributory negligence is a defense which must be pleaded, to be available; and, there being nothing in any allegation of the complaint to indicate contributory negligence, the complaint need not negative it, in which case its allegation that the destruction of the property was without fault of the owners is surplussage, so that neither does it excuse defendant from pleading contributory negligence, nor does the general denial thereof by the answer raise such issue.—Id.

11. Freedom from contributory negligence need not be alleged in a complaint for personal injuries, that being a matter of defense.—Pryor v. Walkerville, 31 Mont. 618; 79 Pac. 240.

12. In an action for injuries to a child, received while playing around machinery operated by defendant, the complaint must allege either that there was an actual invitation to children to play about the machinery or that it was so specially and unusually attractive to children that it constituted an implied invitation; and an allegation that defendant knew that the machinery did attract children is insufficient.—Driscoll v. Clark, 32 Mont. 172; 80 Pac. 1; 80 Pac. 373.

B. EVIDENCE, 13-20.

12. Evidence of previous accidents occurring under the driver of defendant's coach, or of his reputation for competency, is not admissible on the question of whether or not he was negligent at the time the accident complained of occurred.—Higley v. Gilmer, 3 Mont. 90.

14. In an action for damages received in an accident caused by the use of unsafe and unsuitable horses on a stage coach, evidence of

vicious actions of such horses, both before and after the accident, are admissible to show the vicious disposition of the animals. (See 131 U. S. 22.)—Kennon v. Gilmer, 5 Mont. 257; 5 Pac. 847.

15. Evidence of other similar acts of negligence on the part of defendant, is admissible to show negligence in a particular case.—Diamond v. Northern Pacific, 6 Mont. 580; 13 Pac. 367.

16. In actions for damages for personal injuries, contributory negligence is a matter of defense, and the absence of contributory negligence is not required to be proved by the plaintiff as part of his case.—Nelson v. Helena, 16 Mont. 21; 39 Pac. 905.

17. Whenever plaintiff's own case raises a presumption of contributory negligence, the burden of proof is immediately upon him.—Id.

18. Contributory negligence is a matter of defense and the burden of proving it is on defendant unless plaintiff's own case raises a presumption of contributory negligence, when the burden of proving its absence is immediately on him.—Prosser v. Montana Central, 17 Mont. 372; 43 Pac. 81.

19. Where plaintiff's evidence raises a presumption of contributory negligence, the burden is on him to remove it; and hence a finding of contributory negligence may be justified, though defendants offer no proof.—Hunter v. Montana Central, 22 Mont. 525; 57 Pac. 140.

20. Where plaintiff's evidence in an action for injuries shows that the injuries were caused in whole or in part by his own acts, the burden is cast upon him to prove that he was exercising ordinary care at the time.—Cummings v. Reduction Co., 26 Mont. 434; 68 Pac. 852.

C. TRIAL, 21-24.

21. Where it is admitted, in an instruction asked by plaintiff, that plaintiff is without fault or negligence on his part, it is error to admit an instruction asked for by defendant on the question of contributory negligence.—Kelley v. Cable Co., 7 Mont. 70; 14 Pac. 633.

22. In defining "ordinary care" the courts recognize that no fixed arbitrary rule can be laid down, but that the degree of care and vigilance required varies according to the exigencies which require attention and vigilance, conforming in amount and degree to the immediate circumstances under which they are to be exercised.—Johnson v. Mining Co., 16 Mont. 164; 40 Pac. 298.

23. On a trial of an action to which contributory negligence would be a defense, an instruction "that, if the deceased, by any act of negligence on his part, caused his death, then the plaintiff can not recover, and your verdict should be for defendant," is properly refused, as too sweeping in its terms.—Mulville v. Pacific Mutual, 19 Mont. 95; 47 Pac. 650.

24. Where, in an action for injuries, plaintiff's evidence shows, beyond question, that his own omission to use ordinary care contributed immediately to, or itself caused, the injury, a non-suit should be granted.—Cummings v. Reduction Co., 26 Mont. 434; 68 Pac. 852.

NEWSPAPERS.

1. In an action by a publisher to recover from a county for the publication of matter furnished him by the county clerk, under a statute requiring county clerks to cause certain matters to be published in one or more county newspapers, a complaint which states that such matter was furnished by the county clerk for publication, but does not aver that such clerk caused it to be published, or that the newspaper named in the complaint was designated by the clerk as the one in which publication was to be made, is bad on demurrer.—Becker v. Yellowstone, 11 Mont. 490; 28 Pac. 1116.

2. Under Pol. Code, § 4233, fixing the maximum rates for public printing, and providing a certain rate for printing blanks, and an increased rate for county warrants, with stubs, printed on bond paper, and providing for an additional compensation for numbering and perforating road tax receipts, special poor tax, or other blanks requiring such additional work, the price to be paid for printing, perforating and numbering road tax receipts is the price for ordinary blanks, with additional compensation for perforating and numbering, and not the special rate for county warrants.—Stevens v. Ravalli, 25 Mont. 306; 64 Pac. 876.

3. Under Pol. Code, § 4233, providing that newspaper notices printed for the public shall be paid for by the folio, which shall be measured by taking the space occupied by 100 words of solid nonpareil type, a newspaper publishing such notices in larger type is only entitled to compensation for the number of folios which such notices would have required if printed in nonpareil.—Id.

4. Where a printer contracts to furnish blanks to a county for a certain percentage of the maximum rate established by Pol. Code, § 4233, which provides that the standard of sizes used shall be fools scap sheets, 14x16 inches, the printer is not entitled to a special price for blanks not capable of being cut from fools cap paper, since the extra expense of desized blanks should have been considered by the printer in making the contract.—Id.

5. Under Pol. Code, § 4233, fixing the maximum rate for public printing, and providing a reduction of certain percentage for all blanks of a certain kind in excess of 1,000, and providing an additional compensation for perforating and numbering blanks, the charge for perforating and numbering is not reduced because the number exceeds 1,000.—Id.

NEW TRIAL.

I. Nature and Scope of Remedy, 1-5.

II Grounds, 6-44.

- A. Errors and irregularities in general, 6-11.
- B. Misconduct of jury, 12.
- C. Irregularities or defects in verdict or findings, 13-14.
- D. Verdict or findings contrary to law or evidence, 15-24.
- E. Surprise, accident, inadvertence, or mistake, 25-29.
- F. Newly discovered evidence, 30-44.

III. Proceedings to Procure New Trial, 45-118.

- A. Time for application or petition after term, 45.

III. Proceedings to Procure New Trial, 45-118.—Continued.
B. Requisites of application and motion, 46-104.
1. In general, 46.
2. Statement of grounds and specification of errors, 47-63.
3. Bill of exceptions or statement of facts, 64-91.
4. Notice of motion or intention to apply, 92-102.
5. Amendment and filing of motion, 103-104.
C. Affidavits and extrinsic evidence, 105-111.
D. Hearing and determination, 112-118.
IV. Proceedings at New Trial, 119.

I. NATURE AND SCOPE OF REMEDY, 1-5.

1. Where a complaint sets forth three distinct causes of action, and the issues have not been blended, a new trial can be granted only as to those issues which have been improperly tried, under Code Civ. Proc., § 1170, defining a new trial to be a re-examination of an issue of fact in the same court after a trial.—Ramsdell v. Clark, 20 Mont. 103; 49 Pac. 591.

2. A new trial, by Code Civ. Proc., § 1170, is a re-examination of an issue of fact in the same court after a trial and decision. Sec. 1030 defines an "issue of fact" as one arising on the pleadings. *Held*, that a motion which does not ask for a decision on an issue of fact arising on the pleadings is not the subject of a new trial. —Beach v. Water Co., 21 Mont. 7; 52 Pac. 560.

3. An order for new trial generally is too broad where the only objection to a verdict was that the evidence was insufficient to sustain it as to only a part of the alleged causes of action, and it could be readily granted as to those issues improperly tried without confusion resulting on the record.—Hamilton v. Nelson, 22 Mont. 539; 57 Pac. 146.

4. Since a motion for a new trial is a statutory remedy, in order to successfully invoke it, the mode pointed out by the statute must be pursued.—State v. District Court, 28 Mont. 123; 72 Pac. 412.

5. A motion for a new trial does not lie in a proceeding to settle the accounts of a receiver and to fix his compensation.—State v. District Court, 28 Mont. 227; 72 Pac. 613.

II. GROUNDS, 6-44.

A. Errors and Irregularities in General, 6-11.
B. Misconduct of Jury, 12.
C. Irregularities or Defects in Verdict or Findings, 13-14.
D. Verdict or Findings Contrary to Law or Evidence, 15-24.
E. Surprise, Accident, Inadvertence, or Mistake, 25-29.
F. Newly Discovered Evidence, 30-44.

A. ERRORS AND IRREGULARITIES IN GENERAL, 6-11.

6. When facts have been found by the court below and are not disturbed, and the conclusions of law are erroneous, this court will not order a new trial, but direct that proper judgment be entered according to the facts.—Barkley v. Tieleke, 2 Mont. 435.

7. The denial of a motion made before trial for judgment on the pleadings can not be assigned as ground for new trial, as it is not an "error of law occurring during the progress of the trial".—Powder R. C. Co. v. Custer, 9 Mont. 145; 22 Pac. 383.

8. Under Comp. Stat., p. 135, § 296, subd. 7, allowing a new trial for "errors in law occuring at the trial, and excepted to by the party making the application," a new trial can not be granted where no such exceptions were raised at the trial.—Froman v. Patterson, 10 Mont. 107; 24 Pac. 692.

9. That the judgment is against law affords no ground for new trial; otherwise if the verdict or findings are not sustained by the law and the evidence.—Id.

10. Defendant, after judgment entered against him on a referee's decision, filed a notice of intention to move for new trial, and afterwards prepared his statement in support thereof, to which plaintiff submitted amendments, which defendant refused to adopt. The referee meanwhile absconded without filing a transcript of the evidence, and the statement and amendments were never submitted to him. A subsequent motion for new trial was too late. *Held*, that the fact that that referee had absconded and failed to return the transcript was not ground for new trial, not being enumerated as such in Code Civ. Proc., § 1171.—Ogle v. Potter, 24 Mont. 501; 62 Pac. 920.

11. Where an action was tried to the court, and a female employee of one of the successful defendants had communications with the judge, and wrote letters to him, to which he replied, soliciting further conversation with relation to the case while the same was being argued before him, and such letters contained references to benefits to be derived by the judge in case of a decision favorable to the writer's emyloyer, and the judge, in an affidavit submitted, failed to deny the authorship of the reply, such acts entitled plaintiff to a new trial.—Finlen v. Heinze, 28 Mont. 548; 73 Pac. 123.

B. MISCONDUCT OF JURY, 12.

12. A defendant who joins with jurors in drinking at plaintiff's expense, and gives no notice to the court of the occurrence till after the verdict is rendered, can not, on motion to set aside the verdict, urge that the jurors were, by receiving the liquor, influenced in plaintiff's favor.—Bradshaw v. Degenhart, 15 Mont. 267; 39 Pac. 90.

C. IRREGULARITIES OR DEFECTS IN VERDICT OR FINDINGS, 13-14.

13. The fact that appellant's counsel were not present when the verdict was rendered is not ground for new trial, where it was due to failure of the bailiff to keep his promise to notify counsel when the jury came to an agreement. (See 171 U. S. 92.)—Fitzgerald v. Clark, 17 Mont. 100; 42 Pac. 273.

14. The failure of a referee to file his report in court within 10 days, in accordance with the provisions of Code Civ. Proc., § 1139, is not ground for new trial.—Emerson v. Bigler, 21 Mont. 200; 53 Pac. 621.

D. VERDICT OR FINDINGS CONTRARY TO LAW OR EVIDENCE, 15-24.

15. Where the evidence is conflicting, the jury are to determine the facts, and their verdict will not be disturbed, unless clearly unsupported by the evidence before them.—Kleinschmidt v. Dunphy, 1 Mont. 118.

16. A new trial will not be granted if there is some testimony to support the verdict, although there is a preponderance of evidence against it.—Lincoln v. Rodgers, 1 Mont. 217.

17. A new trial will not be granted as against law where the court instructed the jury in the precise language as requested by the respective counsel, and no objection or exceptions being taken.—Orr v. Haskell, 2 Mont. 225.

18. It must be clear that the jury has erred before a new trial will be granted on the ground that the verdict is against the weight of evidence or unsupported by it.—Id.

19. In an action of claim and delivery, where plaintiff asserts a conditional sale, and defendant maintains a sale absolute, and the evidence shows an absolute sale, the trial judge ought promptly to set aside a general verdict in plaintiff's favor, and grant a new trial.—Silver Bow M. & M. Co. v. Lowry, 6 Mont. 288; 12 Pac. 652.

20. In an action against a vendor for breach of warranty in two of three barrels of paint sold, there was evidence that it was all made by the same company, by the same formula; that the paint in the two barrels, but not in the third, when put on a roof, cracked and blew off; that good paint, when put on a roof, in proper condition, will not do this; that the roofs on which this paint was put were in proper condition. *Held*, that on a verdict for defendant, an order granting plaintiff a new trial was proper.—Michaud v. Freisheimer, 16 Mont. 472; 41 Pac. 231.

21. A verdict rendered in disregard of instructions given, though erroneous, is against the law, and should be set aside.—Murray v. Heinze, 17 Mont. 353; 42 Pac. 1057; 43 Pac 714.

22. Though juries are judges of the credibility of witnesses, yet where positive and direct testimony is undisputed and uncontradicted, and no improbability or inconsistency is apparent in it, or disclosed by other facts or circumstances, and the witness is not impeached or discredited, such testimony must be believed, and a verdict contrary to it should be set aside.—Boe v. Lynch, 20 Mont. 80; 49 Pac. 381.

23. Where, in an action for damages for failure to work a mine under the terms of a lease, there was no evidence of damage, and the jury were instructed that, if they found for plaintiff, they could only assess nominal damages, no new trial should be granted on a finding for defendant.—Ramsdell v. Clark, 20 Mont. 103; 49 Pac. 591.

24. On motion for new trial the verdict should be set aside if the trial judge be satisfied that it is not warranted by the evidence.—Harrington v. Mining Co., 27 Mont. 1; 69 Pac. 102.

E. SURPRISE, ACCIDENT, INADVERTENCE, OR MISTAKE, 25-29.

25. Appellant claimed to have been surprised, for the reason that his attorneys told him that the consideration paid made no difference in the case; the findings of the court showed that it did not. *Held*, that appellant could not have been surprised by this advice, and that it would warrant the granting of a new trial.—Morse v. Swan, 2 Mont. 306.

26. When plaintiff has simply proven the allegations of his complaint, defendant will not be allowed a new trial on the ground of surprise.—Francisco v. Benepe, 6 Mont. 243; 11 Pac. 637.

27. The fact that a witness testifies differently from that to which he was expected to testify, does not entitle a party to a new trial on the ground of accident and surprise, where the information that he would so testify was obtained before the trial, and the party was then as fully prepared to take the testimony of the witness as he would have been on another trial.—O'Donnell v. Bennett, 12 Mont. 242; 29 Pac. 1044.

28. Defendant, after judgment entered against him on a referee's decision, filed a notice of intention to move for new trial, and afterwards prepared his statement in support thereof, to which plaintiff submitted amendments, which defendant refused to adopt. The referee had meanwhile absconded without filing a transcript of the evidence, and the statement and amendments were never submitted to him. A subsequent motion for new trial was too late. *Held*, that the misconduct of the referee was not ground for new trial under Code Civ. Proc., § 774, this section referring to cases where parties have been prevented from having a proper hearing in the first instance and are in default.—Ogle v. Potter, 24 Mont. 501; 62 Pac. 920.

29. The trial court found certain counterclaims to have been sufficiently pleaded, and defaulted the plaintiff as to the same, on failure to reply; relying on which default defendant introduced no evidence, on reference of the case, to prove the counterclaims. The court adopted the findings of the referee, but declared that part of the counterclaims only were sufficiently pleaded. *Held*, a new trial would be allowed defendant, as such action of the court was surprise and accident which ordinary prudence could not have guarded against.—Porter v. Printing Co., 26 Mont. 170; 66 Pac. 839; 67 Pac. 67.

F. NEWLY DISCOVERED EVIDENCE, 30-44.

30. A new trial will not be granted on the ground of newly discovered evidence, if the affidavits do not show what diligence was used to obtain it, and the evidence shown is cumulative.—Caruthers v. Pemberton, 1 Mont. 111.

31. Where the affidavits filed on motion for new trial show the newly discovered evidence to be of a cumulative character, the motion should be overruled.—(See 11 Wall. 610.)—Kleinschmidt v. Dunphy, 1 Mont. 118.

32. A new trial will not be granted on the ground of newly discovered evidence, if the same be merely cumulative. (See 130 U. S. 200.)—Garfield M. & M. Co. v. Hammer, 6 Mont. 53; 8 Pac. 153.

33. Where newly discovered evidence could only serve to impeach a witness, and such evidence being also contradicted by the affidavits of two persons, a new trial will not be granted.—Id.

34. Where no effort is made by a party on the trial to prove the contents of a lost deed by secondary evidence, there being within his reach at the time evidence both of the loss of the deed and of its contents, a new trial will not be granted upon the subsequent finding of the deed on the ground of newly discovered evidence.—Quigley v. Birdseye, 11 Mont. 439; 28 Pac. 741.

35. Where the verdict of the jury established the fact that no vein of quartz existed on the lands at the time of application for placer patents, newly discovered evidence of a re-

corded location notice claiming such veins to exist is not ground for new trial.—Butte & B. M. Co. v. Sloan, 16 Mont. 97; 40 Pac. 217.

36. A new trial on the ground of newly discovered evidence will not be granted merely because an affidavit is filed alleging that a witness stated that he swore falsely on the trial, where there is nothing to show that witness would testify differently on another trial, and there was sufficient evidence without his testimony to sustain the judgment. (See 170 U. S. 36.)—Leyson v. Davis, 17 Mont. 220; 42 Pac. 775.

37. A showing of newly discovered evidence, predicted on hearsay only, and containing material contradictions is insufficient to justify the granting of a new trial.—Holland v. Huston, 20 Mont. 84; 49 Pac. 390.

38. A new trial on the ground of newly discovered evidence going only to impeach the credit of a witness on the trial will not be granted.—Baxter v. Hamilton, 20 Mont. 327; 51 Pac. 265.

39. A new trial will not be granted for newly discovered evidence because a witness who testified, through forgetfulness, failed to state all he knew.—Gregg v. Kommers, 22 Mont. 511; 57 Pac. 92.

40. Where the only evidence of surprise was that defendant expected a witness to testify as he did, and the evidence with which he proposed to rebut this witness could have been obtained by due diligence, the motion for a new trial should have been denied.—Rand v. Kipp, 27 Mont. 138; 69 Pac. 714.

41. Where defendant's affidavits in support of a motion for a new trial for newly discovered evidence in a suit for a balance of account merely stated that due diligence had been used, and it appeared that an inquiry of his co-defendant, or an examination of the firm books in his possession, which he said he could not find until after the trial, would have appraised him of all the facts alleged to have been discovered, the motion should have been denied, though the evidence itself was material.—Id.

42. Code Civ. Proc., § 1171, authorizes the granting of a new trial for newly discovered evidence, which the moving party could not with reasonable diligence have discovered and produced at the trial. In an action to recover a loan plaintiff testified in justice's court that no one was present when the loan was made, but in the district court testified that his wife was present. Defendant asked no continuance to secure impeaching witnesses, and he made no effort to that end, but himself testified to the contradiction. *Held*, that a new trial was properly refused.—Smith v. Shook, 30 Mont. 30; 75 Pac. 513.

43. The affidavit of proponent for new trial on the ground of newly discovered evidence, in proceedings to establish a lost will, averred that since the dismissal of his petition he had discovered a witness who would testify that he was shown the will by testator, and that he saw it after his death; that proponent was unable to discover the evidence prior to the trial, although he had inquired of different persons living in the vicinity, and every person whom he thought had any knowledge of the circumstances. The affidavit of the witness in question showed that prior to the death of testator he left the vicinity, but returned after testator's death and occupied a house on testator's property. It did not appear how the evidence was discovered, or that the witness had not lived in the vicinity from a few weeks after testator's death to the time of the trial. *Held*, that there was not a sufficient showing of diligence.—In re Colbert's Estate, 31 Mont. 477; 80 Pac. 248.

44. A motion for new trial is not to be granted on newly discovered evidence unless the evidence makes it clearly probable that it will produce a different result on the re-trial.—Id.

III. PROCEEDINGS TO PROCURE NEW TRIAL, 45-118.

A. Time for Application or Petition After Term, 45.
B. Requisites of Application and Motion, 46-104.
C. Affidavits and Extrinsic Evidence, 105-111.
D. Hearing and Determination, 112-118.

A. TIME FOR APPLICATION OR PETITION AFTER TERM, 45.

45. Where the statement on motion for new trial and the defendant's proposed amendments were not presented to the judge within the 10 days allowed by Code Civ. Proc., § 1173, it was proper to settle the same, and deny the motion for new trial.—Wright v. Matthews, 28 Mont. 442; 72 Pac. 820.

B. REQUISITES OF APPLICATION AND MOTION, 46-104.

1. In General, 46.
2. Statement of Grounds and Specification of Errors, 47-63.
3. Bill of Exceptions or Statement of Facts, 64-91.
4. Notice of Motion or Intention to Apply, 92-102.
5. Amendment and Filing of Motion, 103-104.

1. In general, 46.

46. A stay of execution, granted to allow time for the preparation and service of a statement on motion for new trial, begins to run at the expiration of the 10 days which the law allows for preparation and service of a statement after service of notice of intention to move for new trial.—Kendall v. O'Neal, 16 Mont. 303; 40 Pac. 599.

2. Statement of grounds and specification of errors, 47-63.

47. An order of the district court denying a motion for new trial will be sustained, if there is no statement specifying errors, or bill of exceptions.—Anderson v. O'Laughlin, 1 Mont. 81.

48. A statement on motion for new trial is sufficient if it points out in an intelligent manner the specific errors relied upon by the appellant.—Pinney v. Herschfield, 1 Mont. 367.

49. A motion for new trial must designate and specify, with exactness and precision, the grounds upon which the motion will be made, and these specifications must be carried into the statement and form a part thereof, and only so much of the evidence shall be reproduced as tends to explain the specifications of error.—Griswold v. Boley, 1 Mont. 545.

50. Under Comp. Stat., p. 135, § 298, providing that a statement for new trial shall specify the "particular errors" of law on which appellant relies, a statement containing nothing but an unorganized mass of testimony is insufficient.—Raymond v. Thexton, 7 Mont. 299; 17 Pac. 258.

51. A specification of error, on motion for new trial, stating that "the only ores disposed

of by defendants, and the moneys received therefor, have been fully accounted for to plaintiff," intended to show that a verdict for plaintiff, under pleadings charging the defendants with having converted the ore belonging to plaintiff, was against the evidence, was insufficient.—Zickler v. Deegan, 16 Mont. 198; 40 Pac. 410.

52. An action on an account and to foreclose a mechanic's lien was tried to the court. The court made no findings, and held generally for defendants. On motion for new trial, a specification of error was: "The court erred in finding that M was in any way incapacitated from making a contract with A, the contractor, to furnish materials described in plaintiff's complaint, * * * and the evidence herein fails wholly to sustain the finding of the court in this particular." *Held*, that the statement did not specify the particular errors on which the party would rely, as required by Comp. Stat., p. 136, § 298, subd. 3, and was properly disregarded.—Bardwell v. Anderson, 18 Mont. 528; 46 Pac. 443.

53. A specification of the insufficiency of the evidence to justify the verdict or other decision, on motion for new trial, in terms, "The findings of the court to the effect that the value of the materials described in the complaint had not been sufficiently proven are unsupported by the evidence, and in direct conflict with the same, and are one of the errors specified by the plaintiff herein," is bad as an assignment of insufficiency.—Id.

54. An assignment of error on motion for new trial is sufficient if it calls the attention of the court to the error complained of.—Vogt v. Baldwin, 20 Mont. 322; 51 Pac. 157.

55. Specifications are sufficient to point out the particulars in which the evidence is claimed to be insufficient to justify the verdict, which give the opposite party notice, and advise the court in plain language of the matters that would be urged on the hearing.—Patten v. Hyde, 23 Mont. 23; 57 Pac. 407.

56. Where the only specification in the statement for new trial is that the evidence is insufficient to support the verdict "in finding for plaintiff in the sum of $95.70, with interest," and that the "verdict is contrary to the evidence," there is a failure to comply with the requirement of Code Civ. Proc., § 1173, that when a motion is for insufficiency of evidence the statement shall specify the particulars in which such evidence is alleged to be insufficient.—King v. Lincoln, 26 Mont. 157; 66 Pac. 836.

57. Under Code Civ. Proc., § 1173, a specification merely alleging that the evidence is insufficient to justify a certain finding set out is insufficient.—Finlen v. Heinze, 28 Mont. 548; 73 Pac. 123.

58. Under Code Civ. Proc., § 1173, providing that, where a notice of motion for new trial designates as the grounds thereof errors in law occurring at the trial, the statement shall specify the particular errors upon which the party will rely, a specification in the statement that the court erred in making a certain finding of fact, "there being insufficient evidence to justify such finding, and the evidence being insufficient to support the same, and said finding is contrary to the evidence and wholly unsupported thereby," is insufficient to charge error in law.—Schilling v. Curran, 30 Mont. 370; 76 Pac. 998.

59. Under Code Civ. Proc., § 1173, providing what the statement on motion for new trial shall specify, and that, if no such specifications are made, the statement shall be disregarded on hearing of the motion, a statement which does not specify the insufficiency of the evidence as a ground of the motion must, at least so far as the sufficiency of the evidence is concerned, be disregarded.—Id.

60. Under such section, a specification in the statement that the court erred in making a certain finding, "there being insufficient evidence to justify said finding, and the evidence being insufficient to support the same, and said finding is contrary to the evidence, and wholly unsupported thereby," is not a proper specification of the insufficiency of the evidence.—Id.

61. While, under Code Civ. Proc., §§ 1173, 1152, specifications of error should be arranged separately, under appropriate headings, a statement is not fatally defective to contain neither appropriate or any headings.—Gillies v. Mining Co., 32 Mont. 320; 80 Pac. 370.

62. Where, in an action for injuries to a servant, the principal controversy was whether defendant was guilty of any negligence in providing suitable appliances, and its liability rested on the question whether A was a fellow servant or vice principal, a specification of error in the statement for new trial that there was no evidence that A was an officer of defendant, that he stood in any other relation than that of fellow servant to plaintiff, or that defendant was in any wise bound by his conduct in making an alleged change of a rope and snatch block attached to the hoisting apparatus, sufficiently pointed out wherein the evidence was insufficient as required by Code Civ. Proc., § 1173.—Id.

63. All the errors specified in a statement on motion for new trial were under the heading, "Specifications of errors occurring at said trial." The first specification was that there was no evidence that the defendant, or any officer thereof, failed to provide suitable appliances, or provided unsafe apparatus, so as to cause the injury alleged in the complaint, nor was there any evidence that a certain witness was other than plaintiff's fellow servant, etc. Then followed three other assignments questioning the sufficiency of the evidence, followed by others directed at the instructions. *Held*, that the first four specifications of error were not fatally defective, in that they were designated by the title as errors of law, while in fact they were assignments of particulars wherein the evidence was insufficient to sustain a finding, as provided by Code Civ. Proc., § 1173.—Id.

3. Bill of exceptions or statement of facts, 64-91.

64. This court will not consider a statement that has not been duly settled and certified, or exceptions that have not been duly presented and signed according to statute.—King v. Sullivan, 1 Mont. 282.

65. Where a motion for new trial was made, and overruled before the statement on motion was settled, the appellate court will consider only such matters as were before the court when the motion for a new trial was before it.—Demers v. McCormick, 5 Mont. 234; 2 Pac. 350.

66. A statement on motion for new trial simply certified to by appellant's attorney as correct, is not sufficient under Comp. Stat., p. 135, § 298, requiring that such statement shall be signed by the judge, "with his certificate that the same is allowed."—Raymond v. Thexton, 7 Mont. 299; 17 Pac. 258.

67. Where a party fails to comply with an order requiring the stenographer's minutes filed in the action to be reduced to the form of a statement on motion for new trial, it is proper for the trial court, overruling the motion, to refuse to sign the same as a statement.—Sherman v. Higgins, 7 Mont. 479; 17 Pac. 561.

68. A statement on motion for new trial need not be endorsed with the acceptance of service by the adverse party, where the moving

party shows by affidavit that due service was made.—Wulf v. Manuel, 9 Mont. 276; 23 Pac. 723.

69. Comp. Stat., p. 136, § 298, subd. 3, providing that the moving party shall prepare a draft of the statement on motion for new trial, and serve the same, or a copy, on the adverse party, a service by leaving the original with his attorney, who afterwards returned it, is sufficient.—Id.

70. Settlement of a statement on motion for new trial during the pendency of a motion to strike out the same on the ground of want of service, is not error where due service is shown by the uncontradicted affidavit of the moving party.—Id.

71. Under Comp. Stat., p. 136, § 298, subd. 3, providing that if no amendments are proposed to the statement on motion for new trial, within the time designated, it may be presented for settlement without notice to the adverse party, he can not object that settlement was made without notice to him where he had offered no amendments.—Id.

72. A stipulation "that defendant have until April 1st to make and serve statement and bring on motion for new trial" was complied with by filing and serving the statement on the 31st of March, although under Comp. Stat., p. 135, § 298, plaintiff was entitled to 10 days within which to propose corrections and amendments; since, under § 299, providing that the motion shall be heard "at the earliest practicable period" after the statement has been filed, so much of the stipulation as attempted to fix the date for hearing the motion was immaterial, and additonal time might be allowed within which to propose amendments.—Sweeney v. Railway Co., 11 Mont. 523; 29 Pac. 15.

73. Under Comp. Stat., p. 201, § 536, which provides that the trial court shall not extend the time for filing a statement on motion for new trial to exceed 30 days without the consent of the adverse party, a statement filed more than 30 days after the first order granting an extension of time was made must be stricken from the record, though it was filed within the time fixed by subsequent extensions granted by the court, where such extensions were made without the consent of the adverse party.—Doyle v. Gore, 13 Mont. 471; 34 Pac. 846.

74. The fact that a statement on motion for new trial was not served on all the attorneys of certain of the respondents is not ground for dismissing an appeal from the order denying such new trial, where it appears that attorneys representing all the respondents were served.—Walsh v. Mueller, 14 Mont. 76; 35 Pac. 226.

75. An appeal from an order denying a motion for new trial will not be dismissed because the time for serving the statement on motion for new trial was extended, without respondent's consent, beyond the statutory period, if respondent not only made no objections to such extension, but joined in the settlement without objection.—Id.

76. Where an order extends the time for filing a statement on motion for new trial, or for doing any act in court practice, "to" a specified day, the day specified is part of the time within which the act may be done.—Penn. P. M. Co. v. Schreiner, 14 Mont. 121; 35 Pac. 878.

77. Under Code Civ. Proc., § 1173, subd. 3, where amendments are proposed and adopted the statement may be presented for settlement within a reasonable time.—Woodward v. Webster, 20 Mont. 279; 50 Pac. 791.

78. A delay of 57 days in the presentation for settlement of the statement of the case and amendments, on motion for new trial, unexplained, and found by the trial court to be an unreasonable delay, defeats the right to a new trial.—Id.

79. Having once held that the delay was unreasonable, the objection to the settlement having been properly preserved, and presented when the motion for new trial was heard, the mere granting of a new trial did not nullify the finding that the delay was unreasonable.—Id.

80. Code Civ. Proc., § 1157, and supreme court rule 4, subd. 14, providing that where the judge refuses to settle a proposed statement to be used on motion for new trial in accordance with the facts the party aggrieved may appeal to the supreme court for leave to prove such statement before a referee, or by deposition, do not apply to a refusal to settle a statement because of unreasonable delay, as the remedy in that case is by mandamus.—In re Plume, 23 Mont. 41; 57 Pac. 408.

81. A statement on motion for new trial which has been settled, certified and filed can not be stricken from the record or files on the ground that the draft of the statement was not served in time.—Beach v. Water Co., 25 Mont. 367; 65 Pac. 106.

82. Where a statement on motion for new trial was erroneously stricken from the record by the trial court, such proceeding would vitiate the order denying new trial, since the motion therefor rested on the statement.—Id.

83. Under Code Civ. Proc., §§ 1155, 1173, where a judgment is entered on June 9, notice of intention to move for new trial is served on the 16th, and on the 25th, the judge extends the time to serve the bill of exceptions to July 26, the service of the bill on July 24 is in time, and it may be used on appeal from the judgment.—Whalen v. Harrison, 26 Mont. 316; 67 Pac. 934.

84. Where a motion for new trial made upon a statement of the case which does not contain a copy of the notice of intention or any reference thereto, and such omission was not waived by the adverse party, the order granting a new trial will be reversed.—Carr v. Closser, 27 Mont. 94; 69 Pac. 560.

85. Under Code Civ. Proc., § 1173, subd. 3, where the movant notified his adversary that the statement would be presented to the judge for settlement at a certain time, and at the time appointed failed to appear, and did not present the statement to the judge or leave it with the clerk, or then and there adopt the amendments of the adverse party, it lost its right to have the statement settled at all.—State v. District Court, 28 Mont. 123; 72 Pac. 412.

86. The right could not be revived by a subsequent adoption of the adverse party's amendments.—Id.

87. A motion filed with the clerk for the settlement of a statement on motion for new trial, reciting the acceptance of the adverse party's amendments, but not called to such adverse party's attention, is not notice to him of such acceptance.—Id.

88. Writ of mandate to the judge to settle a statement and bill of exceptions on motion for new trial will not issue, the preponderance of the evidence showing they were not presented in the statutory time, though settlement was refused on another ground.—State v. District Court, 29 Mont. 176; 74 Pac. 414.

89. Under Code Civ. Proc., §§ 1155, 1173, a bill of exceptions or statement once settled and filed becomes a part of the record, not subject to correction, except on a showing that some mistake has been committed.—York v. Steward, 30 Mont. 367; 76 Pac. 756.

90. While Code Civ. Proc., §§ 370-377, require the official stenographer to attend all sittings of the court, and to file with the clerk full notes of the proceedings, besides an ex-

tended copy of rulings, decisions, and exceptions, which are prima facie correct, it is not necessary for litigants, in making up statements or bills of exceptions, to obtain transcripts of the evidence from the official stenographer.—Id.

91. Where a motion for new trial was made on a bill of exceptions, and not on a statement of facts, it was not objectionable for failure of such bill to contain a specification of errors.—Bond v. Hurd, 31 Mont. 314; 78 Pac. 579.

4. Notice of motion or intention to apply, 92-102.

92. A notice on motion for new trial, which insufficiently designates on what the motion will be based, whether on the minutes of the court, a statement of the case, or a bill of exceptions, is cured by a stipulation that a statement of the case might be used on the motion.—Rutherford v. Talent, 6 Mont. 112; 9 Pac. 886.

93. When a sufficient notice of a motion for new trial has been served on the adverse party, no formal written application in addition is necessary in order to bring the motion to a hearing.—Id.

94. Under Comp. Stat., p. 135, § 297, providing that motions for new trial in certain cases may be made "at the option of the moving party, either upon the minutes of the court, or a bill of exceptions, or a statement of the case," the notice of motion need not be confined to one only of these grounds, but may state that the motion will be made upon the minutes of the court and a bill of exceptions and a statement of the case, and the motion may then be made upon one or all of such grounds.—Gamer v. Glenn, 8 Mont. 371; 20 Pac. 654.

95. A notice of motion for new trial is not sufficient which merely states that it will be asked because the evidence is insufficient to justify the verdict, for Comp. Stat., p. 135, § 298, subd. 3, requires that the "statement shall specify the particulars in which such evidence is alleged to be insufficient."—Froman v. Patterson, 10 Mont. 107; 24 Pac. 692.

96. Comp. Stat., p. 135, § 298, provides that a party intending to move for new trial must file or serve notice of his intention, designating the grounds therefor, and whether "the same will be made upon affidavits, or the minutes of the court, or a bill of exceptions, or a statement of the case." *Held*, that where the notice omits to state on what the motion will be made, an appeal from the order overruling the motion will be dismissed, unless the defect has been waived by the adverse party.—Gregg v. Garrett, 13 Mont. 10; 31 Pac. 721.

97. The mere appearance of counsel for the adverse party when defective notice of motion was submitted to the court, without stipulation or other action with reference to the defect therein, was not a waiver by him of such defect.—Id.

98. The fact that notice of motion for new trial was not served on all the attorneys of certain of respondents is no ground for dismissing an appeal from the order denying such new trial, where it appears that attorneys representing all the respondents were served.—Walsh v. Mueller, 14 Mont. 76; 35 Pac. 226.

99. Within 10 days after the decision of a referee, and after judgment entered thereon, defendant filed notice of intention to move for new trial, and afterwards prepared his statement in support thereof, to which plaintiff submitted amendments, which defendant refused to adopt. The referee had meanwhile absconded without filing a transcript of the evidence, and the statement and amendments were never submitted to him. Four months after decision defendant, on notice, filed a motion for new trial, but the notice did not state any ground on which trial would be asked, but referred to an affidavit filed with the clerk, which stated that the referee had absconded, and his residence was unknown, and that counsel could not incorporate in his statement the evidence on which the finding was based, or obtain a settlement of it. *Held*, that under Code Civ. Proc., § 1173, requiring the party moving for new trial to file notice of intention designating the grounds relied on within 10 days from notice of the decision, the original motion having been abandoned, the motion filed four months after the decision was too late.—Ogle v. Potter, 24 Mont. 501; 62 Pac. 920.

100. A notice designating no grounds for new trial is insufficient.—Id.

101. Under Code Civ. Proc., § 1171, subd. 6, a notice of intention to move for new trial on the ground that the evidence was insufficient "to justify the findings and judgment" is sufficient.—Cobban v. Hecklen, 27 Mont. 245; 70 Pac. 805.

102. The time for giving notice of intention to move for new trial in an equity case, where issues have been submitted to a jury, begins to run from the date of notice of the decision by the court adopting or rejecting the findings of the jury, and not from the date of the return of the special findings by the jury.—Spencer v. Hersam, 31 Mont. 120; 77 Pac. 418.

5. Amendment and filing of motion, 103-104.

103. Under Comp. Stat., p. 135, § 298, providing that "the party intending to move for a new trial must, within 10 days after the verdict, * * * file with the clerk, and serve upon the adverse party, a notice of his intention, and designate the ground upon which the motion will be made," where such notice has been filed within 10 days, an additional notice and affidavit specifying the further ground of newly discovered evidence can not be served and filed after the expiration of 10 days.—Sullivan v. Helena, 10 Mont, 134; 25 Pac. 94.

104. A party submitting amendments to a statement on motion for new trial may reserve his right to object to the settement or consideration thereof on the ground that the statement was not served in time.—Power v. Lenoir, 22 Mont. 169; 56 Pac. 106.

C. AFFIDAVITS AND EXTRINSIC EVIDENCE. 105-111.

105. On motion for new trial, an assignment of error that plaintiff was prevented from having a fair trial by accident and surprise which ordinary prudence could not guard against, will not be considered by the appellate court unless supported by proper affidavit.—Orr v. Haskell, 2 Mont. 225.

106. Comp. Stat., p. 135; § 296, subd. 2, provides for a new trial whenever one or more of the jurors shall be induced to assent to a verdict by a resort to the determination of chance, and that such misconduct may be shown by affidavits of the jurors. *Held*, that a verdict will be set aside on an affidavit of a juror that an agreement was entered into by the jury to arrive at the result by a "quotient verdict," and that he was induced to assent to the verdict because of the agreement so made and carried out, though the affidavits of other jurors are that the quotient so arrived at was used as a basis of discussion as to the amount of the verdict.—Gordon v. Trevarthan, 13 Mont. 387; 34 Pac. 185.

107. In an equity case, the findings of a jury being merely advisory, the court below may, in its discretion, disregard an affidavit of a juror, made on motion for new trial, that he was ill, and that he agreed to a verdict in order to get discharged, where no previous intimation of illness was given to the court. (See 171 U. S. 92.)—Fitzgerald v. Clark, 17 Mont. 100; 42 Pac. 273.

108. It is not an abuse of discretion to refuse a new trial asked on account of newly discovered evidence, where the moving party neither offers any affidavits of the witnesses nor any excuse for failing to do so.—Elliott v. Martin, 27 Mont. 519; 71 Pac. 756.

109. A party moving for new trial on the ground of newly discovered evidence must show by his own affidavit that the new evidence was not known to him at the time of the trial, and the affidavits of other persons on that question are not sufficient.—Smith v. Shook, 30 Mont. 30; 75 Pac. 513.

110. An affidavit by plaintiff that he did not know of certain evidence at the time of trial, and could not have discovered it by reasonable diligence, is insufficient to show the diligence required by Code Civ. Proc., § 1171, it being necessary to allege specifically what acts of diligence were performed.—Nicholson v. Metcalf, 31 Mont. 276; 78 Pac. 483.

111. Refusal of new trial for newly discovered evidence is not error, in the absence of an affidavit that it was not known at the time of trial.—Spencer v. Spencer, 31 Mont. 631; 79 Pac. 320.

D. HEARING AND DETERMINATION, 112-118.

112. It is error for the trial court to refuse to hear a motion for new trial on the ground that the statement was not served within the time contemplated by a stipulation, although such objection may be proper ground for refusing to grant the motion.—Sweeney v. Railway Co., 11 Mont. 34; 27 Pac. 347.

113. The presentation of a formal motion for new trial in writing, and the withdrawal thereof, and substitution of another, does not constitute a withdrawal of the notice of intention to move for new trial, nor an abandonment of the proceeding.—Wastl v. Montana Union, 13 Mont. 500; 34 Pac. 844.

114. Where, in an action of ejectment, defendants introduced evidence to prove an equitable defense, and the court instructed the jury that the verdict must be for plaintiffs, the instruction was practically a nonsuit as to defendants' equitable defense, and therefore, on motion for new trial, whatever their evidence tended to prove must be taken as proved. (See 164 U. S. 325.)—Mayer v. Carothers, 14 Mont. 274; 36 Pac. 182.

115. Where, in an action for conversion, the trial court regards the verdict as in excess of the value of the property, it is not error to give plaintiff the option of remitting the excess, and, if he does so, to order the verdict to stand for the residue, instead of granting a new trial absolutely, under Code Civ. Proc., § 1771, subd. 6, authorizing the granting of a new trial for insufficiency of the evidence to justify the verdict.—Chicago T. & T. Co. v. O'Marr, 25 Mont. 242; 64 Pac. 506.

116. Under Code Civ. Proc., § 1174, providing that a motion for new trial may be brought to a hearing on motion of either party, the delay of a party in bringing his motion for new trial to a hearing is not ground for denying the motion.—Wyman v. Jensen, 26 Mont. 227; 67 Pac. 114.

117. Where it appears that nine affidavits relative to an alleged contradiction between the opposing party's testimony at a former and at the present trial were read in support of a motion for new trial, it was not error to refuse to extend the time to enable the moving party to secure additional affidavits.—Smith v. Shook, 30 Mont. 30; 75 Pac. 513.

118. There is no statute requiring the district court, in an order disposing of a motion for new trial, to specify the papers which were used on such motion.—Mahoney v. Dixon, 31 Mont. 107; 77 Pac. 519.

IV. PROCEEDINGS AT NEW TRIAL, 119.

119. Where, in the appeal of a case certain issues and rights of part of the plaintiffs were finally determined, it was necessary and proper to file an amended and supplemental complaint omitting such issues and the parties whose rights had been determined.—Roush v. Fort, 3 Mont. 175.

NOTICE.

1. Comp. Stat., p. 1158, § 1809, provides that a petition for laying out, altering or having a county road shall be accompanied by proof by affidavit that notice has been given by posting in four public places in the vicinity of the proposed road 30 days previous to presentation of the petition. Comp. Stat., p. 548, § 173 prohibits defacing or obliterating any notification set up by authority of law until the time which it is to remain set up expires. *Held*, that on a new trial for defacing a notice and presentation of a petition for laying out a road, it was not necessary for the prosecutor to show that the petition had been presented, accompanied by proof of the posting of the notice, as required by § 1809.—Territory v. Lannon, 9 Mont. 1; 22 Pac. 495.

NOVATION.

1. In an action by a material man against a contractor for lumber furnished for a house, it is no defense that the owner assumed the debt, unless there was a novation which released defendant.—Aldritt v. Panton, 17 Mont. 187; 42 Pac. 767.

NUISANCE.

I Private Nuisances, 1-8.

II. Public Nuisances, 9-11.

I. PRIVATE NUISANCES, 1-8.

1. The right of one to shut off air and light from his neighbor's windows by building on his own lots is unaffected by his motive.—Bordeaux v. Greene, 22 Mont. 254; 56 Pac. 218.

2. An averment of the complaint in an action to abate, as a nuisance, a fence on defendant's lots, adjoining plaintiff's buildings, that it is liable to be blown over on the buildings, and may injure them, is an allegation of conclusions insufficient to withstand a general demurrer.—Id.

3. The carrying on of blasting on premises platted as city lots, continuously for over a year, constitutes a nuisance prima facie, irrespective of the care exercised, and a recovery may be had for injury to property owing to concussions of the air from the blasting.—Longtin v. Persell, 30 Mont. 306; 76 Pac. 699.

4. Under Civ. Code, § 4554, it is not necessary to give one, who continues a nuisance, notice to abate the same, before bringing suit against him for damages resulting therefrom.—Watson v. Smelting Co., 31 Mont. 513; 79 Pac. 14.

5. Landowners can not recover for a destruction of crops by a nuisance prior to the date when they acquired title, unless they were then in the possession of the property or entitled to possession.—Id.

6. A person continuing a nuisance is not liable for damages caused by the operation of the nuisance by his predecessors in interest.—Id.

7. In order to recover damages resulting from a nuisance, for total and permanent injury to land, such injury must have been completed before suit brought.—Id.

8. Where a permanent and total injury to land for agricultural purposes does not immediately result from the perpetration of a nuisance, but several years lapse before the injury is completed, the landowners are entitled to damages for the real injury to their crops, caused by the continuing nuisance, until the completion of the total and permanent injury, but no damages can be allowed for injury to crops after that time.—Id.

II. PUBLIC NUISANCES, 9-11.

9. A penalty of fine and imprisonment can not be imposed for maintaining a common law nuisance under Comp. Stat., p. 583, § 278, providing that on conviction of a misdemeanor not provided for in the criminal laws, punishment may be by fine and imprisonment, since § 162 provides that a person who does certain things, or who shall maintain any other thing, which at common law would be a nuisance, shall be fined.—State v. District Court, 14 Mont. 452; 37 Pac. 9.

10. The fact that powder stored in defendant's warehouse did not exceed the quantity allowed by a city ordinance does not relieve them from liability for death from an explosion if the amount kept by defendants was in excess of that authorized by a state statute.—Cameron v. Kenyon, 22 Mont. 312; 56 Pac. 358.

11. An unauthorized excavation of a street is a nuisance per se.—Robinson v. Mills, 25 Mont. 391; 65 Pac. 114.

OFFICERS.

I. Appointment, Qualification, and Tenure, 1-6.

II. Title to and Possession of Office, 7.

III. Rights, Powers, Duties, and Liabilities, 8-13.

IV. Liabilities on Official Bonds, 14-20.

I. APPOINTMENT, QUALIFICATION, AND TENURE, 1-6.

1. The creation of the office of county commissioners, the manner of the selection of such officers, whether by election or appointment, the term of the period during which they shall act, the character of the duties to be performed, and the compensation to be paid for the performance of such duties, are entirely the subject of legislative enactment.—People v. Van Gaskin, 5 Mont. 352; 6 Pac. 30.

2. A public office is a public trust. It exists not at all for the benefit of the incumbent, but only for the public; it is not a grant to the incumbent, nor is it in the nature of a contract between the incumbent and the commonwealth.—Id.

3. Const., art. 8, § 1, providing that no person while charged with the exercise of powers belonging either to the legislative, executive or judicial departments shall exercise any powers belonging to either of the others, does not inhibit one from being, at the same time, county attorney and notary public.—State v. Jackson, 9 Mont. 508; 24 Pac. 213.

4. Const., art. 8, § 19, provides that the qualifications of one to be county attorney "shall be the same as are required by a judge of the district court, except that he must be over 21 years of age, but need not be 25 years of age." Sec. 35 provides that no district judge shall hold any other public office. *Held*, that § 35 does not apply to the office of county attorney.—Id.

5. Pol. Code, § 994, providing that every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified, applies only where the term of office of an incumbent has expired, and not to a case of vacancy by resignation.—State v. Page, 20 Mont. 238; 50 Pac. 719.

6. Pol. Code, §§ 341, 470, provided that the state land agent should be appointed by the governor with the consent of the state board of land commissioners, and hold his office during the pleasure of the board. *Held*, that a state land agent appointed by the governor in 1895 was not ousted from his office, and hence no vacancy was created, by act Mar. 4, 1897, repealing § 341, and amending § 470 so as to provide that such agent shall hold his office for the term of four years, or until his successor is appointed and qualified.—Id.

II. TITLE TO AND POSSESSION OF OFFICE, 7.

7. When a person is acting as a public officer under the apparent authority of an act of the legislature, his title to the office can not be collaterally attacked.—Carland v. Commissioners, 5 Mont. 579; 6 Pac. 24.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES, 8-13.

8. A person who demands and receives illegal fees as an officer, or under color of his office, is guilty of extortion.—Ming v. Truett, 1 Mont. 322.

8a. A statute requiring that county offices shall be kept open "during business hours of each day," does not prohibit the transaction of official business at other times.—Harmon v. Comstock, 9 Mont. 243; 23 Pac. 470.

9. Under Const., art. 5, § 31, the laws passed by the legislature in 1891 reducing the emoluments of the sheriff for board of prisoners and mileage, were authorized, since the Constitution did not fix the fees and compensation provided for in those acts.—Lloyd v. Silver Bow, 11 Mont. 408; 28 Pac. 453.

10. A complaint against a public officer for non-performance of duty; which fails to show that the officer had the means to perform the duty, is not demurrable, as the want of means is an affirmative defense, to be raised by answer.—Merritt v. McNally, 14 Mont. 228; 36 Pac. 44.

11. Where a city treasurer, pursuant to Comp. Stat., p. 693, § 351, requiring him to deposit the funds of the city, exercised prudence in the selection of a bank of good standing wherein to deposit the funds, and was free from negligence in permitting them to remain there, he was not liable for loss of the funds by the failure of the bank.—Livingston v. Woods, 20 Mont. 91; 49 Pac. 437.

12. The failure of a city treasurer to keep and pay over moneys constitutes a breach of his official bond, which is conditioned that he will faithfully perform his duties and pay over all moneys, but such failure to account for funds does not necessarily constitute a conversion.—Great Falls v. Hanks, 21 Mont. 83; 52 Pac. 785.

13. Act Mar. 3, 1899, creating the office of county road supervisor, and lessening the duties and compensation of county surveyors, does not, as applied to an incumbent at the time it went into effect, violate Const., art. 5, § 31, ordaining that no law shall increase or diminish the salary or emoluments of any public officer after his election or appointment. —State v. Granite, 23 Mont. 250; 58 Pac. 439.

IV. LIABILITIES ON OFFICIAL BONDS, 14-20.

14. An official bond will not be held to be retrospective unless expressly so stated, and sureties thereon will not be held responsible for default made before execution and acceptance. —Commissioners v. McCormick, 4 Mont. 115; 5 Pac. 287.

15. Although a new bond, in lieu of a former one, is accepted by the board of county commissioners, the sureties on the original bond will still be liable for losses suffered by the default of such treasurer before the acceptance of the new bond.—Id.

16. In an action on an official bond, where a demand has been made for money due, and payment refused, the sureties are liable for legal interest from the date of such demand, even though the principal with such interest added exceeds the penalty of the bond. (See 150 U. S. 128.)—Maddox v. Rader, 9 Mont. 126; 22 Pac. 386.

17. Under a bond given by a city treasurer, conditioned that upon vacating his office he will pay over all funds to his successor, his sureties are liable, on his death before the expiration of his term, for city funds withheld from his successor.—Great Falls v. Hanks, 21 Mont. 83; 52 Pac. 785.

18. In an action against sureties to recover for a shortage of the city treasurer, the complaint was drawn in contract. *Held*, that the sureties were not prejudiced by immaterial and incorrect allegations of conversion on the part of the city treasurer.—Id.

19. In an action against sureties on the official bond of a city treasurer to recover moneys received by him and withheld from his successor, it was not error to exclude evidence of the amount received by the treasurer from his successor, when the defendants admitted that he received the funds sought to be recovered. —Id.

20. In an action on a city treasurer's bond to recover for funds received by him and withheld from his successor, it was proper to show, as against the sureties, that the treasurer deposited the funds in a bank, which afterwards failed, and that the treasurer received credit for such funds on the books of the bank.—Id.

PARENT AND CHILD.

1. The evidence to sustain a parol gift or parol sale between parent and child must be direct, positive, express and unambiguous.—Story v. Black, 5 Mont. 26; 1 Pac. 1.

2. The terms of a parol gift or parol sale between parent and child must be clearly defined, and all the acts necessary for its validity must have special reference to it, and nothing else. —Id.

3. A father may emancipate his minor child, and when this has been done, the property purchased by the child with its own means is not subject to the control or disposal of the father.—Francisco v. Benepe, 6 Mont. 243; 11 Pac. 637.

PARTIES.

I. Plaintiffs and Defendants, 1-4.
II. New Parties, and Change of Parties, 5-9.
III. Defects, Objections, and Aemndments, 10-18.

I. PLAINTIFFS AND DEFENDANTS, 1-4.

1. Comp. Stat., p. 1006, § 1296, provides that all joint obligations shall be taken to be joint and several; and Comp. Stat., p. 63, § 20, provides that persons severally liable upon the same obligation, including parties to notes and bills of exchange, and sureties "on the same or separate instruments," may, all or any, be included in the same action. *Held*, that the sureties on a separate contract of suretyship may be joined with their principal in an action for breach of the latter's contract.—Wibaux v. Grinnell, 9 Mont. 154; 22 Pac. 492.

2. A written order by the owner of personal property, authorizing plaintiff to dispose of it, and collect the proceeds, does not constitute plaintiff a "trustee of an express trust," within the meaning of Comp. Stat., p. 61, § 6, which authorizes a "trustee of an express trust" to sue without joining the persons for whose benefit the action is prosecuted.—Swenson v. Kleinschmidt, 10 Mont. 473; 26 Pac. 198.

3. In an action upon a promissory note, made between former partners, providing that it is to be subject to all defenses which the maker may have against the payee on account of any debts of the firm which the maker may be compelled, or become liable to pay, where the complaint alleges that the maker resists payment on the ground of an outstanding liability of the firm, but that no such liability exists, the parties to whom the maker claims liability are proper parties defendant under Comp. Stat., p. 62, § 16, which provides that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of the question involved therein."—Hoskins v. McGirl, 12 Mont. 563; 31 Pac. 544.

4. Since Code Civ. Proc., § 570, provides that actions shall be prosecuted by the real party in interest, it is competent for a corporation, the actions of which are questioned by a minority stockholder, to show that he is not in fact the real owner of the stock standing in his name.—MacGinnis v. Mining Co., 29 Mont. 428; 75 Pac. 89.

II. NEW PARTIES. AND CHANGE OF PARTIES, 5-9.

5. In an action by a mortgagee against a sheriff and his sureties for his misconduct in a sale under the mortgage, the holder of a note secured by the same mortgage may properly intervene, under Comp. Stat., p. 64, § 24, which provides that any person may before trial intervene in an action, who has an interest in the matter of litigation; and the mere commencement of such action by one mortgagee does not secure to him a prior lien on the sheriff's bond. (See 150 U. S. 128.)—Maddox v. Rader, 9 Mont. 126; 22 Pac. 386.

6. Under Comp. Stat., p. 64, § 24, providing that an intervention takes place when a third person is permitted to become a party to an action, and is made by complaint filed by leave of court, one interested in a matter in controversy does not become a party to the action by the filing, without leave of court, of a demurrer to the complaint.—Dietrich v. Steam Dredge, 14 Mont. 261; 36 Pac. 81.

7. Under Comp. Stat., p. 64, § 24, providing that any person may intervene before the trial of an action, a party can not intervene after a default, for want of answer, has been entered and has not been set aside.—Safely v. Caldwell, 17 Mont. 184; 42 Pac. 766.

8. Under Comp. Stat., p. 62, § 22, it is proper to allow the assignee of a claim for material furnished to be substituted as plaintiff in an action thereon after it had been commenced.—Campbell v. Irvine, 17 Mont. 476; 43 Pac. 626.

9. In an action by a mortgagee on a sheriff's bond for misconduct in a sale under the mortgage, the holder of a note secured by the same mortgage may intervene, under Comp. Stat., p. 64, § 24, as a person "who has an interest in the matter of litiagtion."—Maddox v. Teague, 18 Mont. 593; 47 Pac. 209.

III. DEFECTS, OBJECTIONS, AND AMENDMENTS, 10-18.

10. It is sufficient to describe a party to an action by any known or accepted abbreviation of his christian name.—Kemp v. McCormick, 1 Mont. 420.

11. Where there is a misjoinder of parties defendant, the party improperly joined is the only one who can take advantage of the same. —Territory v. Hildebrand, 2 Mont. 426.

12. Plaintiff brought this action against P as surviving partner of the firm of D & P. The firm was composed of D, C and P, but the answer did not set forth that C was a partner, or that there was a non-joiner of parties, and judgment was entered against P alone. *Held*, that P waived the defect of parties by failing to take advantage of it by demurrer or answer, and that the judgment was properly entered.—Parchen v. Peck, 2 Mont. 567.

13. Where the complaint joins too many persons as defendants, but such fact does not appear on the face of the complaint, and the separate answer of one of the defendants, upon whom alone summons was served and against whom alone judgment was entered, denied the allegations of the complaint but did not plead the misjoinder, an objection as to the misjoinder is waived.—Conklin v. Fox, 3 Mont. 208.

14. The complaint alleged that F and two others were copartners, and that the defendants were indebted to plaintiff upon an account; F filed a separate answer denying the allegations of the complaint and also that he is indebted on his individual account, but did not plead the misjoinder. The proof showed that F alone was indebted to plaintiff. *Held*, that F waived his objection to the misjoinder of parties defendant, that the allegations of the complaint concerning the copartnership might be treated as immaterial and that judgment might be entered against F alone.—Id.

15. Any defect of names of parties to an action at law is waived if defendant answers instead of demurring thereto.—Boyd v. Platner, 5 Mont. 226; 2 Pac. 346.

16. Where defendant, being sued under a wrong name, discloses his true name in his answer, he can not object to the court's giving leave, after the evidence is in, to amend the complaint accordingly.—Ramsey v. Cattle Co., 6 Mont. 498; 13 Pac. 247.

17. A demurrer that a suit was not brought "under the proper caption or style, nor in the proper name, to-wit, in the name of the people of the state of Montana, instead of being brought in the name of the state of Montana," was insufficient. It should have been on the ground "that plaintiff has no legal capacity to sue," as required by Comp. Stat., p. 81, § 87. —People v. McIntyre, 10 Mont. 166; 25 Pac. 100.

18. The question of nonjoinder of a party defendant can not be raised on appeal where no demurrer was interposed, and the parties went to trial without objection.—Duignan v. Montana Club, 16 Mont. 189; 40 Pac. 294.

PARTITION.

1. Where, in an action for partition and sale of property, the court, after sale, has made a final order distributing the proceeds, an order made at a subsequent term by a different judge modifying such order of distribution, upon a motion without a trial by judge or jury, and giving a personal judgment against one of the parties, is illegal and a mere nullity.—Fredericks v. Davis, 6 Mont. 460; 13 Pac. 125.

2. Where several persons enter upon and occupy separate parts of a tract of public land and each make valuable improvements upon their respective parts with the consent of each other, and, having agreed to patent the land with the understanding that each was to own his part in severalty, continued, after the title was obtained, to so separately occupy and improve their respective parts for years, this constitutes a parol partition of the land which was not within the operation of the statute of frauds, and by which each owner acquired an equitable title to the tract occupied by him.—Mathes v. Nissler, 17 Mont. 177; 42 Pac. 763.

3. Under Code Civ. Proc., § 1394, providing that costs of partition, including reasonable counsel fees expended by plaintiff or either of defendants "for the common benefit," must be paid by the parties in proportion to their respective interests in the lands, compensation should be allowed to plaintiff for necessary professional services of counsel in conducting the proceedings to a successful completion, and it is error to limit the allowance to services rendered after entry of judgment and decree.—Murray v. Conklin, 19 Mont. 389; 48 Pac. 743.

4. Under the direct provisions of Code Civ. Proc., § 1342, the wife of defendant, having an inchoate right of dower in an undivided share of the property, must be made a party to the action for partition.—Hurley v. O'Neill, 31 Mont. 595; 79 Pac. 242.

5. In a suit for partition, defendant, alleging prior partition of the land by agreement, has the burden of proof.—Id.

6. Under the direct provisions of Code Civ. Proc., § 1355, where property is so situated that partition can not be made without great prejudice to the owners, the court may order a sale thereof.—Id.

PARTNERSIP.

I. The Relation, 1-9.
II. The Firm, Its Name, Powers, and Property, 10-15.
III. Mutual Rights, Duties, and Liabilities of Partners, 16-26.
IV. Rights and Liabilities as to Third Persons, 27-37.
V. Retirement and Admission of Partners, 38-40.
VI. Death of Partner, and Surviving Partners, 41.
VII. Dissolution, Settlement, and Accounting, 42-51.

I. THE RELATION, 1-9.

1. A special agreement between two persons, by which one of them is to receive one-third of the profits of a business for his services and the other is to be liable for the debts, is no defense to an action commenced against them as partners by a credtior who had no notice or knowledge of the agreement before the liability accrued.—Lomme v. Kintzing, 1 Mont. 290.

2. The mere sharing of profits, although cogent evidence of a partnership, is not conclusive, so as to make him who receives such profits a partner in the business or enterprise by which they are earned.—Parchen v. Anderson, 5 Mont. 438; 5 Pac. 588.

3. In an action on a note signed by a firm, a bill head showing the names of the partners, on which the name of one of the defendants did not appear, was competent as evidence that such defendant was not a member of the firm.—Knight v. Richter, 11 Mont. 74; 27 Pac. 392.

4. In a suit to wind up an alleged firm, the only evidence of a partnership was plaintiff's testimony that he and defendant at a certain time agreed to afterwards enter into a copartnership, which defendant denied. Plaintiff testified that after the first conversation there was no mention of a partnership; the goods were purchased and the business carried on with defendant's money, and in his name; plaintiff kept the books in defendant's name, and defendant kept the bank account; suits were brought by plaintiff in defendant's name, plaintiff stating, when asked "who composed the firm," that defendant did; plaintiff made an affidavit for attachment as agent for defendant, and signed the bond as surety, when he and defendant had a "row," and defendant offered plaintiff $100 per month for the time he had worked, which plaintiff refused; when plaintiff refused defendant's offer to arbitrate their differences plaintiff left; in a few days thereafter defendant gave plaintiff a check, with "for wages in full to date" written across the margin, which plaintiff took without objection and cashed. *Held*, that the evidence did not justify a verdict that a partnership existed.—Arnold v. Sinclair, 12 Mont. 248; 29 Pac. 1124.

5. A statement to plaintiff, by one not a party to the suit, that he was not a partner of the parties, is incompetent to bind defendant, who was not present when the statement was made.—Wiggin v. Fine, 17 Mont. 575; 44 Pac. 75.

6. A contract by which J and S agreed to pay, on Jan. 1, 1898, $5,000 to L, recited that, in consideration of the "above loan" of $5,000 by L to J and S, doing business as bankers, L should receive a third of the profits of the business, and should have all the rights and privileges of an equal partner during the period of the contract, which should continue in force until Jan. 1, 1893, L reserving the right to continue the contract. It was also provided that L should not be liable for losses of the business, and that, if a third of the profits did not equal 10% per annum on the $5,000, then L waived his right to any profits, and J and S agreed to pay him interest on the loan at 10% per annum. *Held*, that the fact that L was entitled to share in the profits did not necessarily make him a partner, but that, if the $5,000 were advanced as a loan, and L elected to take the 10%, then the parties were not partners, but L could recover the money.—Hunter v. Conrad, 18 Mont. 177; 44 Pac. 523.

7. An agreement between three persons to buy a race horse, each to pay one-third of the price and to own one-third interest, and each to share equally the expenses of keeping and training the horse, and the losses and profits made from running it, but one of them to be allowed $50 per month and his board for attending to and driving it, makes the parties partners as to ownership of the horse and profits and losses resulting therefrom.—Morrison v. Bennett, 20 Mont. 560; 52 Pac. 553.

8. Where a ranch partnership agreement provided that the firm should continue as long as the parties could mutually agree, and defendant notified plaintiff that he would not consent to the buying of a bull which plaintiff desired to buy to improve the concern's cattle, and defendant staked off 160 acres of government land that had been used in the business, and notified plaintiff that he intended to hold the same as his own, the bull subsequently purchased by plaintiff was not the property of the firm.—Whipple v. Stuart, 26 Mont. 219; 66 Pac. 941.

9. Civ. Code, §§ 3280, 3281, did not apply to a person who uses as a business name his surname, followed by the words "Furniture & Carpet Company."—Lander v. Sheehan, 32 Mont. 25; 79 Pac. 406.

II. THE FIRM, ITS NAME, POWERS, AND PROPERTY, 10-15.

10. Where a member of a firm conveyed an undivided half interest in fee simple in a house and lot to his partner, who thereupon moved into it, and duly filed and recorded his declaration, claiming it as a homestead, *held*, that it being clear that it was not the intention of the partners to hold the property as firm assets, the same was not subject to the doctrine of equitable conversion, and the partners held the realty merely as tenants in common.—Lindley v. Davis, 7 Mont. 206; 14 Pac. 717.

11. The maker of a note to a firm can not complain of its transfer by a member thereof after an assignment for benefit of creditors by the firm, though the proceeds are applied to the individual debts of such partner, where the other partner ratifies such acts.—Meadowcraft v. Walsh, 15 Mont. 544; 39 Pac. 914.

12. Where the surname of all members of a firm is G, a firm name of "G Bros" is not a fictitous name, or a firm name not showing the names of the partners, within Civ. Code, § 3280, requiring firms doing business under such names to file with the county clerk where the business is located a certificate showing the names and residences of its members.—Guiterman v. Wishon, 21 Mont. 458; 54 Pac. 566.

13. Lands purchased with partnership funds for partnership purposes are firm property, though the title be taken in the names of one of the partners.—Quinn v. Quinn, 22 Mont. 403; 56 Pac. 824.

14. Although a partnership, as such, can not hold the legal title to land, it may in equity own real estate, without reference to the title at law, it being of no importance who holds the legal title, or how he came by it, excepting so far as these facts express or reveal the intention of the partnership.—Rockefeller v. Dellinger, 22 Mont. 418; 56 Pac. 822.

15. Where a firm engaged in cattle raising fences a ranch on government land, which they used in common for the purposes of the business, and defendant, one of the partners, staked off 160 acres of the land within the fences for his private use, and claimed the same as his own, such partner was not entitled to the natural hay growing on such 160 acres as against the other members of the firm, on the pretence that such natural hay was fructus naturalis on government land, and therefore became the property of the first taker.—Whipple v. Stuart, 26 Mont. 219; 66 Pac. 941.

III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS, 16-26.

16. In an action to recover a certain sum as the share of the profits of a partnership transaction, a reference or accounting is not necessary, if the answer does not deny that such profits were made.—McCormick v. Largey, 1 Mont. 158.

17. The law gives to each partner a lien upon the joint effects of the partnership for any excess over his partner which he has contributed to their joint business, and to preserve their joint property.—Wilson v. Davis, 1 Mont. 183.

18. One partner can not sue another for his share until the partnership affairs are settled by an accounting, defining their respective rights.—McMahon v. Thornton, 4 Mont. 46; 1 Pac. 724.

19. Though a partner has purchased the interest of his copartner in the partnership and its assets, he can recover from the latter one-half the amount of a private debt due him which had been collected by the copartner and mixed with the firm assets.—Pierce v. Ten Eyck, 9 Mont. 349; 23 Pac. 423.

20. The partner purchasing the interest of the retiring partner for a fixed sum can not recover his portion of a sum which it is alleged the firm was to be credited with on account of the absence of the latter for a few months the credit never having been made or looked after by plaintiff.—Id.

21. Though the purchasing partner was misled by the way the retiring partner kept the books, and by the latter's failure to give him proper credits, and paid a larger sum than he would have paid if he had known the condition of the books, he can not recover the excess; he having been negligent in not having examined the books.—Id.

22. A purchase by a partner of his copartner's interest for a sum certain, without any reservation of demands, relinquishes a claim for a sum put in by the purchaser in excess of his share, which it has been agreed should be first deducted from the assets on dissolution; the agreement not contemplating a dissolution by purchase by one of the partners of the other's interests.—Id.

23. One partner is not entitled to compensation from the partnership for his services in attending to the partnership affairs, unless there is a contract therefore, express or implied.—Galigher v. Lockhart, 11 Mont. 109; 27 Pac. 446.

24. In an action by two partners against a copartnership for an accounting, the referee found that the partnership existed as alleged in the complaint, and that defendant disposed of partnership property of a stated value, and refused to account for the proceeds. *Held*, that plaintiffs are entitled to recover their share of the value of the property.—Emerson v. Bigler, 21 Mont. 200; 53 Pac. 621.

25. Defendant, in 1879, agreed to give his time to the management of a partnership for five years for $25 per month and one-fourth of the profits, such profits to be credited as payments for a one-fourth interest in the business, valued at a certain sum. In 1884 it was agreed that defendant should continue managing the business for $100 per month, and be entitled to a one-fourth interest therein, and was debited on the partnership books $3,116, the difference between one-fourth of the preceding five years' profits and the value of one-fourth of the business. *Held*, that findings that a new partnership was formed in 1884, and that defendant was entitled, on dissolution of the partnership of 1894, to credit of one-fourth of the profits from 1879 to 1884, were proper, since he received credit for such profits by becoming owner of one-fourth of the business.—Murphy v. Patterson, 24 Mont. 575; 63 Pac. 375.

26. The complaint alleged that plaintiff and defendants were partners, and that defendants withdrew a portion of the firm assets from a bank and converted them to their own use; that thereafter defendants assigned all their interest in the partnership to plaintiff; and that on the settlement and dissolution of the firm the whole of the money so wrongfully converted was due and owing and belonged to plaintiff as a portion of his share. *Held*, that the complaint failed to state a cause of action, since defendants could not assign to plaintiff any right of action growing out of the misappropriation, and there was no allegation of an accounting, either in equity or by agreement, or that on such accounting the moneys converted were found to belong to plaintiff, the allegation that such moneys were owing to plaintiff being a mere conclusion.—Riddell v. Ramsey, 31 Mont. 386; 78 Pac. 597.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS, 27-37.

27. A special agreement between two parties, by which one of them is to receive one-third of the profits of a business for his services, and the other is to be liable for the debts, is no defense to an action commenced against them as partners by a creditor who had no notice or knowledge of the agreement before the liability accrued.—Lomme v. Kintzing, 1 Mont. 290.

28. A personal judgment against one of several partners, in an action on a partnership liability, no objection being made after dismissal as to the dismissal as to the other partners, is not void and can not be attacked collaterally.—Wells Fargo & Co. v. Clarkson, 5 Mont. 336; 5 Pac. 894.

29. An assignment by one member of a partnership, of the firm property, in favor of a creditor, without the authority of his copartner, is void; and such property, in the hands of the assignee, can not be considered or treated as a trust for any purpose whatever.—Steinhart v. Fyhrie, 5 Mont. 463; 6 Pac. 367.

30. One partner has no power to assign the property of the partnership to a creditor, without the consent of his copartner.—Id.

31. The fact that one member of the firm sells a large part of the firm property to pay pressing debts is not such constructive fraud as will avoid the sale at the instance of the other partner, who did not concur therein, where the purchaser, though he knew of such other partner's non-concurrence, paid a fair consideration, and the proceeds of the sale were applied on firm debts and encumbrances on the property.—Waite v. Vinsop, 14 Mont. 405; 36 Pac. 828.

32. Evidence that the parties to a chattel mortgage on the stock of merchandise were partners at the time the instrument was executed is competent on the issue as to validity of the mortgage debt.—Heilbronner v. Lloyd, 17 Mont. 299; 42 Pac. 853.

33. Where a partnership purchased lands with firm property, taking the title in the name of the firm members individually, and then mortgaged the lands to obtain money for the firm business, the mortgage was superior to an earlier judgment against one of the members of the firm.—Rockefeller v. Dellinger, 22 Mont. 418; 56 Pac. 822.

34. Since the question whether lands purchased with firm property, the title being taken in the name of the members, were partnership property, was determined by the intention of the partners at the time of purchasing them,

the mortgage was superior to a prior judgment against one of the members, even though none of the moneys realized therefor were devoted to the partnership business.—Id.

35. An instruction that a "partnership may be shown by the separate admissions, acts, declarations or conduct of the parties, or by the acts of one, the declarations of another, and the acknowledgement and consent of a third," standing alone, is liable to mislead.—Lawrence v. Westlake, 28 Mont. 503; 73 Pac. 119.

36. Under Civ. Code, §§ 3231, 3250, it was for the jury to determine whether a debt was created in the usual course of a firm business, and within a firm venture.—Hefferlin v. Karlman, 29 Mont. 139; 74 Pac. 201.

37. Where defendants claimed that a certain contract was made with plaintiff's firm, which plaintiff denies, and according to defendants' claim it was made with both members of the firm, evidence as to whether plaintiff authorized his partner to enter into the contract for the firm is immaterial.—McCormick v. Johnson, 31 Mont. 266; 78 Pac. 500.

V. RETIREMENT AND ADMISSION OF PARTNERS, 38-40.

38. The assignee of certain members of a firm is not liable to the remaining partner for previous services rendered by him for the partnership, where there was no agreement with the other partners that he should receive compensation therefor, and the assignee did not assume such liability.—Galigher v. Lockhart, 11 Mont. 109; 27 Pac. 446.

39. A person who, on buying the interest of certain members of a mining firm, informs the remaining partner that he will no longer carry on the partnership operations, nor be liable for debts contracted thereafter in its behalf, is not liable to such partner for any subsequent expenses incurred by him in developing the mine. —Id.

40. A retiring partner is liable for the debts of the firm to a creditor having actual knowledge that, under the terms of the dissolution, the other partner had assumed to pay the debts, though the creditor had attached the goods of such other partner, and subsequently had released the attachment.—Cash-Register Co. v. Brown, 19 Mont. 200; 47 Pac. 995.

VI. DEATH OF PARTNER, AND SURVIVING PARTNERS, 41.

41. Comp. Stat., p. 332, § 229, provides that, when a partnership exists between the decedent at the time of his death and any other person, the surviving partner may continue in possession and settle the business, and that he must account with the representative of the decedent, and pay over all balances due. Comp. Stat., p. 395, § 533, provides that "personal representative of the decedent * * * is the duly qualified and acting executor," etc. *Held*, that an attachment on property in the hands of defendant as surviving partner should not be dissolved on the ground that he was a trustee thereof, or a personal representative of the deceased partner.—Krueger v. Speith, 8 Mont. 482; 20 Pac. 664.

VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING, 42-51.

42. The member of a partnership, who dissolves it by refusing to continue its business, can not compel his partner to carry out one article of the copartnership, which stipulates that the excess of funds which either contributes shall be paid out of the net earnings of the partnership property; and a court of equity can order the property to be sold to pay such excess. —Wilson v. Davis, 1 Mont. 183.

43. An assignment for the benefit of creditors is not necessarily a dissolution of the partnership, but is prima facie evidence of dissolution.—Williston v. Camp, 9 Mont. 88; 22 Pac. 501.

44. After an assignment for benefit of creditors by a firm, one member in the presence of the others, executed a note in the name of the firm, the proceeds of which were paid to the firm's assignee, with the knowledge and consent of all the partners, and used to procure the release of property of the firm which would otherwise have been applied in payment of the firm debts.—Id.

45. Where one partner sells his entire interest in the property of the firm to his copartner, such sale works a dissolution. (Obiter dictum.)—Pierce v. Ten Eyck, 9 Mont. 349; 23 Pac. 423.

46. An action in equity for the dissolution of a partnership and for an accounting is not an action on a money demand; and a section of the complaint in such an action, which asks for judgment against defendant for such sum as may be found due from defendant to plaintiff, is immaterial matter.—Arnold v. Sinclair, 11 Mont. 556; 29 Pac. 340.

47. A cause of action by one partner against another, to dissolve the firm and wind up its affairs, can not be joined with one to set aside an unauthorized sale of firm property by such other partner.—Waite v. Vinson, 14 Mont. 405; 36 Pac. 828.

48. A retiring partner must, in order to exempt himself from subsequent liability to one who had previously dealt with the firm on the strength of such partner being a member, cause notice of the dissolution to be brought home to such person directly, or it must appear that the facts came to his knowledge in such a way as to give reason to believe that a dissolution had taken place.—Farwell v. Cashman, 16 Mont. 393; 41 Pac. 443.

49. A party who negligently fails to attend a reference hearing on a partnership accounting can not thereafter dispute the correctness of the items of account.—Wiggin v. Fine, 17 Mont. 575; 44 Pac. 75.

50. There was no error, in a partnership accounting, in excluding a book offered by defendant as containing a list of all property belonging to himself that he had turned in to be handled by the firm; it not being a book of the firm, and it being conceded that certain property in controversy was not listed in it.—Lawlor v. Kemper, 20 Mont. 13; 49 Pac. 398.

51. An appeal from a final decree in an accounting between partners after an order dissolving the firm does not divest the court of power to order the receiver to sell the partnership property, and to confirm such sale, since the appeal bond, though operating as a supersedeas, only stays the action of the court as to matters included in the judgment, which does not embrace the disposition of the partnership property.—Murphy v. Patterson, 24 Mont. 591; 63 Pac. 380.

PAUPERS.

1. To give persons a claim on public bounty they must be unable to earn a livelihood by reason of sickness, infirmity or other cause; and they must have come to their deplorable state by misfortune, and not by vice.—Lebcher v. Custer, 9 Mont. 315; 23 Pac. 714.

2. Where a statute requires the assessor to

collect the poor tax, and his bond provides, in effect, that he will pay over moneys so collected, the sureties are estopped from claiming that the statute authorizes him to collect such tax is in conflict with Const., art. 16, § 5, providing that in each county there shall be one treasurer, who shall collect all taxes.—Meagher v. Gardner, 18 Mont. 110; 44 Pac. 407.

3. Where the statute requires the assessor to collect the poll tax, and that he shall give a bond to the effect that he will pay over moneys so collected, and the bond given by him so provides, the fact that the statute does not provide that the assessor shall be liable on his official bond for the non-performance of his official duties in collecting the poor tax does not affect the liability of the sureties on his bond.—Id.

PAWNBROKERS.

1. In a prosecution for doing business as a pawnbroker without a license, in violation of a city ordinance, it appeared that defendant frequently loaned to divers persons on personal effects, and accorded such persons the right of redeeming them on repayment of the loan with interest; and defendant admitted the transactions, but claimed they were sales, and that he merely resold them at advanced prices. *Held*, that the evidence justified a conviction.—Phillipsburg v. Weinstein, 21 Mont. 146; 53 Pac. 272.

2. An ordinance making it unlawful to keep open a pawn shop after 6 o'clock p. m, is not a prohibition of the business, but a regulation of it, authorized by Pol. Code, § 4800, subd. 16. —Butte v. Paltrovich, 30 Mont. 18; 75 Pac. 521.

3. One taking a license to carry on a pawn shop business, which states nothing as to the hours within which the business may be conducted, takes with notice that the city may impose reasonable regulations therefor.—Id.

4. An ordinance making it unlawful to keep open a pawn shop, loan office, or second hand store after 6 o'clock p. m., except on days preceding a holiday, when they may be kept open till 10, will, in the absence of clear proof to the contrary, be held reasonable.—Id.

PAYMENT.

1. A person who performs labor for another under contract and is entitled to a lien for a part of said labor, and can have no lien for the remainder, can charge therefor under two distinct accounts. If the debtor at the time of the payment of any sum, fails to appropriate the same to either of these accounts, the creditor can do so before he makes out and files his lien. —Christnot v. Montana etc. M. Co., 1 Mont. 44.

2. Under a contract that is made in New York to be performed in Montana, in which the place of payment for services is not fixed, the demand for payment must be made in New York, if the employers have their domicile there.—Isaacs v. McAndrews, 1 Mont. 427.

3. Where defendant in his answer denies the payment of the judgment in respect of which a wrongful execution was issued, and the record shows that a certain sum had been paid to the attorneys of defendant to be applied on the judgment (which purported to be a balance), and in full thereof, evidence is admissible to show that certain amounts of money had been so paid.—Davis v. Frederick, 6 Mont. 300; 12 Pac. 664.

4. Rev. Stat., p. 81, § 87, requires an answer to contain a specific denial of the material allegations of the complaint controverted by the defendant, and, if the complaint be verified, the denial of each allegation controverted must be specific and positive, or according to information and belief. *Held*, that where the complaint in an action on a note made by a deceased person alleged that no part of the note had been paid, except two stated sums, paid at stated times, a denial in the answer that plaintiff "received from decedent such moneys" is not a denial of such allegation; also a denial that "no part of said note has been paid, except," etc., is bad, as being at most only equivalent to saying that more than the excepted sum has been paid; and a denial that anything is due and unpaid on the note is not an allegation of payment, and raises no issue.—Stewart v. Budd, 7 Mont. 573; 19 Pac. 221.

5. A note provided for the payment of "interest at the rate of 1 1-2% per month from date until maturity; and, if this note is not paid at maturity, we will pay the same rate of interest upon the principal sum until the same is fully paid and satisfied." *Held*, that these words did not require that payments made after maturity should be applied first to the discharge of the principal, and then to the interest, but they should be applied first to the interest due. —Anderson v. Perkins, 10 Mont. 154; 25 Pac. 92.

6. Where the payee of a note receives a draft drawn in favor of the maker of the note, and properly endorsed for collection and application on it, he is bound to allow the credit, unless, on failure of the obligor to make payment, he gives due notice of its dishonor to the endorser.—Murphy v. Phelps, 12 Mont. 531; 31 Pac. 64.

7. Where, in an action on a lease, defendant introduced a receipt of "payment in full," under the lease, and it is not denied that plaintiff received the money specified therein, defendant established a prima facie defense, and the burden was on plaintiff to destroy the effect of the receipt.—Ramsdell v. Clark, 20 Mont. 103; 49 Pac. 591.

8. Civ. Code, § 2123, provides that a court of equity will relieve against a mistake of law when it arises (1) from a misapprehension of the law by all parties by supposing that they knew or understood it, and by making substantially the same mistake, or (2) a misapprehension of the law by one party of which the others are aware at the time of contracting, but which they do not rectify. *Held*, that where plaintiff brought suit under the second subdivision to recover an over-payment made on a repurchase of property sold under foreclosure, and alleged that she made the payment under misapprehension as to her legal right, and that the payment was caused to be made through the fraud, conspiracy, and deceitful practices of defendants, but the proof showed that whether plaintiff had a right of redemption at the time was a mooted question of law, and that defendants acted in good faith in their contention that her right of redemption was barred, there was a fatal variance.—Bottego v. Carroll, 31 Mont. 122; 77 Pac. 430.

PERJURY.

1. Perjury may be proved by one witness, corroborated by circumstances proved at the trial, notwithstanding the declaration of Comp. Stat., p. 223, § 616, that "the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason."—State v. Gibbs, 10 Mont. 213; 25 Pac. 289.

PHYSICIANS AND SURGEONS.

I. Admission to Practice, and Regulation of Practice and Professional Conduct, 1-11.

II. Liability and Actions for Negligence or Malpractice, 12-16.

I. ADMISSION TO PRACTICE, AND REGULATION OF PRACTICE AND PROFESSIONAL CONDUCT, 1-11.

1. Laws 1889, p. 175, § 4, providing that the board of medical examiners may revoke a certificate of a physician for unprofessional, dishonest or immoral conduct, and that, in all cases of revocation, the applicant may appeal to the district court, does not give the board power to revoke a certificate without reasonable notice to the physician of the charge against him, and the time and place of trial.—State v. Schultz, 11 Mont. 429; 28 Pac. 643.

2. Under Laws 1889, p. 175, regulating the practice of medicine, graduates of medical schools, who commence to practice medicine in Montana after the passage of the act, as well as persons who are not graduates, are required to submit to an examination.—Craig v. Medical Examiners, 12 Mont. 203; 29 Pac. 532.

3. The right of a physician to appeal to the district court from the action of the state board of medical examiners in revoking his license to practice, as provided by Laws 1889, p. 175, is not nugatory, because the legislature has prescribed no rules of practice to guide the district court in adjudicating such cases.—State v. District Court, 13 Mont. 370; 34 Pac. 298.

4. A complaint before the state board of medical examiners for the purpose of revoking defendant's license as a physician for unprofessional, dishonorable and immoral conduct, charged that, on a certain date, defendant threw into a furnace a human fœtus, 7 months old, with intent to destroy it and conceal its birth; that, at the coroner's inquest over such fœtus, he testified that he had attended a woman who had a miscarriage, and that the fœtus was the result thereof; that he refused to give the name of the mother, for the reason that she had requested him not to do so, and he had been advised that he was not obliged to give it; that he stated he would give it to the coroner the next day, who could use his discretion with it; that on the next day he testified that the mother had left the state, and, without her present to explain her condition at the time, his answer would incriminate him, and be testimony against him; and that for that reason he refused to give the name. *Held*, that the facts stated did not constitute unprofessional, dishonorable or immoral conduct, and the complaint was insufficient.—State v. Kellogg, 14 Mont. 426; 36 Pac. 957.

5. Defendant's license to practice medicine was revoked by the state board of medical examiners. Defendant appealed to the district court, which rendered judgment revoking his license, and then to the supreme court, which reversed the judgment. Pending the appeal, defendant was convicted of practicing without a license. *Held*, that the conviction should be set aside.—Id.

6. Pol. Code, § 603, providing that, in "all cases of the refusal or revocation of a certificate" by the medical board, the person aggrieved thereby may appeal from the decision of the board to the district court, applies as well where the certificate to practice medicine has been refused by the board for incompetency as where it has been refused for unprofessional, dishonorable or immoral conduct.—State v. District Court, 19 Mont. 501; 48 Pac. 1104.

7. The right of appeal from the decision of a medical board in refusing a certificate to practice medicine is not rendered nugatory because the law does not prescribe rules to guide the court in trying such appeal.—Id.

8. Pol. Code, §§ 600-608, give the board of medical examiners power to refuse a certificate to any applicant who is not proficient, or who, on investigation, is found to have been found guilty of unprofessional, dishonorable or immoral conduct. The applicant may appeal from a refusal or revocation of a certificate to the district court, with the right to practice pending appeal in a case of revocation in the district court. On charges of "unprofessional, dishonorable and immoral conduct," specifying that an applicant had been detected in the secret use of notes during an examination, the board found him guilty, and refused to allow him to proceed with the examination. On appeal to the district court the judge thereof, after examination as to his qualifications, authorized the applicant to practice medicine pending the appeal. *Held*, that the district court had no power to allow applicant to practice medicine pending his appeal from the refusal to grant a certificate.—State v. District Court, 26 Mont. 121; 66 Pac. 754.

9. Under Code Civ. Proc., § 1892, providing that a notice without the title of the proceeding in which it is made, or with a defective title, is as effectual as if duly entitled, if it intelligibly refer to such proceeding, a notice of appeal from a decision of the board of medical examiners, sufficient in other respects, is effectual, though entitled "in the matter of the application of * * * for a certificate from the board of medical examiners to practice medicine and surgery."—State v. District Court, 27 Mont. 103; 69 Pac. 710.

10. Where, on an appeal from a decision of the board of medical examiners, a sufficient notice of appeal was served on the board, it is immaterial whether the board was represented at the first trial or not.—Id.

11. Under Pol. Code, § 603, providing that, when an application to the board of medical examiners for a certificate is refused, the applicant may appeal to the district court, and that such appeal shall be conducted in all respects as an appeal from a decision of a board of county commissioners disallowing a claim, the board, when aggrieved by the decision of the district, may appeal or move for a new trial.—Id.

II. LIABILITY AND ACTIONS FOR NEGLIGENCE OR MALPRACTICE, 12-16.

12. The gist of an action to recover damages for unskillful treatment of a fracture is the negligence of the surgeon, and the statute begins to run from the time of the alleged negligence.—Coady v. Reins, 1 Mont. 424.

13. In proving the actual injury caused by the unskillful treatment of a fracture, it is competent to show all the facts resulting from the time the right of action accrued to the verdict.—Id.

14. A plaintiff in an action to recover damages for malpractice by a physician may be allowed to amend his complaint to correspond with the proof.—Wormall v. Reins, 1 Mont. 627.

15. In an action against a physician, to recover damages for malpractice, the evidence showed that plaintiff had sustained a fracture of the wrist, and that defendant, in treating him, had used pasteboard splints, and put cotton under them next to the hand. The evidence further showed that the injured limb was normal in proportions, and that the treatment was in accordance with the best known treat-

ment. *Held*, that a verdict for plaintiff could not be sustained.—Stevenson v. Gelsthorpe, 10 Mont. 563; 27 Pac. 404.

16. In an action against a physician for damages for negligence in his treatment of a particular case, evidence as to his reputation for skill and ability is incompetent.—Id.

PLEADING.

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I. FORM AND ALLEGATIONS IN GENERAL, 1-14.

1. No attachment will be dissolved for surplusage in the affidavit.—Cope v. Upper, etc. Co., 1 Mont. 53.

2. Under our Code system of pleading, a promise when it is implied, need not be alleged, for it is not proper under this system to set forth implications of law.—Higgins v. Germaine, 1 Mont. 230.

3. Under Civ. Pr. Act a complaint should not set forth a promise which is implied from the facts alleged, but an express promise should be averred and proved.—Id.

4. An allegation of the right to possession is an allegation of a conclusion of law.—Parks v. Berkley, 1 Mont. 514.

5. Where a complaint alleges title, right of possession, wrongful possession by defendant, and damages, an answer admitting the title, but denying the right of possession, wrongful withholding and that plaintiff has been damaged, is bad, as stating only conclusions of law, and raising no issues.—McCauley v. Gilmer, 2 Mont. 202.

6. An allegation that a mortgage is void under the bankrupt law is not sufficiently explicit without setting out the clause of the law under which the claim is made and the necessary facts to justify the introduction of evidence.—Smith v. Auerbach, 2 Mont. 348.

7. In an action to recover possession of a horse such horse was described in the complaint as "one large horse about 6 years old." *Held*, to be an insufficient description. (Ob dict.)—Vantilburgh v. Hamilton, 2 Mont. 413.

8. Where the allegations in the replication contradict those of the complaint, such pleadings will not support the judgment. Pleadings must be consistent with each other.—Hauswirth v. Butcher, 4 Mont. 299; 1 Pac. 714.

9. Defendant, in his verified answer, having stated that a person through whom plaintiff derived title to a mining claim was a citizen of the United States, can not move for a nonsuit on the ground that plaintiff's title is invalid on account of such person being an alien.—Wulf v. Manuel, 9 Mont. 276; 23 Pac. 723.

10. A complaint which alleged that a railroad was in Jefferson county, and that at the time of the injury plaintiff was "in the employment of the defendant as brakeman * * * upon such railroad" sufficiently sets forth where the contract of employment was to be performed.—Oels v. Reduction Co., 10 Mont. 524; 26 Pac. 1000.

11. A complaint in replevin which, in one count alleges that goods sold to C by plaintiff under false representations were transferred to P & J for the benefit of creditors, and in another count alleges that the goods were transferred in payment of a debt due P. is demurrable as being uncertain and ambiguous.—Reed v. Poindexter, 16 Mont. 294; 40 Pac. 596.

12. In an action by the state to recover a penalty under a general statute, it is not necessary that the complaint refer to the statute, or conclude "against the form," etc.—State v. Owsley, 17 Mont. 94; 42 Pac. 105.

13. Denials which are as specific as the allegations they are intended to meet, and which controvert the spirit and substance of the adverse pleading, are sufficient to raise issues.—Moore v. Murray, 30 Mont. 13; 75 Pac. 515.

14. An allegation that an execution was issued before judgment was properly entered, being pregnant with the admission that judgment was entered, is a mere conclusion of law, and presents no statement on which an issue of fact can be made.—Burton v. Kipp, 30 Mont. 275; 76 Pac. 563.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT, 15-24.

15. An allegation in the complaint that plaintiff accepted of defendant's promise and liability for the debt of a third person, and that said third person released said defendant from his liability to said third person, to the extent and amount of plaintiff's claim, was *held* to be sufficient as alleging the release of a debt due from said third person to plaintiff.—Lee v. Hudson, 1 Mont. 84.

16. Where plaintiff describes himself in his complaint as "H C Wiebold" and defendant demurs to the complaint on the ground that the Christian name of plaintiff did not appear

therein, such demurrer should be sustained under Civ. Pr. Act, § 49, and a judgment rendered thereon was void.—Wiebold v. Harmann, 2 Mont. 609.

17. The time and place of demand need not be alleged in a complaint declaring upon commercial paper.—Frank v. Murray, 7 Mont. 4; 14 Pac. 654.

18. In an action to recover money alleged to be due for goods delivered by plaintiff to defendants, where it appears that defendants are liable only for the goods which have been sold by them, and that there is a balance due plaintiff on such sales, palitniff can not abandon the contract sued on, and in the same action insist on a judgment for such balance.—Newell v. Nicholson, 17 Mont. 389; 43 Pac. 180.

19. Plaintiff is not bound by admissions in a portion of his complaint which he abandoned without objection before trial.—Mahoney v. Hardware Co., 19 Mont. 377; 48 Pac. 545.

20. A complaint averring that defendant had leased a certain mine from plaintiff, and alleging, as a first breach, that defendant had worked the mine for six months, but had failed to pay over any of the net proceeds, as provided by the lease, and, as a second breach, that he had failed to work the mine in a workmanlike and substantial manner, and, as a third breach, that defendant had failed to work the mine at all after six months, sets forth three distinct causes of action.—Ramsdell v. Clark, 20 Mont. 103; 49 Pac. 591.

21. When a complaint in an application to restrain a county clerk from preparing an official ballot so as to include a question of the removal of the county seat alleged that the order under which he was about to act was not made by the county commissioners, and that the persons who made it acted without evidence other than the petition, which was alleged to be signed by less than the requisite number of electors, its allegations are not so inconsistent as to render it ambiguous, unintelligible, and uncertain; since, if the order was not the act of the commissioners de jure or de facto, it was void.—Buck v. Fitzgerald, 21 Mont. 482; 54 Pac. 942.

22. Where a complaint contains more than one count, introductory matter, such as the partnership capacity in which plaintiffs and defendants are brought into the action, need not be repeated after the first count.—Hefferlin v. Karlman, 29 Mont. 139; 74 Pac. 201.

23. Under Code Civ. Proc., § 1003, a prayer for such other and further relief as may be meet and agreeable to equity and good conscience warrants the granting of any relief to which plaintiff is entitled on the allegations and proof.—Merk v. Mining Co., 31 Mont. 298; 78 Pac. 519.

24. A count of a complaint alleged that plaintiff granted to defendant the privilege of selling certain articles at a specified race track for a certain time, and that defendant used the privilege for such time, that it was reasonably worth a specified sum, and that plaintiff owed the claim against defendant, and that defendant refused to pay. *Held*, that under Code Civ. Proc., § 570, the account was not subject to an objection that it did not state a cause of action, on the ground that it did not allege that plaintiff was the owner of the privilege granted, that there was no allegation of value, and that it was not alleged that the sum claimed had not been paid.—Harmon v. Fox, 31 Mont. 324; 78 Pac. 517.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE, 25-56.

A. Defenses in General, 25-30.
B. Pleas in Abatement, 31.
C. Traverses or Denials, and Admissions, 32-51.
D. Set-off, Counterclaim, and Cross-Complaint, 52-56.

A. DEFENSES IN GENERAL, 25-30.

25. In ejectment, a cross-complaint seeking to charge the holder of the legal title as trustee with fraud in procuring a patent from the United States, to which defendant was properly entitled, must be distinct from those portions of the answer intended for defenses.—Meyendorf v. Frohner, 3 Mont. 282.

26. An answer filed six months after the complaint, denying that plaintiffs are then in possession, is an admission that plaintiffs were in possession at the time of the filing of the complaint.—Leggatt v. Stewart, 5 Mont. 107; 2 Pac. 320.

27. An objection that the action was prematurely commenced must be considered as waived, unless taken advantage of by demurrer or answer.—Wright v. Fire Ins. Co., 12 Mont. 474; 31 Pac. 87.

28. A defendant is entitled to plead in the same answer as many defenses as he may wish to present, even though inconsistent with each other; and is entitled to present and rely upon any of such defenses upon the trial, subject to proper instructions as to their effect in each case.—Ball v. Gussenhoven, 29 Mont. 321; 74 Pac. 871.

29. A defendant may plead inconsistent defenses in the same answer, and may rely on them at the trial, subject to instructions as to their proper effect. Thus defendant in conversion may assert rights as absolute owner and as mortgagee.—Potter v. Lohse, 31 Mont. 91; 77 Pac. 419.

30. An answer filed after defendant's default for failure to answer has been entered will be stricken from the files; the proper practice being to move to set aside the default, tendering the answer with the motion.—Mantle v. Casey, 31 Mont. 408; 78 Pac. 591.

B. PLEAS IN ABATEMENT, 31.

31. Code Civ. Proc., § 671, provides that the complaint must contain the names of the parties to the action. Sec. 774 provides that the court may allow a party to amend by correcting a mistake in name. Sec. 777 provides that, when plaintiff is ignorant of defendant's name, he may designate defendant by any name, and amend on discovery of his true name. *Held*, that where defendant answered in abatement for misnomer, alleging its true name, it was error for the court to enter judgment on the merits against defendant, but plaintiff should have amended in accordance with the answer, its truth being conceded, or the action have been abated.—Clark v. Railroad Co., 29 Mont. 317; 74 Pac. 734.

C. TRAVERSES OR DENIALS, AND ADMISSIONS, 32-51.

32. A denial that defendants "wrongfully and illegally" diverted certain water *held*, in an action for such diversion, to amount to an admission of the act of diversion.—Harris v. Shonts, 1 Mont. 212.

33. The denials of the answer must controvert the express allegations of the complaint and those that are necessarily implied from them.—Higgins v. Germaine, 1 Mont. 230.

34. An answer that denies "legally and lawfully" the allegations of the complaint raises

no issue of fact.—Territory v. Rodgers, 1 Mont. 252.

35. The denial of "unlawful and wrongful" diversion admits the diversion. (See 18 Wall. 648.)—Toombs v. Hornbuckle, 1 Mont. 286.

36. The material allegations of the complaint are admitted if the answer does not deny them.—Bullard v. Gilette, 1 Mont. 509.

37. Civ. Pr. Act, Jan. 12, 1872, providing that a verification of a pleading shall state that the facts stated are true, except those matters which are therein stated on information and belief, does not modify § 56 of the act, providing that an answer shall contain a specific denial of each allegation of the complaint intended to be controverted by defenadnt, so as to permit defendant to make a denial on information and belief. (See 4 Otto 586.)—Sands v. Maclay, 2 Mont. 35.

38. Under Rev. Stat., p. 56, § 87, when a complaint is verified, the denials of the answer must be specific; a general denial raises no issue.—Power v. Gum, 6 Mont. 5; 9 Pac. 575.

39. In an action to enjoin defendant from diverting the waters of a creek, plaintiff alleged that his land was valuable for producing grain by irrigation; that he and his predecessors had appropriated the waters by ditches, and had enjoyed their uninterrupted use till defendant's wrongful diversion; and that all the waters were necessary for irrigating plaintiff's land. *Held*, that the complaint was sufficiently traversed by an answer denying, on information and belief, plaintiff's ownership of the land, and denying that there was a creek having a regular and continuous flow from defendant's land to that of plaintiff; that grain could be grown on the land; that defendant had prevented plaintiff from using the waters of the creek to which he was entitled; or that plaintiff or his predecessors were ever the owners of all the waters of the creek, or had ever appropriated the same.—Raymond v. Wimsette, 12 Mont. 551; 31 Pac. 537.

40. In replevin a denial in the answer that defendant took "and" carried away the goods described in the complaint is bad as a negative pregnant.—Bach v. Montana L. & P. Co., 15 Mont. 345; 39 Pac. 291.

41. Under Comp. Stat., p. 82, § 89, providing that if a complaint be verified the denial of each allegation must be specific, and be made positively, or according to the information and belief of defendant, a specific denial, with an allegation that it is on defendant's information and belief, is sufficient.—Lewis v. Weyerhorst, 16 Mont. 267; 40 Pac. 589.

42. Under Comp. Stat., p. 82, § 89, providing that if the complaint be verified, the denial of each allegation controverted must be specific, and be made "positively, or according to the information and belief" of defendant, an allegation that, as to whether relator is a tenant, respondent "has no knowledge or information upon which to form a belief, and therefore denies the same," is not a sufficient denial.—State v. Water Co., 18 Mont. 199; 44 Pac. 966.

43. Under such action, an allegation "that, as to whether the payee named in said note transferred the same by endorsement, or whether plaintiff is or ever has been the owner or holder of said note, defendant has no knowledge or information sufficient to form a belief, and therefore denies the same," is insufficient.—Id.

44. In an action to restrain the county board from funding an illegal indebtedness, the complaint alleged that the board made a pretended loan, issuing warrants therefor; that it was agreed that the sum loaned should not be drawn unless bonds were sold for an amount sufficient to pay the warrants. The answer admitted that the agreement was made, but alleged that it was abandoned before the action was begun. *Held*, that this was an admission of the existence of the agreement when the warrants were issued, sufficient to show that the indebtedness was in fact fictitious.—Hoffman v. Gallatin, 18 Mont. 224; 44 Pac. 973.

45. An answer which denies that "the amount of stock sold" by plaintiff to defendant was ever delivered, is defective, because a negative pregnant.—Edgerton v. Power, 18 Mont. 350; 45 Pac. 204.

46. Under Comp. Stat., p. 82, § 89, an allegation "that, as to whether the payee named in the said note transferred the same by endorsement, or whether plaintiff is or ever has been the owner or holder of said note, defendant has no knoweldge or information sufficient to form a belief, and therefore denies the same," is insufficient.—Rossiter v. Loeber, 18 Mont. 372; 45 Pac. 560.

47. Where plaintiff admitted a bond pleaded by defendant, his denial of its plain and specific provisions is unavailing.—Aikens v. Frank, 21 Mont. 192; 53 Pac. 538.

48. A negative pregnant allegation in an answer, admitting by implication a material fact alleged in the complaint, does not operate to prevent an express denial of such fact from putting it in issue.—Kennedy v. Dickie, 27 Mont. 70; 69 Pac. 672.

49. Where, in an action to recover money from a constable, the complaint alleged that defendant refused to pay plaintiff the money, and wrongfully retained and still holds the possession thereof, and the answer merely contained a denial "that defendant wrongfully retains or holds possession" of the same, or any part thereof, such denial operated to deny the "wrongful" possession, only, and constituted an admission of possession.—Yank v. Bordeaux, 29 Mont. 74; 74 Pac. 77.

50. In an action on a note against a corporation, an answer denying the execution of the note, and denying that it received "said sum," referring to the amount of the note, in carrying on its business for its use, and denying that defendant, "with its knowledge or consent," paid a sum of interest thereon at any time, was pregnant with an admission that defendant used the money.—Agle v. Drug Co., 29 Mont. 111; 74 Pac. 135.

51. In a suit for specific performance, an answer alleging that, since the contract was made, defendants had conveyed the land in controversy to another, constituted an admission that defendants were the owners of the land at the time the contract was made.—Christianasen v. Aldrich, 30 Mont. 446; 76 Pac. 1007.

D. SET-OFF, COUNTERCLAIM, AND CROSS-COMPLAINT, 52-56.

52. Though the prayer of defendant's answer is that he be discharged, relief may be given thereon as a counterclaim.—Davis v. Davis, 9 Mont. 267; 23 Pac. 715.

53. In an equitable action to set off one judgment against another, evidence that plaintiff had in his hands book accounts of defendant of sufficient value to pay off plaintiff's judgment, is admissible, although defendant has not pleaded payment or counterclaim.—Union Mercantile Co. v. Jacobs, 20 Mont. 270; 50 Pac. 793.

54. A counterclaim can not be established by defendant without pleading it, since Code Civ. Proc., § 690, subd. 2, provides that the answer of defendant must contain a statement of any new matter stating a defense or counter-

claim.—Union Merc. Co. v. Jacobs, 20 Mont. 554; 52 Pac. 375.

55. Where an action to recover an interest in a mining claim was tried on the issues raised by the counterclaim seeking specific performance of an alleged contract by plaintiff to convey his interest in such claim to defendant, and the answer thereto, a decree of specific performance would not be reversed on the ground that defendant's answer to plaintiff's complaint alleged that plaintiff had forfeited all his rights to the mine prior to the date of the agreement sought to be enforced.—Finlen v. Heinze, 28 Mont. 548; 73 Pac. 123.

56. In an action for the conversion of lumber, an answer that defendant claimed the property as assignee for the creditors of the original owner, and that plaintiff never made any demand on defendant, but stood by, with knowledge of defendant's claim, and allowed and induced defendant to sell the property as assignee, did not state a counterclaim.—Babcock v. Maxwell, 29 Mont. 31; 74 Pac. 64.

IV. REPLICATION OR REPLY, AND SUBSEQUENT PLEADINGS, 57-76.

57. Where the answer contained no new matter constituting a claim, or entitling defendants to affirmative relief, no replication was necessary.—Caruthers v. Pemberton, 1 Mont. 111.

58. Whenever the answer sets up new matter, authorized and constituted by statute as a defense, a replication is necessary, or such new matter will be held as admitted by plaintiff, and he will not be allowed to introduce testimony to contradict or disprove such admissions.—Davis v. Clark, 2 Mont. 310.

59. A replication to new matter is, in effect, and must be treated as, an answer, and in those cases where a general denial is sufficient in an answer under the Code, such denial in a replication is also proper and sufficient.—Mammer v. Edwards, 3 Mont. 187.

60. To set up facts in avoidance of new matter in the answer is not necessarily a departure in the pleadings, or an abandonment of the claims in the allegations of the complaint.—Lamme v. Dodson, 4 Mont. 560; 2 Pac. 298.

61. Whatever facts are alleged in the answer that might have been proven under a specific denial of the allegations of the complaint, should be regarded as a specific denial only, and require no replication.—Mauldin v. Ball, 5 Mont. 96; 1 Pac. 409.

62. Whatever averments of the answer amount to an admission of the allegations of the complaint, and tend to establish some fact not inconsistent with such allegations, constituting a defense or counterclaim, and which could not have been proven under a specific denial, are new matter and require a replication.—Id.

63. Where there is no replication, all affirmative material allegations contained in the answer will be presumed to be admitted.—McMillan v. Carter, 6 Mont. 215; 9 Pac. 906.

64. Where the denials of the replication are as specific as the allegations which they meet, and controvert both the spirit and substance of the same, a motion for judgment on the pleadings should be denied.—Miles v. Edsall, 7 Mont. 185; 14 Pac. 701.

65. In trespass to realty, where defendant pleaded settlement and a release, as contained in a certain deed conveying a portion of the premises to defendant, a reply denying that the agreement in the deed covered the injuries complained of, or that the consideration therein included payment for the damages alleged in the complaint, is sufficient to raise the issue as to such settlement and release.—Sweeny v. Montana Central, 19 Mont. 163; 47 Pac. 791.

66. A corporation, sued on a note alleged to have been executed by it, after a denial of execution, by a so called "separate defense," denied that one who, as general manager, subscribed defendant's name to the note, was authorized to do so. *Held*, that this so called "separate defense" was evidential matter, and not new matter stating a defense admitted for for want of denial.—Helena Nat'l Bank v. Telegraph Co., 20 Mont. 379; 51 Pac. 829.

67. Under Code Civ. Proc., § 720, requiring a reply to contain a denial of the material allegations of the counterclaim or any matter stating a defense thereto, and § 754, providing that the allegation of new matter in the answer to which no reply is required, shall be deemed controverted, a reply is not necessary to an answer containing new matter not stating a counterclaim.—Babcock v. Maxwell, 21 Mont. 507; 54 Pac. 943.

68. Where, in an action on a note, the answer alleges that the note was secured by a real estate mortgage executed at the same time which has not been foreclosed, such allegation is a defense, and not a counterclaim, and hence a reply is not necessary under Code Civ. Proc., §§ 720-723, 754, requiring a reply to a counterclaim.—Brophy v. Downey, 26 Mont. 252; 67 Pac. 312.

69. Plaintiffs sued defendant on a quantum meruit, for services rendered in delivering certain ties. Defendant denied liability on the ground that the ties were delivered under a contract in writing with which it was alleged plaintiffs had not complied, and plaintiffs by replication admitted that there was a contract in writing, but denied that it contained the entire agreement or that defendant had performed its obligations, and alleged a separate agreement by which plaintiffs were to receive extra pay for hauling ties a greater distance than that provided for in the contract. *Held*, that the allegations of the replication were the mere explanation of plaintiffs' denial of the answer, and not the statement of a new cause of action entitling defendant to judgment on the pleadings.—Cook v. Railroad Co., 28 Mont. 509; 73 Pac. 131.

70. Under Laws 1899, p. 152, plaintiff may have judgment without a replication if the new matter states no defense, or only such as might have been raised under a general denial contained in the answer.—Babcock v. Maxwell, 29 Mont. 31; 74 Pac. 64.

71. Where part of an answer does not contain sufficient allegations within itself or by reference to other parts of the answer to constitute a separate defense, but is merely a repetition of other parts of the answer, which are denied, no specific denial thereof is necessary.—Boucher v. Powers, 29 Mont. 342; 74 Pac. 942.

72. Plaintiff alleged in her complaint a cause of action for defendant's diversion of water in an irrigation ditch, thereby depriving plaintiff of water sufficient to irrigate her crops, but did not plead or rely on certain admissions in defendant's answer in another case relating to the same ditch, or the judgment therein, either as an estoppel or res judicata. Defendant's answer denied plaintiff's complaint, and alleged facts showing that plaintiff had sufficient water, whereupon, in a reply, plaintiff denied such facts, and pleaded that defendant was estopped by his answer in the previous case, and by the judgment, from denying that plaintiff had been prevented from using "any" water. *Held*, that plaintiff having pleaded in her complaint that she did use a portion of the water, she thereby in fact contradicted her plea of estoppel or res

judicata, and was not therefore entitled to the benefit of the same.—Flannery v. Campbell, 30 Mont. 172; 75 Pac. 1109.

73. Under Laws 1899, p. 142, amending Code Civ. Proc., § 720, which provided that, where the answer contains a counterclaim, the reply must contain a denial of each of the material allegations of the counterclaim controverted by plaintiff, "or any knowledge or information thereof, sufficient to form a belief;" so that as it now reads, the quoted phrase is omitted, and denial on information and belief is now sufficient; and where such a denial is interposed the allegations of the answer denied in that manner must be deemed admitted.—Floyd-Jones v. Anderson, 30 Mont. 351; 76 Pac. 751.

74. In a suit to set aside a deed because never delivered, an allegation in the reply that subsequent to the time for the delivery of the deed, according to the conditions of its delivery in escrow, the grantee procured the grantor to mortgage premises to the grantee, is not conclusive as to the non-delivery of the deed, as, under the express provisions of Code Civ. Proc., § 754, such allegation is deemed denied by the grantee.—Swain v. McMillan, 30 Mont. 433; 76 Pac. 943.

75. Where, in a suit for specific performance, plaintiff pleaded a breach of the contract, and defendant alleged that plaintiff had failed to perform within the time prescribed, whereupon defendant had sold the land to W, but did not allege whether the sale to W was before or after the commencement of the action, nor state any facts with reference to the consideration paid by W, and his notice of plaintiff's equity, the answer did not set up sufficient new matter to require replication.—Christiansen v. Aldrich, 30 Mont. 446; 76 Pac. 1007.

76. In an action for personal injuries allegations in the answer of contributory negligence constitute new matter, within Code Civ. Proc., § 720, as amended by Laws 1899, p. 142, the truth of which is admitted by failure of plaintiff to reply thereto, though the complaint contains an allegation of the exercise of due care by plaintiff.—State v. District Court, 32 Mont. 37; 79 Pac. 546.

V. DEMURRER OR EXCEPTION, 77-91.

77. In an action brought by an assignee in bankruptcy to recover the value of goods, the filing of a general demurrer to the complaint was sufficient to confer jurisdiction upon the court.—McKiernan v. King, 2 Mont. 72.

78. If there is one good cause of action set forth in a complaint a demurrer to the whole of the complaint should be overruled.—Collier v. Ervin, 2 Mont. 335.

79. Any demurrer to a complaint, except for want of cause of action, and of jurisdiction, as if for improper joinder of action, should specifically point out the defect, or it will be disregarded. The mere language of the statute in such case is insufficient for the purpose.—Id.

80. A demurrer necessarily admits the truth of facts stated in the complaint so far as they are relevant and well pleaded, but it does not admit the conclusions of law drawn therefrom. —Boley v. Griswold, 2 Mont. 447.

81. A demurrer to a complaint because of the insufficiency of the description of property should be overruled when the uncertainty can only be shown by evidence.—Foster v. Wilson, 5 Mont. 53; 2 Pac. 310.

82. In a suit to enjoin a sheriff's sale of land, an allegation in the complaint that the sale will result in great and irreparable injury and damage to the owner is not admitted by demurrer, as such allegation is a conclusion of law, and not the statement of a fact.—McCormick v. Riddle, 10 Mont. 467; 26 Pac. 202.

83. Where a demurrer to a complaint is overruled, it is error for the court, on concluding subsequently that the ruling on the demurrer was wrong, to exclude evidence in support of the complaint, unless plaintiff is first given an opportunity to amend.—Creek v. McManus, 13 Mont. 152; 32 Pac. 675.

84. Where plaintiff states one cause of action in two contradictory counts, neither the trial nor the appellate court will inquire on demurrer whether either or both of the statements are sufficient.—Reed v. Poindexter, 16 Mont. 294; 40 Pac. 596.

85. A demurrer to a complaint for breach of contract on the ground of insufficiency must specify wherein the complaint is uncertain.—Jacobs v. Union Merc. Co., 17 Mont. 61; 42 Pac. 109.

86. Want of jurisdiction over the subject matter is not ground for demurrer, unless it appears on the face of the complaint.—Knight v. Le Beau, 19 Mont. 223; 47 Pac. 952.

87. Since plaintiff's incapacity to sue is a separate ground for demurrer (Code Civ. Proc., § 680,) the question of capacity can not be considered on a demurrer for want of facts sufficient to constitute a cause of action.—Id.

88. Where more than one cause of action is alleged in one count of a complaint, the remedy is by demurrer, and not by objection to the introduction of evidence thereunder.—Bandmann v. Davis, 23 Mont. 382; 59 Pac. 856.

89. Where a demurrer is interposed to a counterclaim on the ground that it does not state facts sufficient to constitute a cause of action, this being a ground of demurrer under Code Civ. Proc., § 680, subd. 6, it is sufficient to state the objection in the language of that subdivision.—Power v. Sla, 24 Mont. 243; 61 Pac. 468.

90. The refusal to permit defendants to demur to a complaint amended after the jury is sworn is not ground for reversal, where no ground for the demurrer was stated, nor any written demurrer offered, and the complaint seems to have stated a cause of action.—Cook v. Railroad Co., 28 Mont. 340; 72 Pac. 678.

91. Where a complaint alleged that defendants' use of premises was merely permissive, and that their right to such use was terminable at plaintiff's pleasure, and defendants, by demurring to the complaint, admitted such fact, they could not contend in support of the demurrer that, as to them, plaintiff was not the owner of the premises.—Clark v. Wall, 32 Mont. 219; 79 Pac. 1052.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER. 92-118.

A. In General, 92.
B. Leave of Court to Amend, 93-100.
C. Amendment of Declaration, Complaint, Petition, or Statement, 101-111.
D. Amendment of Plea or Answer, 112-118.

A. IN GENERAL, 92.

92. An application to amend during trial, not made to correct a variance, is properly refused, where the necessity for it is not made to appear.—York v. Steward, 21 Mont. 515; 55 Pac. 29.

B. LEAVE OF COURT TO AMEND, 93-100.

93. Pleadings may be amended to conform to the proof, where the opposite party is not sur-

prised thereby, and no new cause of action or defense is introduced.—First Nat'l Bank v. How, 1 Mont. 604.

94. Where, in an action against a physician for malpractice, the plaintiff alleged that his arm was dislocated, put out of joint, disrupted, broken, fractured, wounded and bruised, though the answer did not deny the allegation of the complaint, it was not error for the court to permit the plaintiff to amend by omitting the words "broken" and "fractured" before the case was submitted to the jury, in order to make the allegations correspond with the proof.—Wormall v. Reins, 1 Mont. 627.

95. It is in the discretion of the court to refuse to allow amendments to pleadings if, in its judgment, they are not needed or warranted by the facts of the case.—Hammond v. Foster, 4 Mont. 421; 1 Pac. 757.

96. Under Comp. Stat., p. 87, § 112, providing that no variance between pleading and proof shall be deemed material unless it actually misleads the adverse party, in a suit on a note alleged to have been given by a firm, where the evidence showed that it was given for money advanced to the assignee of the firm to be used by him for its benefit, with the full knowledge of the firm, an amendment of the pleadings to conform to the evidence should be allowed.—Williston v. Camp, 9 Mont. 88; 22 Pac. 501.

97. An omission to require an affidavit to show ground for an amendment not affecting the substantive rights of the parties is not reversible error.—Muth v. Erwin, 14 Mont. 227; 36 Pac. 43.

98. An offer to amend a pleading to conform to the evidence is properly refused after return of the verdict and findings and discharge of the jury.—Neimick v. American Ins. Co., 16 Mont. 318; 40 Pac. 597.

99. The allowance of an amendment to a pleading during a trial is largely a matter of discretion, and will not be held ground for reversal where it does not appear that a postponement of the case was requested or made necessary, or that appellant was injured thereby.—Bennett v. Marsh, 18 Mont. 28; 44 Pac. 80.

100. Plaintiff can not claim to have been surprised by the amendment of the counterclaim to conform to the proof, which defendant was permitted to make after conclusion of his direct testimony, where the same variance existed on a former trial, and was called to the attention of the parties in the opinion on appeal from the decree thus rendered.—Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

C. AMENDMENT OF DECLARATION, COMPLAINT, PETITION, OR STATEMENT, 101-111.

101. A court may, in furtherance of justice and upon such terms as are just, allow the amendment of any pleading at any stage of a proceeding.—Wormall v. Reins, 1 Mont. 627.

102. A court, in furtherance of justice, and on proper terms, should allow an amendment of a pleading so as to make it correspond with the evidence introduced on trial, at any stage of the proceedings before final judgment, and may do so even after judgment. Refusal to do so may be the cause of revising the judgment of the court below.—Hartley v. Preston, 2 Mont. 415.

103. A court in furtherance of justice should grant leave to amend so that the issue in the pleadings should correspond with the proof, even after judgment.—Hershfield v. Aiken, 3 Mont. 442.

104. A complaint may be amended, if necessary, even after the evidence is concluded.—Palmer v. McMaster, 6 Mont. 169; 9 Pac. 898.

105. Amending the prayer of a complaint is not material; and a party is entitled to the relief which the facts alleged and proved warrant, whether his prayers are answered or not.—Gillett v. Clark, 6 Mont. 190; 9 Pac. 823.

106. Where the complaint in an action on a fire insurance policy alleges that defendant agreed that additional insurance might be taken, an amendment to the effect that defendant, irrespective of such agreement, knew of the additional insurance on the property before its destruction, and made no objection thereto, being inconsistent with the alleged agreement, is properly refused.—Neimick v. American Ins. Co., 16 Mont. 318; 40 Pac. 597.

107. Upon the filing of an amended pleading the original pleading becomes functus officio.—Gettings v. Buchanan, 17 Mont. 581; 44 Pac. 77.

108. Where defendant has consented to the filing of an amended complaint out of time, the overruling of a subsequent motion to strike it out because not filed in time is not an abuse of discretion.—Radford v. Gaskill, 20 Mont. 293; 50 Pac. 854.

109. In an action to quiet title to mining property, *held* that certain amendments made to the complaint at the close of the evidence did not present new issues.—M. O. P. Co. v. Mining Co., 27 Mont. 410; 71 Pac. 403.

110. It was error for the court to permit an amendment to the complaint, after denial of a motion for non-suit on plaintiff's evidence and before judgment, where no hardship or surprise to defendant was shown, and where no change of the issue resulted.—Miller v. Matheson, 28 Mont. 132; 72 Pac. 414.

111. In a suit for specific performance, plaintiff, pending a motion for judgment on the pleadings, applied for leave to amend the complaint by adding an allegation of tender of the unpaid purchase price and a demand for a deed, and by making an allegation of readiness and willingness to perform more specific. *Held*, that the application was properly granted, defendant having declined the court's offer to postpone the hearing to the next term.—Christiansen v. Aldrich, 30 Mont. 446; 76 Pac. 1007.

D. AMENDMENT OF PLEA OR ANSWER, 112-116.

112. An application to the court for leave to withdraw a counterclaim, after the testimony has closed but before the court finally charged the jury, is a matter over which the court should exercise a sound discretion, and it has power to grant or refuse amendments, and upon such terms as it thinks just and proper.—Isaacs v. McAndrew, 1 Mont. 427.

113. It is not an abuse of discretion to refuse to allow defendants to file a second amended answer, where their affidavits do not show what the defense is, and why they had not made it before.—First Nat'l Bank v. How, 1 Mont. 604.

114. When a complaint is amended it is no longer any part of the case and will be stricken from the record.—Raymond v. Thexton, 7 Mont. 299; 17 Pac. 258.

115. Two years after action brought, plaintiff moved for judgment, on the ground that the answer was insufficient. Pending this motion defendants moved to amend, which motion was denied; they having been offered the third opportunity to amend. *Held*, to be no abuse of the court's discretion.—Billings v. Sanderson, 8 Mont. 201; 19 Pac. 307.

116. It is not error to permit a defendant to amend his answer while the jury is being empanelled, where the amendment does not surprise, injure of inconvenience plaintiff, and no

continuance is rendered necessary on account thereof.—Jorgensen v. Butte M. C. Co., 13 Mont. 288; 34 Pac. 37.

117. An amended answer may be filed pending a motion by plaintiff for judgment on the pleadings.—Bryant v. Davis, 22 Mont. 534; 57 Pac. 143.

118. Code Civ. Proc., § 773, authorizing the amendment of any pleading of course, once, by filing the same as amended, and serving a copy on the adverse party, does not apply to amendments made by order of the court; and where leave is given to amend an answer, and the amendment, rather than the answer as amended, is filed and served, the original answer is not substituted by the amendment, except as thereby changed.—Holter v. Mining Co., 24 Mont. 184; 61 Pac. 3.

VII. VERIFICATION, 119.

119. In supplemental proceedings by garnishment against an assignee, where it is affirmed that the deed of assignment was made with intent to defraud, and is not genuine, and facts are alleged which, if proved, would establish such affirmation, the action is not founded upon the deed of assignment, but upon facts dehors the instrument, and the instrument could not operate as its own defense, and is not therefore within Comp. Stat., p. 84, § 98, providing that where a defense is founded on a written instrument, and the answer contains a copy thereof, its genuineness and execution are deemed admitted, unless plaintiff by affidavit denies the same.—Teitig v. Boesman, 12 Mont. 404; 31 Pac. 371.

VIII. FILING, SERVICE, AND WITHDRAWAL, 120-123.

120. A party who withdraws his demurrer to a verified complaint, and obtains leave to file an answer thereto at a certain time, can not then file another demurrer: but if another demurrer is filed, the court may disregard it and enter judgment for want of an answer.—McFarland v. Cutter, 1 Mont. 383.

121. The service of summons with a true copy of the complaint, though such copy was not certified by the clerk as required by Civ. Pr. Act, § 34, is a sufficient compliance with § 36, and gives the court jurisdiction to try and determine the case. Such service is according to general understanding and usage, and if the sections are inconsistent the subsequent should have the greatest weight.—Dunphy v. Ford, 2 Mont. 302.

122. An attorney who had represented defendant in the original proceeding and on the first appeal and had not withdrawn his appearance, was a proper person upon whom to serve an amended or supplemental complaint, after the case had been remanded.—Roush v. Fort, 3 Mont. 175.

123. In an action to determine an adverse claim to a mining location, the file mark on the complaint, not being a part of the pleading, was not conclusive evidence of the date it was filed for the purpose of showing that it was not filed within 30 days from the filing of the adverse cleaim, as required by U. S. R. S., § 2326. —Hopkins v. Copper Co., 29 Mont. 390; 74 Pac. 1081.

IX. MOTIONS, 124-146.

A. JUDGMENT ON PLEADINGS, 124-133.
B. STRIKING OUT PLEADING OR DEFENSE, 134-143.
C. STRIKING OUT MATTER FROM PLEADING, 144-146.

A. JUDGMENT ON PLEADINGS, 124-133.

124. The complaint alleged that plaintiff is seized in fee and entitled to the immediate possession of a certain tract of land; that defendants are in possession and withhold the same from plaintiff, and that plaintiff has been damaged in the sum of $300. Answer admits title in plaintiff but denies right of plaintiff to possession, and the wrongful withholding of the property, and that plaintiff has been damaged. *Held*, that the complaint states a good cause of action; that the answer is sham and irrelevant, and that judgment was properly rendered for plaintiff upon the pleadings.—McCauley v. Gilmer, 2 Mont. 202.

125. In an action on a note, a refusal to strike from the first amended answer an allegation that there was a written agreement that collateral should be exhausted before suit, is in no way inconsistent with granting plaintiff judgment on the pleadings after the second amended answer had been filed, which showed that said agreement was oral and varied, and contradicted the terms of a written agreement between the parties.—Fisher v. Briscoe, 10 Mont. 124; 25 Pac. 30.

126. Where defendants failed to amend after the defective condition of their answer was brought to their notice, judgment was properly rendered against them on the pleadings.—McDonald v. Pincus, 13 Mont. 83; 32 Pac. 283.

127. Plaintiff became the purchaser in 1874 of lots which, by the survey under which he purchased, were contiguous. On a survey in 1885 it was found that there was ground between these lots, for which piece plaintiff brought suit. He alleged adverse possession of such piece from the time of his purchase, but in such an obscure way as to require a construction of certain deeds, in connection with other evidence, to get exact knowledge of the meaning of such allegations. The answer denied actual occupation by plaintiff of such fractional piece previous to the latter survey, alleging that it did not lie between the lots purchased by plaintiff, and that hence the possession of those lots purchased by plaintiff could not have included possession of the ground in controversy. *Held*, that plaintiff was not entitled to judgment on the pleadings.—Horsky v. Moran, 13 Mont. 250; 34 Pac. 360.

128. In an action by the administrator of a deceased landlord's estate for the possession of leased premises for the nonpayment of rent, where the defendant's answer admits having leased the premises from deceased, and also default in the payment of rent, judgment on the pleadings for plaintiff is justified.—State v. Votaw, 13 Mont. 403; 34 Pac. 315.

129. Under a rule of court providing that when a demurrer is overruled the demurrant may answer or reply within 24 hours, in case an answer to a good complaint in an action on a note sets up a good defense of alteration, and both parties make a motion for judgment on the pleadings, it is error, on overruling plaintiff's motion, to render judgment for defendant on the ground that plaintiff's motion confessed the answer, a replication having been filed within 24 hours after plaintiff's motion was overruled.—Floyd v. Johnson, 17 Mont. 469; 43 Pac. 631.

130. Where, in a suit to enforce a resulting trust, the complainant alleges an agreement by defendants to purchase property for the benefit of plaintiff, and the answer denies generally the allegations of the complaint, and sets up a different agreement, which, if proved, will defeat plaintiff's suit, a judgment on the pleadings can not be entered for plaintiff.—Bryant v. Davis, 22 Mont. 534; 57 Pac. 143.

131. Judgment on the pleadings can not be entered where there is an issue framed thereby.

—Moore v. Murray, 30 Mont. 13; 75 Pac. 515.

132. Although Code Civ. Proc., § 741, provides that an appeal can not be taken from a denial of judgment on the pleadings, and that subsequent proceedings of either party are not prejudiced thereby, it was proper for the court to enter judgment for the defendant after overruling plaintiff's motion for judgment on the pleadings, where plaintiff, instead of proceeding to trial upon the merits, announced that he would stand on the motion as made.—Id.

133. In an action on an instrument representing an indebtedness to become due on the happening of a certain contingency, the admission in the answer of the execution of the instrument, its assignment to plaintiff, the happening of the contingency, and non-payment, entitled plaintiff, as assignee, to judgment.—Noyes v. Young, 32 Mont. 226; 79 Pac. 1063.

B. STRIKING OUT PLEADING OR DEFENSE, 134-143.

134. Where an answer raises no material issue, plaintiff may either move that it be stricken out as sham and irrelevant, or move for judgment.—Lomme v. Kintzing, 1 Mont. 290.

135. In an action against common carriers, it was alleged in the complaint that certain goods were delivered to said common carriers and by them lost. The answer alleged, "the defendants have not, and can not obtain sufficient information upon which to base a belief, as to whether said goods, or any thereof, are or were lost to the plaintiffs, and therefore deny the same." *Held*, that such denial might well be considered sham and judgment be entered upon the allegations of the complaint without striking out the answer. (See 4 Otto 586.)—Sands x Maclay, 2 Mont. 35.

136. An averment in an answer to a complaint on a bill of exchange, providing for the payment of attorney's fees in case of suit, that such fees were not due at the time the suit was filed, is properly stricken out as sham.—Bank v. Fuqua, 11 Mont. 285; 28 Pac. 291.

137. Where, in an action on a note by the endorsee against the makers, the answer states as a sole defense that the payee failed to perform services which he agreed to perform as the consideration for the note, but does not allege the terms of the agreement, or the conditions thereof, such answer is properly stricken from the files as sham; Comp. Stat., p. 85, § 101, providing that sham and irrelevant answers and irrelevant matter inserted in a pleading may be stricken out, on such terms as the court may, in its discretion, impose.—McDonald v. Pincus, 13 Mont. 83; 32 Pac. 283.

138. Where the facts alleged in support of an allegation of fraud are contradictory thereof, they are properly stricken out.—State v. Dickerman, 16 Mont. 278; 40 Pac. 698.

139. A motion to strike out a portion of the replication on the ground that it is a departure from the complaint is properly overruled if it fails to show in what the alleged departure consists.—Maddox v. Teague, 18 Mont. 512; 46 Pac. 535.

140. Though an answer does not set out matter sufficient to constitute a defense, it will be stricken out on the ground that it is sham, if from the answer itself the matter does not appear to be false.—Sweetman v. Ramsey, 22 Mont. 323; 56 Pac. 361.

141. Notice of a motion to strike out part of an answer, set for hearing August 2, but not called till the day of trial, in October of the same year, when both parties were present, was sufficient.—Kipp v. Silverman, 25 Mont. 296; 64 Pac. 884.

142. Where plaintiff alleged a wrongful levy on goods in possession of his agent, and the answer denied plaintiff's ownership, justifying the seizure thereof on a judgment execution against the agent as the owner of the goods, a further paragraph of the answer, alleging the agent's exclusive ownership, and that plaintiff was estopped from claiming any interest therein, because the goods were on an Indian reservation, the rules of which forbade plaintiff from selling at said place, was redundant, and hence properly stricken out.—Id.

143. On the filing of an answer improperly interposing a counterclaim, plaintiff's motion to strike out the counterclaim should have been allowed.—Osmers v. Furey, 32 Mont. 581; 81 Pac. 345.

C. STRIKING OUT MATTER FROM PLEADING, 144-146.

144. A commenced an action against B in 1875 upon a promissory note made in California in 1869, payable one day after date, alleging that A and B were residents of California when the note was made, that B resided in Nevada from 1871 until 1872, when he removed to Montana, and that he has resided in Montana since 1872. *Held*, that such allegations were material and that the complaint, without them, would have stated a cause of action barred by the statute, and they should not be stricken out as redundant and immaterial.—Knox v. Gerhauser, 3 Mont. 267.

145. In a complaint which sufficiently charges a partnership and asks for an accounting, a clause setting forth a special cause of action against one of the partners may be stricken out on motion as mere surplusage.—McMahon v. Thornton, 4 Mont. 46; 1 Pac. 724.

146. Plaintiff advertised chattels for sale under a mortgage from T to plaintiff, after which they were taken from plaintiff's possession on execution against T. In an action to recover possession defendant answered that the mortgage and notice of sale estopped plaintiff from denying T's ownership at the time of the levy. *Held*, that though the answer was relevant, as supporting defendant's claim of T's ownership, it should be stricken out as redundant, since it consisted of evidentiary matter, merely tending to show the ultimate fact of T's ownership.—Sweetman v. Ramsey, 22 Mont. 323; 56 Pac. 361.

X. ISSUES, PROOF, AND VARIANCE, 147-151.

147. Under an answer denying "each and every allegation in the complaint," which alleged that plaintiff was the owner of certain personal property, the defendant may prove that he owned the same.—Staubach v. Rexford, 2 Mont. 565.

148. Defendant's answer in replevin claimed a crop of hay cut by him in plaintiff's field under an agreement to repair plaintiff's fences in payment therefor. Plaintiff's replication admitted the repairing of the fences, but averred the agreement to be that defendant was to cut the grass growing in time to allow plaintiff to cut the second crop, and, defendant having failed to cut the crop within a reasonable time, he was forbidden by plaintiff to enter the field. *Held*, that the agreement did not require proof, and the only issue raised was whether defendant cut the grass within reasonable time.—Gregg v. Garrett, 13 Mont. 10; 31 Pac. 721.

149. There is no variance between an answer describing an obligation due from plaintiff to defendant merely as an indebtedness or lease, and proof that such indebtedness is evidenced by a note.—Kleinschmidt v. Kleinschmidt, 13 Mont. 64; 32 Pac. 1.

150. Where plaintiff, in an action for forfeiture of a lease, alleges non-performance of certain conditions by defendant, as grounds of forfeiture, and defendant denies the allegation, he can not, in support of a verdict for himself, urge that plaintiff, with knowledge of his non-performance of the duties waived the same.—Murray v. Heinze, 17 Mont. 353; 42 Pac. 1057; 43 Pac. 714.

151. Where a complaint to establish the right to use the entire waters of a stream was met by denials raising the general issue, and also an allegation that plaintiff was entitled to a certain number of inches of the waters, but no more, the latter allegation did not require a reply, and hence evidence that plaintiff was entitled to all the waters was admissible. —Arnold v. Passavant, 19 Mont. 575; 49 Pac. 400.

XI. DEFECTS AND OBJECTIONS, WAIVER, AND AIDER BY VERDICT OR JUDGMENT, 152-178.

152. That the answer did not set up a legal defense can not be considered on appeal, though, after demurring for that reason, plaintiff filed a replication.—Bohn v. Dunphy, 1 Mont. 333.

153. Variance between pleading and proof must be taken advantage of at the trial, or it is waived.—Frohner v. Rodgers, 2 Mont. 179.

154. Where an answer is not as specific and void of negative pregnants as good pleading might require, but no advantage was taken of it, either before or after the trial, an objection made after the verdict comes too late.—Orr v. Haskell, 2 Mont. 225.

155. An agreement in open court that a cause pending shall be tried on general denial in the answer to every material allegation in the complaint, precludes a party from objecting to the sufficiency of such denial on the introduction of testimony thereunder. If such denial was deemed insufficient it was the duty of counsel to have demurred thereto; even if the answer was defective it was cured by the agreement.—Allport v. Kelley, 2 Mont. 343.

156. Any defect in the sufficiency of the complaint to state a cause of action is cured by defendants answering to the merits and going to trial.—Vantiburgh v. Hamilton, 2 Mont. 413.

157. Where a party amends his pleading after judgment sustaining a demurrer thereto, he waives his right to call in question the action of the court in sustaining the demurrer.—Perkins v. Davis, 2 Mont. 474.

158. An objection that the complaint is uncertain because the christian name of the plaintiff does not appear therein is waived by answer and recognizing the plaintiff by the name in which he brings the action.—Nichols v. Dobbins, 2 Mont. 540.

159. Objections to the sufficiency of the verification of the complaint, if not made in the lower court, can not be raised on appeal.—Power v. Gum, 6 Mont. 5; 9 Pac. 575.

160. By answering over and going to trial, the party waives his right to be heard on appeal on the question of overruling his demurrer.—Francisco v. Benepe, 6 Mont. 243; 11 Pac 637.

161. Defendant can not rely on the failure of plaintiff to reply to an allegation in the answer, which appellant claims was new matter, when the point was not raised in the court below, either on the trial or on motion for a new trial, and where the appellant treated it as denied, and produced evidence in support of it. —Beck v. Beck, 6 Mont. 285; 12 Pac. 646.

162. Whether or not a contract is well pleaded by annexing a copy thereof to the complaint, and marking it as an exhibit, and referring to it in the complaint as a part thereof, such defect, if any, is cured, if the complaint has not been demurred to on that ground, and defendant has answered, and findings have been rendered on reference, provided the contract and complaint together show a cause of action. —Quirk v. Clark, 7 Mont. 231; 14 Pac. 669.

163. A complaint against a railroad company for destroying the property by fire alleged that "on account of defendant not keeping free from dried and dead grass and other such combustible material its right of way, * * * and on account of not providing suitable spark arresters," the defendant's locomotive emitted sparks which set fire to the dried grass on the right of way, "which fire was then and there communicated to the said standing grass in plaintiff's enclosure, and to the said hay and wood," and burned up all of said property. *Held*, that where no demurrer was raised, but defendant answered, and evidence was introduced as to how the fire was communicated to plaintiff's property, the above averment will be held sufficient on appeal, under Comp. Stat., p. 85, § 100, which requires pleadings to be "liberally construed."—Spencer v. Montana Central, 11 Mont. 164; 27 Pac. 681.

164. Defective denials in pleadings are waived by the introduction of testimony on the issues, without objection, and can not be urged for the first time in this court.—Hogan v. Shuart, 11 Mont. 498; 28 Pac. 969.

165. In an action to recover the value of horses alleged to have been negligently killed, the answer admitted the killing, denied negligence, and pleaded contributory negligence. Defendant tendered evidence that, though not so obliged by law or contract, it had built and maintained, for the accommodation of neighbors at the place of accident, a sufficient fence and gates. Plaintiff thereupon gave rebutting evidence, showing that the gates were either broken down or left open so as to admit stock upon the track, and that his horses which had been turned out to graze upon the public domain, had started through them upon defendant's track. No objection to this evidence was taken by either party at the trial, and defendant asked the jury to return special findings of negligence, if any, of defendant. The jury found, inter alia, that defendant was negligent in not keeping its gates closed and locked. *Held*, that defendant's objection to such evidence on the ground that there was no foundation laid in the pleadings could not be sustained on appeal. —McMaster v. Montana Union, 12 Mont. 163; 30 Pac. 268.

166. Though allegations in the answer are uncertain, and there is no motion to make them more definite, the defect may be cured by evidence and findings, and is no ground for reversal on appeal.—Raymond v. Wimsette, 12 Mont. 551; 31 Pac. 537.

167. After verdict for defendant, matter of defense in the answer can not be attacked for the first time on appeal for alleged insufficiency, where such matter was neither demurred to or denied in the replication.—Kleinschmidt v. McDermott, 12 Mont. 598; 31 Pac. 541.

168. Ambiguity in a pleading in an action for injuries in a collision between street cars, consisting in the allegation that defendant was negligent in failing to switch "each of its cars to await the passage of others," is cured by a denial in the answer of any negligence in failing to switch "each, either or any of said cars or trains to await the passage of the other."—Hamilton v. Railway Co., 17 Mont. 334; 42 Pac. 860; 43 Pac. 713.

169. Error in allowing an amendment of a pleading is waived by failure to object to the order allowing it when made.—Sanford v. Newell, 18 Mont. 126; 44 Pac. 522.

170. Where no demurrer was interposed to a complaint, but issue was joined thereon by answer, it will not be held insufficient on the ground of ambiguities or uncertainties of statement.—Sanderson v. Power Co., 19 Mont. 236; 47 Pac. 998.

171. Objection raised by demurrer that a complaint is ambiguous and uncertain is waived by answering after demurrer is overruled.—Lynch v. Bechtel, 19 Mont. 548; 48 Pac. 1112.

172. Where plaintiff in a creditor's suit pleaded actual fraud in a sale by a husband to his wife, and introduced evidence of constructive fraud, in that there was no change of the possession of the property, the fact that defendant did not object to the introduction of such evidence did not constitute a waiver of their right to raise the question that the proof was not responsive to the pleadings.—Finch v. Kent, 24 Mont. 268; 61 Pac. 653.

173. A defective allegation of partnership is cured by an answer which, denying all other allegations, admits the firm relation.—Hefferlin v. Karlman, 29 Mont. 139; 74 Pac. 201.

174. Objection to a complaint, raised by demurrer, that it does not state a cause of action, is not waived by pleading over.—Van Horn v. Holt, 30 Mont. 69; 75 Pac. 680.

175. Under Code Civ. Proc., § 778, providing that the court must at every step disregard every error or defect in the pleadings which does not affect the substantial rights of the parties, and no judgment shall be reversed by reason of such defects, a technical objection to a complaint in a suit for specific performance not affecting the substantial rights of the parties is not available after judgment.—Christiansen v. Aldrich, 30 Mont. 446; 76 Pac. 1007.

176. Where, after a trial amendment, the case proceeded and was tried upon the issues formed by the amended complaint and answer, and it appeared that defendants were afforded every opportunity to present their entire case, the fact that the amendment was not formally incorporated in the complaint was not reversible error.—Id.

177. Where the complaint in an action to recover a sum alleged to be due plaintiff for the privilege granted defendant to sell certain articles in a certain territory was defective with reference to an allegation of non-payment by defendant, the defect was cured by defendant's answer admitting non-payment.—Harmon v. Fox, 31 Mont. 324; 78 Pac. 517.

178. A demurrer to a complaint, charging that it did not state facts sufficient to constitute a cause of action, but not objecting on the ground that the complaint was ambiguous and uncertain, is a waiver of the second objection, under Code Civ. Proc., § 685.—Pryor v. Walkerville, 31 Mont. 618; 79 Pac. 240.

PLEDGES.

1. An action for money had and received will not lie by a pledgor against a pledgee with power to sell, until after settlement and a demand of payment for balance found due. Where dispute arises as to the amount applicable for interest out of the avails of pledged securities, an action for an accounting is the proper remedy.—Stephens v. Hartley, 2 Mont. 504.

2. In an action by a pledgor against a pledgee for the conversion of a pledge given in lieu of a bond to secure performance of a contract, a recovery will be defeated by proof that there was a breach of the contract, by which defendant sustained damages in an amount greater than the value of the pledge, and that he sold the pledge for its full value, and gave plaintiff credit for the proceeds.—Reardon v. Patterson, 19 Mont. 231; 47 Pac. 956.

3. Before the pledgor can sue for conversion, he must show that he was entitled to possession, either by proving performance of the contract for which it was pledged as security or payment of the damages for non-performance.—Id.

4. A surrender of the pledged property to the assignee of a pledgor for the purpose of a sale does not waive the pledgee's lien, where the rights of creditors have not been prejudiced.—Durgee v. Harper, 22 Mont. 354; 56 Pac. 582.

5. A pledge and the pledgor's assignee for benefit of creditors may agree that the assignee shall sell the pledged property at private sale, and for cash only.—Id.

PRINCIPAL AND AGENT.

I. The Relation, 1-10.

II. Mutual Rights, Duties, and Liabilities, 11-23.

III. Rights and Liabilities as to Third Persons, 24-46.

I. THE RELATION, 1-10.

1. The declaration of an agent of a corporation, respecting his authority, is hearsay testimony.—Brown v. Mining Co., 1 Mont. 57.

2. The acknowledgement and recording of a power of attorney is no part thereof, and as between the parties thereto such instruments are good without acknowledgement or record, these requirements being for the benefit of third persons. (See 119 U. S. 235.)—McAdow v. Black, 4 Mont. 475; 1 Pac. 751.

3. Where C, empowered to act as agent for defendants in the purchase of wool, telegraphed them in regard to the purchase of a certain lot, a reply that he had better not take it, revoked his authority to buy it.—First Nat'l Bank v. Hall, 8 Mont. 341; 20 Pac. 638.

4. Where one borrows money of a bank on certain notes, and agrees to deposit money from time to time, and authorizes the bank to apply his deposits to the discharge of the notes before maturity, if it so desires, the authority thus given is a naked power, not coupled with an interest, which ceases at the depositor's death, and the bank has no authority, after notice of his death, to make such an application of moneys then standing to his credit.—Gardner v. Bank, 10 Mont. 149; 25 Pac. 29.

5. An alleged agent may testify that he was an agent, though his declarations of agency are incompetent.—Nyhart v. Pennington, 20 Mont. 159; 50 Pac. 413.

6. The assignment of the subject matter of an agency by a principal for the benefit of creditors revokes the authority of the agent, unless that authority is coupled with an interest.—Wilson v. Harris, 21 Mont. 374; 54 Pac. 46.

7. By agreement between defendants in partition and L, the latter agreed, by himself or agent, to buy in the property at the sale in his own name, and hold it for the former, to whom he was to reconvey the same, or a part thereof, as he should elect, he being reimbursed for the costs and expenses. One agreement was signed for one of the defendants by an attorney in fact, who afterwards bought the property at the sale in his own name, but who did not otherwise sign either agreement. *Held*, that the agreements did not establish a trust relation between the purchaser and L, who claimed that the property was bought for him.—Largey v. Leggatt, 30 Mont. 148; 75 Pac. 950.

8. A letter written subsequent to the beginning of the action for rent, which did not by its terms ratify any previous act by the lessors, was inadmissible for the purpose of showing authority on his part to make a previous agreement with the lessee on behalf of the other lessor.—Dandt v. Schneider, 31 Mont. 15; 77 Pac. 307.

9. A letter written by R and B, two lessors, to the third lessor to the effect that they had concluded that R should go the place where the third resided, and agree concerning the leased premises, was inadmissible to show that R had authority to extend the lease as agent of B.—Id.

10. Under Civ. Code, § 3140, where an agent was authorized by a master to employ medical assistance for an injured servant, such agent had no authority to delegate a physician employed to employ an assistant.—Bond v. Hurd, 31 Mont. 314; 78 Pac. 579.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES, 11-23.

11. Before a principal can maintain an action against his agent for money collected, a demand must be made therefor.—Anderson v. Hulme, 5 Mont. 295; 5 Pac. 865.

12. In an action by a principal to recover money alleged to be due him from his agent, the complaint should aver the fact of a demand having been made upon defendant.—Id.

13. Plaintiff claimed employment by defendant to secure for the latter an interest of his co-owners in a mine. Defendant claimed that the object of the arrangement was to effect a sale to third parties, and if not effected, plaintiff was to have no commission. *Held*, that testimony of a witness as to a previous contract he had with defendant for the sale of the mine, and that plaintiff was sent to take the witness's place, was inadmissible, having no connection with the contract in suit.—Huntoon v. Lloyd, 8 Mont. 283; 20 Pac. 693.

14. Plaintiff alleged a verbal contract by which he was to obtain for defendant the titles of the latter's co-owners of a mining claim for not more than a certain sum, his commission to be the difference between that sum and the price paid. Defendant alleged that, unless a certain sale of the property which he was negotiating was effected, plaintiff was to have nothing for his services, and that the sale was not effected. *Held*, that evidence of what a witness, who was in no way connected with defendant, and was not present at the conversation during which the contract was made, said to plaintiff about his understanding with defendant before plaintiff went to see defendant, was irrelevant.—Id.

15. Plaintiff claimed an employment by defendant to secure for the latter the interest of his co-owners in a mine. Defendant claimed that the object of the employment was to effect a sale to third parties, plaintiff to have no commission if such sale was not effected. *Held*, that an instrument signed by plaintiff only, stating that he had leased the interest of other owners of the mine, with the option of buying, and obliging himself to sell to defendant for a certain sum, to be paid to the credit of his lessors, and a further sum to be paid plaintiff, was admissible.—Id.

16. A conveyance by an attorney in fact of land of his principal to himself, through a third person, is invalid.—Davis v. Davis, 9 Mont. 267; 23 Pac. 715.

17. An attorney in fact, by accepting the power of attorney, and attempting to convey thereunder land of his principal to himself, is not estopped from asserting an equitable title thereto previously vested in himself.—Id

18. In an action for services plaintiff admitted that he was not to receive commission on goods sold for defendant unless he made money for him. Defendant claimed that plaintiff, by ordering different goods to be shipped to his customers than those sold, subjected defendant to considerable expense, and that plaintiff did not make money for defendant. *Held*, that it was error to instruct that plaintiff was entitled to commission on goods sold, without taking into consideration the question whether plaintiff had made money for defendant.—Nixon v. Cutting, 17 Mont. 90; 42 Pac. 108.

19. In an action against a vendor of cattle for commission under a contract of sale negotiated by telegraph, it appeared that plaintiff commenced negotiations on May 26, 1890, at the instance of the vendee's agent, by asking defendant's lowest price for cattle of a certain description, delivered; that plaintiff, up to July 2, spoke of the vendee as his buyer, and asked for an option, and for time for his buyer to go to the ranches and see the cattle; that on June 22 defendant asked plaintiff to whom it was to make the contract, and on June 24 telegraphed a contract naming plaintiff as purchaser, which plaintiff refused to sign. Plaintiff then drew up a contract naming his buyer as purchaser, and in his letter transmitting it, for the first time, claimed commission from defendant. *Held*, that defendant did not employ plaintiff to negotiate the sale.—Courtney v. Cattle Co., 17 Mont. 394; 43 Pac. 185.

20. One who was employed as the trusted agent of the parties to a contract to assist the surveyor in matters precedent to securing patents to mining claims, and had notice of the contract relation, and had agreed to post amended notices for the owners' benefit, could not defeat the parties' rights by posting notices in another's name, in violation of the confidence reposed in him.—Largey v. Bartlett, 18 Mont. 265; 44 Pac. 962.

21. Evidence in an action for commissions for selling coal *held* sufficient to sustain a finding that plaintiff, in consideration of his agency for defendant, agreed to pay a debt owing them by another.—McCormick v. Johnson, 31 Mont. 266; 78 Pac. 500.

22. Defendants who, in an action against them for commissions earned by a firm, claimed that for a valuable consideration the firm agreed to pay the debt of an insolvent corporation to them, may testify that they received nothing from the assignee of the corporation.—Id.

23. Evidence in an action for commissions *held* sufficient to sustain a finding that plaintiff's indebtedness to defendants equalled the amount of the commissions.—Id.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS, 24-46.

24. A contract, signed by one who designates himself as a general manager and superintendent for a certain company, is not conclusive of his personal liability; but it may be shown that it was the intention to bind the company, though its name did not appear in the body of the contract.—Gerber v. Stuart, 1 Mont. 172.

25. The extent of the power of an agent to bind his principal is a question of law for the court.—Herbert v. King, 1 Mont. 475.

26. Where an agent perpetrates a fund or wrong on another, the principal is liable, if the agent acted strictly within the scope of his authority, but no enlargement of this liability will be tolerated.—Id.

27. If, between the time of performance of an unauthorized act by an agent and its ratifi-

cation by the principal, the rights of third persons intervene, such rights are not defeated by the ratification.—Schnepel v. Mellen, 3 Mont. 118.

28. A telegram authorizing an agent to draw on a corporation in his own name for money for a particular purpose, did not authorize him to draw in the name of the corporation.—Bank v. Mining Co., 3 Mont. 146.

29. A principal who ratifies the mortgage executed by his attorney in fact by accepting the money paid thereunder, can not afterwards deny its validity by repudiating the power of attorney. (See 119 U. S. 235.)—McAdow v. Black, 4 Mont. 475; 1 Pac. 751.

30. An agent employed to drive cattle, to whom the possession thereof is entrusted by the principal, can not deliver such possession to a subagent appointed by himself.—Underwood v. Birdsell, 6 Mont. 142; 9 Pac. 922.

31. On an issue as to the authority of the superintendent of a mining company to accept a mill erected for the company, it was proven that he was superintendent of the company's works; that he prepared the plans and specifications for the mill; that numerous changes were ordered by and made to suit him during construction, and the extra charges therefor paid by the company; that the president and assistant manager of the company had said to the agent of the party building the mill that whenever the mill was acceptable to their superintendent it would be acceptable to the company, and that such superintendent, after writing the certificate of acceptance, had shown a letter press copy to the assistant general manager of the company, who had raised no objection to it. *Held*, that the superintendent's authority to accept was fully proven. (See 141 U. S. 222)—Starr v. Mining Co., 6 Mont. 485; 13 Pac. 195.

32. Where C telegraphed to his principal as to the purchase of certain wool, and was instructed not to buy, but purchased the wool and procured plaintiff bank to discount a draft on his principal for the price, plaintiff could not recover on the draft on the ground that it had no notice of the telegram; it appearing that the bank made no inquiry as to the power of C; that only once before had the latter caused similar drafts to be discounted by the bank, and then the authority was exercised to pay for wool purchased on the joint account of himself and his principal.—First Nat'l Bank v. Hall, 8 Mont. 341; 20 Pac. 638.

33. A principal is responsible for the acts of his agent, when they have been done within the scope of his authority; and this liability will not be enlarged.—Kircher v. Conrad, 9 Mont. 191; 23 Pac. 74.

34. An attorney in fact, being authorized by power of attorney to take possession of an infant child of the principal, and to deliver said child into the custody of the principal, and to do all things necessary to be done in order to so deliver said child, may institute and maintain a habeas corpus proceeding to secure possession of the child.—State v. Giroux, 15 Mont. 137; 38 Pac. 464.

35. An agent authorized to collect rent for his principal has no implied authority to accept a surrender of the lease.—Blake v. Dick, 15 Mont. 236; 38 Pac. 1072.

36. On an issue as to whether an agent had authority to bind his principal by the purchase of a claim, judgments on other claims purchased for the principal by such agent were admissible.—Mahoney v. Hardware Co., 19 Mont. 377; 48 Pac. 545.

37. A principal is under no duty as to third persons to suspect the agent of exceeding his authority.—Helena Nat'l Bank v. Telegraph Co., 20 Mont. 379; 51 Pac. 829.

38. A principal is not bound by a promise of his agent, where there is no evidence that the agent acted within the scope of his agency, or attempted to bind any other person than himself.—Ming v. Pratt, 22 Mont. 262; 56 Pac. 279.

39. The authority of an agent to contract to sell land in August, 1894, was not required to be in writing, and could be shown by oral testimony, or any evidence legitimately raising the inference of agency, since Civ. Code, §§ 2181, 3085, and Code Civ. Proc., § 3276, requiring such authority to be in writing, did not take effect until July 1, 1895.—Cobban v. Hecklen, 27 Mont. 245; 70 Pac. 805.

40. Whether an attorney in fact, under a general power of attorney, may execute a trust deed containing a stipulation for attorney's fees in case the deed is enforced by an action, is immaterial, where the trustee in the deed sells the property under a power of sale therein granted.—Muth v. Goddard, 28 Mont. 237; 72 Pac. 621.

41. Under Civ. Code, § 3821, and Code Civ. Proc., § 1293, an attorney in fact under a general power of attorney to sell, convey and mortgage the grantor's property may secure the payment of his grantor's debt by executing a trust deed conveying the grantor's property, and authorizing the trustee, or his successor in trust, to sell the same in case of non-payment of the indebtedness.—Id.

42. An attorney in fact authorized to sell, convey and mortgage the grantor's property may execute a trust deed conveying the grantor's individual property as security for the payment of a debt due from a firm of which he is a partner.—Id.

43. One who signs a contract only as attorney in fact for a party thereto is not bound by the contract, and it has the same effect, so far as an action against him based thereon is concerned, as if the party had signed only his own name thereto.—Largey v. Leggat, 30 Mont. 148; 75 Pac. 950.

44. One who joins, by an agent, in the redemption of property, is charged with all the knowledge that the agent possesses concerning the equities in the property.—Coombs v. Barker, 31 Mont. 526; 79 Pac. 1.

45. Where, in a suit to restrain interference with certain ditches, it is not alleged that a co-defendant was the agent of the owner of the land, or authorized to represent him or make any representations for him, and other defendants are not connected with his statements, defendants are not estopped to deny plaintiff's right to transmit waters through the ditches by representatives of such co-defendant, before plaintiff's purchase, that the waters were carried through the ditches.—Campbell v. Flannery, 32 Mont. 119; 79 Pac. 702; 80 Pac. 240.

46. One paying a debt secured by mortgage to a supposed agent of the owner of the mortgage is bound to ascertain the scope of the agent's authority.—Cornish v. Woolverton, 32 Mont. 456; 81 Pac. 4.

PRINCIPAL AND SURETY.

I. Creation and Existence of Relation, 1-10.
II. Nature and Extent of Liability of Surety, 11.
III. Discharge of Surety, 12-15.
IV. Remedies of Creditors, 16-21.
V. Rights and Remedies of Surety, 22-28.

I. CREATION AND EXISTENCE OF RELATION, 1-10.

1. Where, in an action to recover on an appeal undertaking, it appears that the bond was signed by the sureties, and delivered to the probate judge with express directions that the same be not filed until it was signed by the principal, and that the judge promised to obey these directions, but filed the bond without the signature of the principal, which fact the sureties did not learn until the appeal had been determined, the sureties are not liable.—Ney v. Orr, 2 Mont. 559.

2. The liability of sureties is not affected by any verbal representations as to the contents or effect of an instrument, when they have had full opportunity to see and judge for themselves.—McCormick v. Hubbell, 4 Mont. 87; 5 Pac. 314.

3. Where the creditor has knowledge that one of the signers to the note signed as surety, the remedy of the latter is to pay the note and himself sue the principal debtor.—Smith v. Freyler, 4 Mont. 489; 1 Pac. 214.

4. In an action against a surety on an undertaking to prevent an attachment, it is no defense that the defendant in the action did not sign the undertaking as principal.—McIntosh v. Hurst, 6 Mont. 287; 12 Pac. 647.

5. Since an indemnifying bond in attachment is a good bond of the sureties, without the signature of the principal who procures and delivers it, and the sureties' recourse against him is in no wise impaired by his failure to sign, they can not defend a suit on such bond, as having signed it on condition that he should sign before delivering, and never intended nor consented that it should be delivered without his signature.—Woodman v. Calkins, 13 Mont. 363; 34 Pac. 187.

6. In an action against a surety on an appeal bond, the answer alleged that defendant's co-surety was the real principal, that he had agreed to hold defendant harmless, and that plaintiff had compromised with said co-surety, and had released him on payment of one-half of the bond. *Held*, that such facts were insufficient to constitute a bar to the action.—Lay v. Nixon, 14 Mont. 64; 35 Pac. 458.

7. To enforce the liability of a surety on a bond which the principal, whose liability was fixed by another contract, failed to sign, the obligee need not show an express understanding by the surety that the bond should be delivered and have effect without the principal's signature.—Cockrill v. Davie, 14 Mont. 131; 35 Pac. 958.

8. Where the liability of the principal in a bond is fixed by contract or by operation of law, his failure to sign the bond does not affect the liability of his sureties thereon.—Id.

9. The mere fact that the principal obligor on a bond given for the faithful performance of his duties as agent is already indebted to the obligee, on the failure of the latter to divulge that fact to the sureties at the time the bond is executed will afford the sureties no defense to an action thereon if no artifice was used to deceive them.—Palatine Ins. Co. v. Crittenden, 18 Mont. 413; 45 Pac. 555.

10. Where the names of two sureties appear in the body of an indemnifying bond, which is, however, signed by but one, the condition of the bond is notice to the obligee, so as to permit the defense, by the surety signing, that his liability was conditioned upon obtaining the signature of his co-surety.—Butte v. Cook, 29 Mont. 88; 74 Pac. 67.

II. NATURE AND EXTENT OF LIABILITY OF SURETY, 11.

11. The bond of the city terasurer specified the amounts for which each bondsman was bound, which were put opposite the signature of each bondsman. In the body of the instrument, after the part specifying these amounts, was the phrase, "for the payment of which, well and truly to be made, we bind ourselves, our heirs * * * jointly and severally, by these presents." Comp. Stat., p. 225, § 631, provides that in the construction of the instrument the intention of the parties is to be pursued, if possible, and when a general and particular provision are inconsistent the later is paramount; and a particular intent will control a general one that is inconsistent with it. Sec. 336 provides, when an agreement has been intended in a different sense by the parties to it, the sense is to prevail against either party in which he supposed the other party understood it, and, when different constructions are equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made. In an action on the bond the complaint alleged that "defendants have forfeited the bond, and become and are indebted to plaintiff in the respective sums set after their names in said bond." *Held*, that the instrument bound the sureties severally for the amount only expressly stated as respectively undertaken.—Butte v. Cohen, 9 Mont. 435; 24 Pac. 206.

III. DISCHARGE OF SURETY, 12-15.

12. The surety on a promissory note will not be released from his liability thereon if the creditor fail or refuse to sue the principal debtor, after notice by the surety, even though at the time of such notice the principal debtor was good and afterwards became insolvent.—Smith v. Freyler, 4 Mont. 489; 1 Pac. 214.

13. A surety upon a building contract, providing that the men shall be paid by the owner upon time checks signed by the contractor, who, with knowledge of such provisions, and that the contract price is exhausted, instructs the owner to pay them, thereby waives the right to object that the time checks were not signed by the contractor.—Hamilton v. Woodworth, 17 Mont. 327; 42 Pac. 849.

14. In an action against sureties on a note it is no defense that the money raised on the note was, by the principal maker, diverted from the use intended, and in consideration of which the sureties signed, and that plaintiff had knowledge of the diversion.—Hefferlin v. Krieger, 19 Mont. 123; 47 Pac. 638.

15. The holder's failure to sue the principal debtor at the maturity of a note does not discharge the sureties, though the principal afterwards became insolvent.—Id.

IV. REMEDIES OF CREDITORS, 16-21.

16. The defense of coverture in the defendant in the principal action can not be raised by the sureties in an action brought on the undertaking.—McCormick v. Hubbell, 4 Mont. 87; 5 Pac. 314.

17. An averment that the time for payment of a note was extended, but not stating any definite period, by an agreement between the creditor and principal debtor is not sufficient to discharge the surety.—Smith v. Freyler, 4 Mont. 489; 1 Pac. 214.

18. Where the complaint, in an action to recover the amount paid in satisfaction of a judgment on a note for which plaintiff was liable as surety, alleges that the judgment was rendered by a court of competent jurisdiction of a foreign state, and the allegation is not denied,

a paragraph of the answer denying execution of the note on which the judgment was based is insufficient.—Oppman v. Steinbrenner, 17 Mont. 369; 42 Pac. 1015.

19. Where a part of an agreement creating an agency was a bond executed to plaintiff by the agent and defendant, conditioned that if the agent failed to perform his duties, and pay over to plaintiff such sums as might be due him, defendant would pay such sum, not exceeding $200, defendant was surety, within Civ. Code, § 3670, defining a surety as one who becomes responsible for another to secure a benefit to the other, and hence the agent and defendant were properly joined in an action on the bond, under Code Civ. Proc., § 585, providing that persons severally liable on the same obligation, including sureties on the same or separate instruments, may be included in the same action at the plaintiff's option.—Cole Mf'g Co. v. Morton, 24 Mont. 58; 60 Pac. 587.

20. Code Civ. Proc., § 1001, providing that if, on the rendition of any judgment, it shall be shown that one or more defendants against whom the judgment is to be rendered are principal debtors, and others are sureties, the court may order the judgment so to state, and shall direct the sheriff to make the amount due thereon out of the goods, etc., of the principal debtor before resorting to the sureties, refers to judgments on obligations, the makers of which signed in fact as principal and surety, and not to judgments on those on which the makers are all principals, though, as between themselves, some are sureties merely.—Brownlee v. Young, 25 Mont. 38; Pac. 798.

21. The statute applies to cases in which the parties whose rights are to be determined before the court, and not to cases in which judgment is sought, at the petition of plaintiff, as authorized by Code Civ. Proc., §§ 585, 593, and Civ. Code, § 1941, against but one of the obligors.—Id.

V. RIGHTS AND REMEDIES OF SURETY, 22-28.

22. Where the complaint in an action to recover the amount paid, as surety, in satisfaction of a foreign judgment, alleges the judgment, and also a judgment of revivor, a demurrer is properly sustained to a paragraph of the answer alleging absence from the foreign state where the judgment was rendered, and that defendant's appearance was fraudulently entered therein, where it is doubtful whether the answer refers to the original judgment or the judgment of revivor.—Oppman v. Steinbrenner, 17 Mont. 369; 42 Pac. 1015.

23. In a proceeding by sureties to enforce contribution from a co-surety on a judgment paid by them, it appeared that the money with which the judgment was paid was borrowed on the individual note of the sureties seeking to enforce contribution; that at the maturity of said note it was paid with money borrowed on the note of the principal judgment debtor, a corporation, which was endorsed by the sureties, who were members of its board of trustees, that the corporation was insolvent, and had been from the time of the payment of the judgment; that its liabilities greatly exceeded its assets; that at the time of the endorsement of the note it was well known by the endorsers, as well as the non-paying co-surety, who was also a member of its board of trustees, that it would have to be paid by the endorsers; that it was still unpaid; and that the execution of said note was never authorized by the board of trustees, of which fact the co-surety had notice. *Held*, that the co-sureties had not been reimbursed by the principal debtor for the amount paid by them in satisfaction of the judgment.—Bank v. Opera House Co., 23 Mont. 1; 57 Pac. 440.

24. The right of a surety who has paid a judgment against his principal, and himself and other sureties, to enforce contribution from a co-surety, under Code Civ. Proc., § 1242, which provides that a surety paying a judgment against his principal and himself and other sureties shall be entitled to the benefit of the judgment, to enforce contribution or repayment, if within 10 days after payment he shall file with the clerk of the court where the judgment was rendered notice of his payment, and claim for contribution, is not barred by the lapse of three years after the payment of a judgment, but exists as long as the judgment is alive.—Id.

25. In an action to enforce contribution, under Code Civ. Proc., § 1242, evidence that the execution of the notes on which the judgment paid was entered was authorized by the corporation defendant is immaterial.—Id.

26. A surety who paid a judgment against his principal and himself and other sureties may take an assignment of the judgment to himself, and enforce contribution from his co-sureties: the remedy afforded by Code Civ. Proc., § 1242, which provides that a surety paying such a judgment may have the benefit of it to enforce repayment and contribution, if within 10 days after payment he files with the clerk a notice of payment and claim of repayment and contribution, not being exclusive.—Bank v. Opera House Co., 23 Mont. 33; 57 Pac. 445.

27. A judgment against a principal and sureties was paid by one of the sureties, who took an assignment of it to compel contribution from his co-sureties. Thereafter the judgment was, at the request of the paying surety, satisfied of record to relieve the real estate of the paying surety from the lien. It was intended to have it satisfied only as to the paying surety. *Held*, that as to a co-surety who paid no consideration for it, such satisfaction did not release his liability to contribute.—Id.

28. In a proceeding to enforce contribution from a co-surety, by a surety who has paid and taken an assignment of a judgment against them, it is competent for the paying surety to testify that he did not intend to have the judgment satisfied as to his co-surety, where he had, after payment and assignment of the judgment, procured a formal satisfaction of it to release his real estate from the apparent lien thereof.—Id.

PRISONS.

1. Where the sheriff is authorized to confer the custody of the jail and prisoners on a jailer in case of his own absence or disability, he can not claim compensation for the jailer's services without showing such necessity.—Platner v. Commissioners, 5 Mont. 458; 6 Pac. 365.

2. Under Comp. Stat., p. 945, § 1075, providing that the fees allowed the sheriff for the board of prisoners shall be, for five or under, $1 per day for each prisoner, and for over five, 80 cents per day each, the sheriff is entitled, when the number exceeds five, to receive for the five prisoners $1 a day each, and for the excess 80 cents.—Lloyd v. Commissioners, 7 Mont. 562; 19 Pac. 217.

3. Under Comp. Stat., p. 1000, § 1271, providing that the sheriff may employ, at the county's expense, "a jailer," in his absence, the sheriff may, when necessary, employ a night and day jailer.—Lloyd v. Silver Bow, 15 Mont. 433; 39 Pac. 457.

4. Since the sheriff is responsible for the safety of his prisoners, he has authority to employ, at the county's expense, a necessary watch for a prisoner under sentence of death.—Id.

5. Where the county refuses to pay the salary of the necessary persons employed by the sheriff to guard his prisoners, the sheriff may pay them, and recover the amount from the county as money paid for the benefit of the county.—Id.

PROCESS.

I. Nature, Issuance, Requisites, and Validity, 1-9.

II. Service, 10-22.

III. Defects, Objections, and Amendments, 23-26.

I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY, 1-9.

1. No process is required when the court orders that a person be made a defendant, and all the parties to the action are charged with notice thereof. (See 12 Wall. 259; 20 Wall. 689.)—Mason v. Germaine, 1 Mont. 263.

2. A judge of the probate court has no power to issue and attest a summons under his own hand, if there is no law providing for a clerk or seal of the court, and no jurisdiction is acquired by such summons.—Murphy v. Ames, 1 Mont. 276.

3. In an action on an official bond to recover the penalty for alleged breaches in the conditions thereof, a summons stating that the action is brought to recover the penalty named in the bond, with interest and costs of suit is sufficient under Civ. Pr. Act, § 30.—Commissioners v. Lineberger, 3 Mont. 231.

4. A summons in an action for conversion which reads, "the said action is brought to recover the sum of $150, the value of 30 tons of ice belonging to said plaintiff, and taken possession of and disposed of by said defendant" at a certain time and place, sufficiently states the cause and general nature of the action as required by Comp. Stat., p. 74, § 68.—Sawyer v. Robertson, 11 Mont. 416; 28 Pac. 456.

5. In an action for conversion a notice in the summons that unless the defendant appears and answers the plaintiff will take judgment for a certain sum is bad, and will not support a default judgment, as under Comp. Stat., p. 74, § 68, the notice in such case should state that unless defendant appears and answers the plaintiff will apply to the court for the relief demanded in the complaint.—Id.

6. A compaint, which has been served, and which seeks recovery for a certain amount, can not be amended without further notice so as to include, upon default, interest accruing after the commencement of the action, or otherwise to enlarge the amount of recovery, although such an amendment may not be necessary, and the interest could have been recovered under the complaint as originally filed.—Schuttler v. King, 12 Mont. 149; 30 Pac. 25.

7. Under Comp Stat., p. 74, § 68, and p. 119, § 245, providing that in actions arising on contracts for the recovery of money or damages only, the summons shall contain a notice that, in case of default, plaintiff will take judgment for the sum demanded, naming it, and that the judgment may be entered by the clerk, but that in other cases the notice shall be that plaintiff will apply to the court for the relief demanded, instead of stating that he will take judgment for a certain sum.—Id.

8. Comp. Stat., p. 199, §§ 527, 528, provide that the district court shall have a seal, and that the clerk of the court shall keep the same. Sec. 68 provides that the summons "must" be issued under the seal of the court. *Held*, that a summons issued out of the district court without the seal of such court being attached was void, and the service thereof on the defendant, in an action in such court, gave the latter no jurisdiction.—Choate v. Spencer, 13 Mont. 127; 32 Pac. 651.

9. Code Civ. Proc., § 632, providing that a summons must be signed by the clerk, is mandatory, and a summons issued without such signature is void.—Sharman v. Huot, 20 Mont. 555; 52 Pac. 558.

II. SERVICE, 10-22.

10. Service of summons should be proved by the return of the officer or a written acknowledgment of the party served. It is improper practice to establish this fact by the affidavit of persons who were absent when the service was made.—Brown v. Mining Co., 1 Mont. 57.

11. An attorney in fact could not, without special authority, appear and waive service of summons.—Lamb v. Mining Co., 1 Mont. 64.

12. Service by publication will not give the court jurisdiction when the summons was published and no affidavit was filed showing that copies had been mailed as directed in the order of the court.—Haase v. Corbin, 2 Mont. 409.

13. Under § 28, p. 139, Stats. 1867, providing that "the summons shall be served by the sheriff * * * or by a person specially appointed by him, or appointed by the judge of the court in which the action is brought, or by any white male citizen of the United States, over 21 years of age," service by the United States marshal was invalid, and the court did not acquire jurisdiction.—Black v. Clendenin, 3 Mont. 44.

14. Where the case is not one within the exceptions specified in Rev. Stat., p. 52, § 72, providing that summons shall be served by delivering a copy thereof to defendant personally, and where the record itself shows that service was only had upon defendant's agent, the court is without jurisdiction of the person of defendant, and a judgment against him is a nullity.—Davidson v. Clark, 7 Mont. 100; 14 Pac. 663.

15. Under Laws 1883, p. 50, providing for service by publication when defendant, after due diligence, can not be found, and an affidavit stating these facts is filed with the clerk, a publication based on an affidavit alleging due diligence, but not stating the facts showing the diligence, is void.—Alderson v. Marshall, 7 Mont. 288; 16 Pac. 576.

16. Under Comp. Stat., p. 77, § 73, an affidavit stating that a cause of action exists against defendant must be filed with the clerk, and where publication of service is made under an affidavit which does not contain such statement, a default judgment entered in the case is invalid.—Palmer v. McMaster, 8 Mont. 186; 19 Pac. 585.

17. Since the statute requires an affidavit on which an order of publication is made to state that defendant can not be found after due diligence, it is insufficient to allege merely that "defendant has departed from this territory, and can not be found therein," without stating that diligence has been used to ascertain his whereabouts, or that any effort has been made to obtain personal service on him.—Palmer v. McMaster, 13 Mont. 184; 33 Pac. 132.

18. Under Comp. Stat., p. 77, § 73, providing that in certain cases, when an affidavit setting up any such case is filed with the clerk, the clerk shall cause the service of summons by publication, an affidavit is sufficient if it sets forth, substantially in the language of the statute, enough of the ultimate facts recited in

the statute as reasons for the publication of the summons.—Ervin v. Milne, 17 Mont. 494; 43 Pac. 706.

19. Under Comp. Stat., p. 253, § 744, subd. 4, providing for service of summons by reading it to defendant personally, or by leaving a copy at his residence, service by merely delivering a copy to him personally is void.—Sanford v. Edwards, 19 Mont. 56; 47 Pac. 212.

20. Where all the defendants in an action to quiet title, residing in the same county, were served with summons, and one defendant was served with a copy of the complaint as required by Code Civ. Proc., § 635, the fact that such defendant filed a disclaimer of any interest in the land did not affect the service on the other defendants; there being nothing to show that he was not made a defendant in good faith.—Mantle v. Casey, 31 Mont. 408; 78 Pac. 591.

21. Under Code Civ. Proc., § 635, where several defendants reside in the same county, and a copy of the complaint is served on one of them with the summons, a return of service need not show that defendants all resided in the county.—Id.

22. Code Civ. Proc., § 637, does not abrogate the common law rule requiring a personal service of summons in actions in personam.—Silver Camp Mining Co. v. Dickert, 31 Mont. 488; 78 Pac. 967.

III. DEFECTS, OBJECTIONS, AND AMENDMENTS, 23-26.

23. The signing of a stipulation agreeing to withdraw all pleas and defenses and to interpose no objections to the taking of judgment constitutes a general appearance, and the party so appearing waives any defect in service of the summons, if he comes into court without limiting his object in so doing.—Kleinschmidt v. Morse, 1 Mont. 100.

24. The filing of a general demurrer to a bill in equity is a waiver of any irregularity in the service of the subpœna.—Sanders v. Farwell, 1 Mont. 599.

25. Defects in the summons are waived by demurring to the complaint.—Butte Butchering Co. v. Clarke, 19 Mont. 306; 48 Pac. 303.

26. Code Civ. Proc., § 774, providing that pleadings may be amended, before trial, to supply an omission, does not authorize the amendment of a summons which is void because not signed by the clerk, as required by § 632.—Sharman v. Huot, 20 Mont. 555; 52 Pac. 558.

PROHIBITION.

1. On application for a writ of prohibition to restrain a district judge from any further proceedings in the administration of an intestate's estate, it appeared that intestate died in the county of C; that he left property in the counties of C and L; that on November 11, D, the public administrator of the county of C, filed a petition for letters of administration on the estate; that two days later intestate's sister and heir, a resident of the county of L, filed a petition in that county for letters of administration to S, her husband; that notice was given that the hearing of the petition of D was set for November 21, in the county of C; that after notice that the hearing of the petitions of intestate's sister and S was set for November 25, in the county of L, the intestate's sister filed objections to the hearing in the county of C, and it was postponed to November 28; that the court in L appointed S administrator; that supplemental objections were filed to the hearing in the county of C, on the grounds that the court in the county of L had adjudged that intestate was a resident of that county, and had appointed S administrator; that the court in C county adjudged that intestate was a resident of that county, and appointed D administrator; and that subsequently the court of C county had refused to order D to account to S, and had directed D to sell the property. The record did not show the evidence from which each court determined that the intestate was a resident in its jurisdiction. *Held*, that the writ should not issue at the instance of S, as it did not appear from the record that the court in C county was without jurisdiction to appoint the administrator, and as the relator had an adequate remedy by appeal.—State v. Benton, 12 Mont. 66; 29 Pac. 425.

2. Laws 1897, pp. 166-171, relating to the erection of a state capitol, and providing that all architects, etc., shall be citizens of the state, but providing that the capitol commission may avail itself of the plans and specifications previously adopted if the same can be modified so as to be used in the construction of the building under the amended law, an application for a writ of prohibition to prevent the board from making a contract with certain architects, who, it alleges are not citizens, states a good cause of action, though it fails to state that the plans of said architects are not a modification of the plans previously adopted, such matter being proper ground for defense.—State v. Smith, 21 Mont. 148; 53 Pac. 183.

3. The Constitution, giving this court supervisory control over inferior courts, does not authorize it to grant a writ of prohibition prohibiting a district court from appointing a receiver of a corporation merely to avert probable injury to the applicants for the writ, in view of Const., art. 8, § 2, vesting power in this court under such limitations as may be provided by law, and Code Civ. Proc., § 1980, authorizing the issuance of a writ of prohibition to arrest proceedings in which the court is without jurisdiction.—State v. District Court, 22 Mont. 220; 56 Pac. 219.

4. Code Civ. Proc., § 1980, making a writ of prohibition "the counterpart of a writ of mandate," does not enlarge the class of cases in which the writ may be resorted to, in view of the clause providing that the writ is to arrest the proceedings of any tribunal which are without, or in excess of, jurisdiction.—Id.

5. On an application for a writ of prohibition to arrest the proceedings of a district court in a pending suit in equity, it will be presumed, in the absence of a showing to the contrary, that the court will not exceed the limitations of its jurisdiction, though it has no jurisdiction to grant a part of the relief asked for.—Id.

6. The district court, having jurisdiction, appointed a receiver for a corporation, which thereafter moved to be allowed to file a supplemental answer setting up subsequent events, which it claimed dispensed with the necessity of a receiver, and also moved for the receiver's discharge and a stay of proceedings. The court refused to stay the proceedings, and delayed the hearing of the other motions. *Held*, that the court did not thereby lose jurisdiction so as to warrant the granting of a writ of prohibition restraining the lower court and the receiver from proceeding further.—State v. District Court, 22 Mont. 376; 56 Pac. 687.

7. Where the district court, having jurisdiction, appointed a receiver, this court can not, on application for a writ of prohibition to restrain further proceedings in the lower court, because, as stated in the moving affidavit, subsequent events having rendered the receiver unnecessary, assume such statements as true, so as to warrant it in holding that the lower court

was without jurisdiction to proceed further.—Id.

8. Code Civ. Proc., § 579, provides that the writ of prohibition is the counterpart of the writ of mandate, and arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, etc. *Held*, that such provision did not enlarge the common law office of the writ so as to permit its use to arrest proceedings not of a judicial, but merely of a ministerial, character.—State v. Hogan, 24 Mont. 379; 62 Pac. 493.

9. An order denying a motion for a change of venue can be reviewed only on appeal from final judgment, and not on an application for a writ of prohibition.—State v. District Court, 30 Mont. 547; 77 Pac. 318.

10. Under Code Civ. Proc., § 1980, this court will not by prohibition restrain the district court from entertaining and determining a motion to strike an answer from the files and enter judgment by default under Code Civ. Proc., § 3306, on the ground that such section is unconstitutional, although the district court has erroneously decided to uphold the constitutionality of the section, and may, in consequence, eventually make an order which will be in excess of jurisdiction.—State v. District Court, 32 Mont. 402; 80 Pac. 675.

PUBLIC LANDS.

I. Government Ownership, 1-10.
II. Survey and Disposal of Lands of the United States, 11-76.
A. Entries, sales, and possessory rights, 11-38.
1. Lands subject to entry or sale, 11-12.
2. Rights acquired by occupancy, 13.
3. Homestead, 14.
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B. Donation and bounty lands, 39-42.
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D. Proceedings in land office, 52-61.
E. Patents, 62-67.
F. Remedies, 68-72.
G. Conveyances, contracts, and exemptions, 73-76.

I. GOVERNMENT OWNERSHIP, 1-10.

1. Mining lands located within the territory do not belong to it, but to the federal government.—Territory v. Lee, 2 Mont. 124.

2. By the acts relating to the mineral lands of the public domain of Jul. 26, 1866, Jul. 9, 1870, and May 10, 1872, congress has recognized the authority of the legislative assembly of the territory and the miners of districts to enact laws regulating the extent of mining claims which can be located, and the manner of working and developing the same, and appropriating the minerals therein contained; but the power to control and dispose of said lands has been conferred on congress by the constitution, and can not be delegated to the territorial assembly.—Id.

3. Where a tract of land is owned in ascertained proportions by two persons, but the particular part of the land owned by each is not defined by application to the subject matter, a suit for an accounting is not the proper method of determining the damage to the interest of one of the parties by the other cutting timber on the land.—United States v. Northern Pacific, 6 Mont. 351; 12 Pac. 769.

4. In an action by the United States to recover the value of cord wood alleged to have been cut by defendants on the public lands, a complaint which alleges that defendants had cut so many cords of wood from timber growing on the public lands, and the value thereof, and other formal matter, shows a sufficient cause of action to put defendants on their defense.—United States v. Williams, 6 Mont. 379; 12 Pac. 851.

5. Lands granted by a railroad, to which the grantee has been unable to get title, the township not being surveyed, are not within U. S. Comp. Stat., p. 1524, prohibiting the conveyance of "public lands of the United States" without color of title.—United States v. Godwin, 7 Mont. 402; 16 Pac. 850.

6. Defendant fenced in a tract of unsurveyed public land, and filed a notice of declaration as a settler on the public domain in the office of the recorder of the county in which such lands were situate, with the view of entering them in the proper land office as soon as it could legally receive a filing thereon. U. S. Comp. Stat., p. 1524, making enclosures of public lands without color of title unlawful, excepts lands enclosed under an "asserted right thereto by or under claim made in good faith, with a view to the entry thereof at the proper land office." *Held*, that the enclosure was lawful.—Id.

7. Sections 16 and 36 in each township in Montana, though by U. S. R. S., § 1946, reserved from the public domain, and set apart for school purposes, form part of the public lands, within the meaning of 23 Stat. at Large 321, forbidding the enclosure of any public lands by any person who has no claim or color of title thereto.—United States v. Bisel, 8 Mont. 20; 19 Pac. 251.

8. A right of action by the United States for cutting timber less than eight inches in diameter, on public mineral lands, in violation of the regulations of the secretary of the interior, prescribed under U. S. Comp. Stat., p 1528, which permits timber to be cut on such lands under such regulations as the secretary of the interior may make, does not fail by the subsequent repeal of the regulation, especially when U. S. Comp. Stat., p. 6, provides that the repeal of a statute shall not release any liability incurred under it, unless the repealing act so provides.—United States v. Williams, 8 Mont. 85; 19 Pac. 288.

9. In an action for cutting timber on public mineral lands less than eight inches in diameter, in violation of the regulations of the secretary of the interior, an offer to prove that the defendant "cut from the public mineral lands of the United States, from December 1884 to December 1885, the trees and timber growing thereon, which trees and timber were less than eight inches in diameter, and that he converted the same to his own use," embraces all that is necessary to make out a case.—Id.

10. A permit, granted by the secretary of the interior, to cut timber on the public lands of the United States, did not attach to land upon which a homestead filing had been previously made, and remained uncancelled.—Nelson v. Mining Co., 17 Mont. 553; 44 Pac. 81.

II. SURVEY AND DISPOSAL OF LANDS OF THE UNITED STATES, 11-76.

A. Entries, Sales, and Possessory Rights, 11-38.
B. Donation and Bounty Lands, 39-42.
C. Grants in Aid of Railroads, 43-51.
D. Proceedings in Land Office, 52-61.
E. Patents, 62-67.
F. Remedies, 68-72.
G. Conveyances, Contracts, and Exemptions, 73-76.

A. ENTRIES, SALES, AND POSSESSORY RIGHTS, 11-38.

1. Lands Subject to Entry or Sale, 11-12.
2. Rights Acquired by Occupancy, 13.
3. Homestead, 14.
4. Timber Culture and Desert Lands, 15-16.
5. Townsites, 17-37.
6. Evidence, 38.

1. Lands subject to entry or sale, 11-12.

11. The fact that land entered by the probate judge, trustee under a patent, was not included in a plat of the site, does not give one the right to enter it as public land included in a government subdivision.—Brooke v. Jordan, 14 Mont. 375; 36 Pac. 450.

12. The fact that land entered by the probate judge, trustee under the patent, as part of a townsite, was not included in a plat of the townsite by the surveyor appointed to make such plat, does not give the owner of land the right to enter such excluded land as public land included in a government subdivision.—Neill v. Jordan, 15 Mont. 47; 38 Pac. 223.

2. Rights acquired by occupancy, 13.

13. The first appropriator of land in the Territory of Montana acquires a title to the same, which is valid against all persons except the United States and its grantees.—Parks v. Berkley, 1 Mont. 514.

3. Homestead, 14.

14. A residence for voting purposes in another precinct than that in which land is situated precludes an entryman from claiming a residence at the same time on land for homestead purposes. (See 196 U. S. 403.)—Small v. Rakestraw, 28 Mont. 413; 72 Pac. 746.

4. Timber culture and desert lands, 15-16.

15. In a suit to restrain trespasses on land, evidence that plaintiff applied to enter the land under the timber culture laws, that he occupied the land, and obtained a receipt from the receiver of the land office, makes prima facie showing of ownership and right of possession in plaintiff.—Lee v. Watson, 15 Mont. 228; 38 Pac. 1077.

16. Const., art. 17, providing that all lands in the state that may be granted to the state by congress shall be public lands, and shall be held in trust for the people, to be disposed of as hereafter provided, etc., relates only to such lands as the state may acquire title to after they are selected under laws provided for that purpose, and is not applicable to the desert lands which the United States proposes to part with under Act Cong., Aug. 18, 1894; title to such lands not vesting in the state or its assigns until after they have been reclaimed as provided by law.—State v. Wright, 17 Mont. 565; 44 Pac. 89.

5. Townsites, 17-37.

17. The trustee of a townsite held all the public lands within its exterior limits, which had not been occupied and to which there were no possessory rights, for the benefit of the inhabitants as a community, and had no power to deduct any portion of the tract as an alley for the use of any person.—Hall v. Ashby, 2 Mont. 489.

18. Parties who receive deeds from the trustee of a townsite are required to ascertain his authority, and they acquire no right to the use of a part of the townsite illegally granted as an alley.—Id.

19. Though the trustee of a townsite can not grant any portion of an alley for the use of any persons, he is not estopped from executing a deed to the claimant of a lot which has been improperly described as an alley by his predecessor in office.—Id.

20. The trustee of a townsite on the public lands, under the laws of the United States and the Townsite Act of Montana, has no right to make a deed of a vacant lot to a citizen who is not in the possession of, or without the right of possession to, the premises; and such trustee can not execute a deed of a town lot to an applicant who has not complied strictly with the law.—Edwards v. Tracy, 2 Mont. 49.

21. The rule of the United States pre-emption laws that, when the last day for a required act falls on Sunday, the act may extend to the next day, applied to the 60 days' time of publication of notice of entry of a townsite under Cod. Laws 1872, p. 548, c. 58, § 5.—Schnepel v. Mellen, 3 Mont. 118.

22. The probate judge or corporate authorities, under the Townsite Act, providing the means whereby the inhabitants of such townsites may acquire title to the lands therein occupied and possessed by them, are only trustees of such persons as are in the actual, open, notorious, apparent, unequivocal, uninterrupted and exclusive possession, so as to be entitled to make a valid statement of a claim.—Id.

23. Mere temporary and partial occupancy of a trespasser is not such open, continuous and exclusive possession as under the townsite acts of congress is required as preliminary to the statement and proof.—Id.

24. Under the laws of the United States providing for the acquisition of townsites by the settlers thereon, a deed of an alley given by the probate judge as trustee, is unauthorized and void, the same being true of a map or survey, not conforming to the rights of occupants, even though accepted and approved by the county commissioners. (See 110 U. S. 526.)—Parchen v. Ashby, 5 Mont. 68; 1 Pac. 204.

25. The provision of the territorial statute dedicating the streets and alleys, shown on the probate judge's survey, to the public use forever, is of no consequence unless such survey and plat conform to the prior rights of occupants.—Id.

26. A valid location of a mining claim, on public lands of the United States, is not affected by a subsequent entry of a townsite, although such claim is situated within the boundaries of the townsite, and the owners of the mining claim are under no obligation to file an adverse claim to the entry of the townsite.—Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. 570.

27. The land department of the United States is only authorized to issue patents to the probate judge, for townsite purposes on the public lands, not previously granted, sold or reserved from sale; it can not include in such patents any mine, mining claim or possession.—Id.

28. The probate judge, in relation to town-

sites, is the trustee of an express trust, and has authority, under Rev. Stat., p. 42, § 6, to sue to protect his title as such.—Hartman v. Smith, 6 Mont. 295; 12 Pac. 655.

29. The owner of a valid mining claim over which a townsite is extended by United States patent is not required to file an adverse claim to such patent, as his claim is expressly excepted by law, and the usual exception inserted in such townsite patent from its operation.—Smoke House Lode Cases, 6 Mont. 397; 12 Pac. 858.

30. Claimants claiming title, under a townsite patent, to the surface ground of a mining claim over which the townsite is extended, are not relieved by such townsite patent from setting up their adverse claim on notice of application for a patent to the mining claim, and their failure to sue the other claimant before such patent is issued, bars them from doing so thereafter.—Id.

31. U. S. R. S., § 2392, in relation to townsites, which provides that "no title shall be acquired under the foregoing provisions of this chapter to any mine, * * * or to any valid mining claim or possession," applies also to a mill site properly located under Rev. Stat., § 2337, and the townsite patent carries no title to the mill site.—Hartman v. Smith, 7 Mont. 19; 14 Pac. 648.

32. Rev. Stat., p. 665, § 1207, provides that the judge of the probate court who has entered a townsite "in trust for the use of the several occupants thereof," as provided in U. S. R. S., § 2387, shall have the same surveyed and platted; and § 1208, that "such townsite shall be surveyed into blocks, lots and alleys, * * * and the plat shall be filed, * * *. and thereafter the streets and alleys designated in such plat shall remain dedicated to the public use forever." *Held*, that the act of the probate judge in establishing by such plat a street over lands actually occupied as a residence when the entry was made, was in conflict with the execution of his trust to convey the lands to occupants, and the public had acquired no rights as against the occupant.—Helena v. Albertose, 8 Mont. 499; 20 Pac. 817.

33. When the grantor describes himself as "N H, probate judge of L county," and executes a deed as "N H, probate judge," he executes it as probate judge.—Ming v. Foote, 9 Mont. 201; 23 Pac. 515.

34. That the consideration named in a deed by a probate judge of a townsite is less than is allowed by law is immaterial, as the sum stated is not conclusive.—Id.

35. Act Dec. 12, 1867, §§ 11, 12, passed to carry out Act Cong., Mar. 2, 1867 (relating to grants of townsites to probate judges in trust for the inhabitants), requiring the judge to hear testimony and adjudicate between contestants, and allowing an appeal from his decision to the district court, vests him with quasi-judicial powers, and a deed from him can not be collaterally assailed in ejectment by showing that the preliminary steps required to give authority to convey a lot were not taken, though the act of congress provides that any act of the trustee not in conformity to the rules made by the state or territory shall be void.—Id.

36. The original claimant of a lot in a townsite, entered according to the act of congress of 1867 and the territorial laws, is not the owner in fee of the street or alley upon which his lot abuts, and has only an easement therein.—Loeber v. Electric Co., 16 Mont. 1; 39 Pac. 912.

37. Under 14 Stat. 541, as amended by 16 Stat. 183, and under Comp. Stat., § 546 et seq., a district judge has no jurisdiction to issue a deed for an unsurveyed portion of a townsite to a person not claiming to be an occupant of the land at the time the townsite was entered, before such portion had been surveyed, platted and necessary streets, etc., laid out as required by Pol. Code, § 5117.—State v. Webster, 28 Mont. 104; 72 Pac. 295.

6. Evidence, 38.

38. Under Comp. Stat., p. 1103, § 1663, which provides that the record of any declaration showing muniment of title shall be received as presumptive evidence of the regularity of the paper itself, it is proper to charge that a declaration filed on unsurveyed land is presumptive evidence of the regularity of the paper itself, though the statute does not require such filing to be made, and the record in such case is not presumptive evidence of the peaceable possession of the party filing the declaration.—Brand v. Servoss, 11 Mont. 86; 27 Pac. 407.

B. DONATION AND BOUNTY LANDS, 39-42.

39. Under the authority of the Smoke House Lode cases, 6 Mont. 397, *held*, that the townsite patent to Butte City does not cover the mineral ground included within the limits of the Silver King lode, but that the said lode is expressly reserved from the operation of the same by the terms of the patent itself, and by the act of congress.—King v. Thomas, 6 Mont. 409; 12 Pac. 865.

40. A grant of public land must be construed in favor of the grantor.—Story v. Woolverton, 31 Mont. 346; 78 Pac. 589.

41. In a grant by the government of a section of land, "to embrace the buildings thereon," the word "embrace" means to enclose, as by surrounding or encircling.—Id.

42. 26 Stat., p. 748, § 2, granting to the state of Montana one section of land of a former military reservation, to be selected "so as to embrace the buildings and improvements thereon," did not grant any right to the use of the water of a stream from which the government had taken water by means of a ditch across other lands to the land granted.—Id.

C. GRANTS IN AID OF RAILROADS, 43-51.

43. Act Cong., Jul. 2, 1864, granting lands to the Northern Pacific to aid its construction, contained words of present grant, and therefore operated as a grant in præsenti, notwithstanding the conditions subsequent imposed by the act, and notwithstanding the provision for patents, confirming the title, to be issued as the road should be constructed.—Northern Pacific v. Majors, 5 Mont. 111; 2 Pac. 322.

44. Where an act of congress is in itself a grant, the purpose of a patent is merely to confirm a title already bestowed, and ejectment may be maintained without the patent.—Id.

45. A subsequent location of mineral land, although followed by a patent, can not affect the right of the Northern Pacific over the same, as the exclusion of mineral land from the operation of its charter act applies to the land granted in addition to the right of way.—Wilkinson v. Northern Pacific, 5 Mont. 538; 6 Pac. 349.

46. The grant to the Northern Pacific of the right of way through the public lands, 200 feet wide on each side of its track, is present and absolute, and subject to no conditions, except those necessarily implied, such as those that the road shall be constructed and used for the purposes designed.—Id.

47. Under the act granting lands in aid of the Northern Pacific, when the general route of the road was fixed, the title to the lands

thereby granted immediately attached and took effect, and whether the lands had been surveyed or not.—Northern Pacific v. Lilly, 6 Mont. 65; 9 Pac. 116.

48. Under the grant of lands in the charter of the Northern Pacific, which provides "that there be, and hereby is, granted to said company every alternate section of public land, not mineral, designated in odd numbers to the amount of 20 alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and providing for a survey of the lands when the line of the road is located, previous to the survey of the lands the government and the company are not tenants in common, but the latter takes, from the date of the charter, a grant in severalty, to be applied to the subject matter upon the fixing of the line of the road and survey of the lands.—United States v. Northern Pacific, 6 Mont. 351; 12 Pac. 769.

49. Plaintiff in ejectment claimed title by deed from the Northern Pacific, whose title was acquired by virtue of a selection of lands by the land commissioner within the indemnity limits, in lieu of lost lands; such selection being made, by direction of the secretary of the interior, without requiring any advance lists of the lost lands in lieu of which such selection was made. *Held*, that until it was shown by the approval of the secretary of the interior, or other proper officer, that lands thus selected in lieu of lands actually lost to the railroad company from lands granted to it, according to 13 Stat. at Large, p. 367, § 2, plaintiff could not maintain his action.—Elling v. Thexton, 7 Mont. 330; 16 Pac. 931.

50. Plaintiff must show that the lands thus selected in lieu of lands actually lost by the railroad company from lands granted it, and the court will not take judicial notice of losses of lands which the railroad company sustained by reason of Indian reservations and settlements made within the limits of its grant prior to the location of the company's line, and that the selection of the lands in question was in lieu of losses thus sustained.—Id.

51. A grant by congress to a railroad company of land 200 feet wide on either side of the track gives an exclusive right of possession to the full width, as against one who occupied the land before the grant without title.—Burton v. Laughrey, 18 Mont. 43; 44 Pac. 406.

D. PROCEEDINGS IN LAND OFFICE, 52-61.

52. In controversies as to conflicting claims for patents, depending on the question of the use and occupation of a located claim, the decision of the land commissioner is not binding on the court.—Hartman v. Smith, 7 Mont. 19; 14 Pac. 648.

53. The decision of the secretary of the interior, on appeal from the land department, that certain land was not included in a grant to defendant, is conclusive so long as it stands, and can not be collaterally attacked in an action to recover purchase money by one to whom defendant agreed to convey title. (See 164 U. S. 383.)—Colburn v. Northern Pacific, 13 Mont. 476; 34 Pac. 1017.

54. A letter of the secretary of the interior to the commissioner of the general land office saying, "Your judgment from which an appeal has been taken * * * is affirmed," is a judgment of cancellation, being relative to a protest against issuance of a patent, on the ground of fraud in obtaining receipts for entry on land, in which matter the commissioner had rendered a decision of cancellation of the entry. —Murray v. Polglase, 17 Mont. 455; 43 Pac. 505.

55. A decision of the register and receiver of the land office who make the first examination of a protest against issuance of a patent, on the ground that a receipt for entry thereon was obtained by fraud, can not be objected to, in an action to determine the right to proceed for a patent, on the ground that it is not a decision cancelling the receipt, but simply recommends the cancellation; they having concluded that the entry should be cancelled, and having, pursuant to their duty and jurisdiction, and the practice of the land office, certified that fact to the commissioner of the general land office.—Id.

56. Nor can a decision of the commissioner of the general land office, that "said entry is hereby held for cancellation," be objected to as not cancelling the entry.—Id.

57. Nor is such decision of the commissioner affected by the addition of the words, "subject to the right of further appeal."—Id.

58. A decision of the secretary of the interior that certain land was not included within a grant to a corporation is conclusive until reversed in a direct proceeding for that purpose, and can not be collaterally attacked in an action to recover the purchase price of the land by one to whom it has been conveyed by such corporation.—Moore v. Northern Pacific, 18 Mont. 290; 45 Pac. 215.

59. It not appearing that the secretary of the interior, in holding that one claiming under the homestead law had not complied therewith as to residence, had no other evidence before him than that he had a residence for voting purposes in another precinct, it can not be said that his decision was on an erroneous construction of the law, so as to allow interference by the court, even if his holding that residence for voting purposes in one precinct precluded his claiming residence at the same time on land in another precinct for homestead purposes was wrong. (See 196 U. S. 403.)—Small v. Rakestraw, 28 Mont. 413; 72 Pac. 746.

60. 21 Stat. 140, provides that in all cases where any person has contested and procured the cancellation of any pre-emption he shall be allowed a preferential right to enter the lands on receipt of notice of cancellation. A contest thereunder resulted in a dismissal by the local land office. On appeal the commissioner of the general land office also adjudged that the contest be dismissed. On reconsideration he revoked and set aside his decision, holding the contested entry for cancellation, Feb. 25, 1891. Congress repealed the Timber Culture Act by Act Mar. 3, 1891 (26 Stat. 1098), and in § 7 provided for confirmation of contested pre-emptions in the hands of bona fide purchasers. On Mar. 26, 1891, the purchasers of the contested pre-emption applied for a confirmation under the new law, whereupon the commissioner suspended his order of Feb. 25, 1891, and confirmed the contested entry. On appeal the secretary of the interior also confirmed the entry. Thereafter patent was issued to the purchasers. *Held*, that the entry was never cancelled, so as to entitle the contestant to the preferential right under the act repealed.—Graham v. Townsite Co., 30 Mont. 393; 76 Pac. 808.

61. The land department finding on the issue as to whether certain persons are bona fide purchasers of contested pre-emptions is conclusive on the state courts.—Id.

E. PATENTS, 62-67.

62. When the land department exceeds the scope of its authority in issuing a patent, such patent is in so far void.—Silver Bow M. & M. Co. v. Clark, 5 Mont. 378; 5 Pac. 570.

63. An exception in a townsite patent, excluding from its operation all mines, mining claims and possessions held under existing laws, is an exception required by the law, is made by the law itself, and is conclusive upon the question that the government did not, and did not intend by such townsite patent to, convey any valid mine, mining claim or possession held under existing laws; and it is therefore impossible, under a patent to a townsite, to acquire any interest in any valid mine or mining claim, or in the surface thereof.—Smoke House Lode Cases, 6 Mont. 397; 12 Pac. 858.

64. A townsite patent to a probate judge, in trust for the occupants, to lands covered by a prior location of a placer mining claim, is not void, but only voidable, and can not be collaterally attacked in an action at law by the owner of the placer claim, who never perfected his title. (See 178 U. S. 205.)—Horsky v. Moran, 21 Mont. 545; 53 Pac. 1064.

65. The owner of a placer mining location, who permitted another to take possession of the lands covered by it, under a deed from a probate judge, to whom the lands had been patented as a townsite in trust for the occupants, and remain in uninterrupted possession for 20 years, was estopped by laches from attacking such person's title collaterally.—Id.

66. The title conveyed by a patent will not be disturbed where the proof of its validity is not clear and convincing.—Graham v. Townsite Co., 30 Mont. 393; 76 Pac. 808.

67. 28 Stat. 683, providing that no patent or other conveyance of title shall be delivered to the Northern Pacific for any lands in Montana and Idaho, under the congressional grant to such railroad, until the lands have been examined and classified as non-mineral by mineral land commissioners provided for, a patent to such railroad company for land classified by such commissioners as non-mineral is conclusive as to the character of the and, in the absence of fraud, imposition or mistake.—Traphagen v. Kirk, 30 Mont. 562; 77 Pac. 58.

F. REMEDIES, 68-72.

68. Where fraud has been practiced in procuring a patent, only the United States can attack such patent.—Meyendorf v. Frohner, 3 Mont. 282.

69. That the holder of the legal title under a patent may be adjudged to hold it as trustee for plaintiff, because of an erroneous ruling of the land department, it is necessary to show not only that defendant was not entitled to the patent, but that plaintiff was so entitled. (See 196 U. S. 403.)—Small v. Rakestraw, 28 Mont. 413; 72 Pac. 746.

70. A complaint, to hold the patentee of public lands a trustee thereof for plaintiff, alleged merely that plaintiff made application to purchase it as coal land, filing a declaratory statement in the land office, and went into possession and improved it; that defendant caused a forged relinquishment of plaintiff's rights to be filed in the land office, of which she did not know until five months after expiration of the time within which she might have made proof and payment; and that defendant then purchased the land, and a patent was issued to him—does not state a cause of action; it not showing that plaintiff did not also make a voluntary relinquishment, by failure to prosecute work on the land, or to make, or offer to make, seasonable proof and payment.—Gebo v. Mining Co., 30 Mont. 87; 75 Pac. 859.

71. Plaintiff in a suit in equity to declare bona fide purchasers of a pre-emption to be his trustees, praying that they be decreed to execute and deliver to him a deed therefor free from all incumbrances, predicated on his contest of the original entry, has no equity which will prevail over the title of defendants, where he never made a declaration of homestead as to the contested pre-emption, nor paid any fees for the land, and his good faith in bringing the suit is questionable.—Graham v. Townsite Co., 30 Mont. 393; 76 Pac. 808.

72. Congress, by the passage of Act Mar. 3, 1891 (26 Stat. 1098), provided for the confirmation of contested pre-emptions in the hands of bona fide purchasers, cut off the rights of successful contestants under Act May 14, 1880 (21 Stat. 140), giving a successful contestant a preferential right to enter on notice of cancellation of a contested entry.—Id.

G. CONVEYANCES, CONTRACTS, AND EXEMPTIONS, 73-76.

73. "Mortgage" is included within the words "grant or conveyance," as used in U. S. R. S., § 2262, providing that any grant or conveyance made by a settler of lands pre-empted before "final receipt, shall be null and void, except in the hands of a bona fide purchaser for value." (Disapproved, Norris v. Heald, 12 Mont. 282; 29 Pac. 1121.)—Bass v. Buker, 6 Mont. 442; 12 Pac. 922.

74. A mortgage in good faith by a pre-emptor of land prior to the time of making his final proof is not a grant or conveyance within the prohibitory clause of U. S. R. S., § 2262, which provides that "any grant, except in the hands of bona fide purchasers, for a valuable consideration, shall be null and void, except as provided in § 2288."—Norris v. Heald, 12 Mont. 282; 29 Pac. 1121.

75. The purpose for which a sum of money is so borrowed is material to show the bona fides of the mortgagor.—Id.

76. The validity of a verbal transfer of a settler's right of entry of unsurveyed lands can not be questioned by a third person not claiming under the government.—McDonald v. Lannen, 19 Mont. 78; 47 Pac. 648.

QUIETING TITLE.

I. Right of Action and Defenses, 1-3.

II. Proceedings and Relief, 4-13.

I. RIGHT OF ACTION AND DEFENSES, 1-3.

1. Code Civ. Proc., § 1310, confers on courts of equity power not previously existing to ascertain and quiet title to real property without the intervention of a court of law.—M. O. P. Co. v. Mining Co., 27 Mont. 410; 71 Pac. 403.

2. An action seeking to remove as a cloud on plaintiff's title defendant's claim under a contract giving them an option to purchase, which plaintiffs had declared forfeited before commencement of the action, is not an action to declare a forfeiture.—Merk v. Mining Co., 31 Mont. 298; 78 Pac. 519.

3. Where plaintiffs gave a lessee an option to purchase, and the lessee gave defendant an option to purchase from him, pursuant to which defendant made a payment to the lessee, who turned it over to plaintiffs, they were not required to return it to defendant in order to maintain a suit against defendant to remove its claim as a cloud on the title.—Id.

II. PROCEEDINGS AND RELIEF, 4-13.

4. An allegation in the answer of title in defendant does not present a new issue, as it

may be proven under a general denial.—Leggatt v. Stewart, 5 Mont. 107; 2 Pac. 320.

5. In an action to quiet title to an undivided interest in land, a finding that defendant had built a foundation for a house partly upon a portion of the premises is not a finding that plaintiff was not in possession when the action was brought.—Butte Hardware Co. v. Cobban, 13 Mont. 351; 34 Pac. 24.

6. A district court has jurisdiction of an action to quiet title brought by the holder of a tax deed after expiration of the period of redemption.—Light v. Pressy, 18 Mont. 263; 44 Pac. 983.

7. In an action to quiet title, an answer which raises an issue as to actual possession is good.—Sklower v. Abbott, 19 Mont. 228; 47 Pac. 901.

8. An allegation in a complaint to quiet title that "during all the times mentioned in the complaint, and for a long time prior thereto, plaintiff has been residing with her husband in and upon, and in the actual possession" of the property in controversy, is a sufficient allegation of residence in the state at the dates mentioned in the complaint.—Mitchell v. McCormick, 22 Mont. 249; 56 Pac. 216.

9. A denial in an answer to a bill to quiet title that the property in controversy is plaintiff's homestead, and that a sale made under defendant's judgment is void or a cloud on title, raises issues of law, and not of fact.—Id.

10. A complaint to recover land alleged that defendant unlawfully withheld it, and that the relation of landlord and tenant existed between the parties, which defendant denied, and alleged that plaintiff's grantor held the property as trustee to secure certain indebtedness due him from defendant, and not as owner, of which fact plaintiff had knowledge, and defendant demanded to be decreed the owner of the premises. *Held*, that such action was not maintainable as a suit to quiet title, as the necessary averment of ownership by plaintiff does not appear.—Boucher v. Barsalou, 25 Mont. 439; 65 Pac. 718.

11. In an action to remove a cloud from the title to a mining claim, plaintiff averred that defendant had no interest therein. On direct examination he testified that he knew of defendant's asserted claim of an interest two years before he brought suit, and that an exchange of deeds between him and defendant had been made to enable plaintiff to perfect his chain of title so that he could secure a patent from the government, and with the understanding that the deeds should not transfer any interest. On cross examination he testified that he had not attempted to purchase defendant's interest, nor authorized his attorney to endeavor to do so; that he told his attorney that he would rather settle the matter than have a lawsuit; that, in response to the attorney's proposition whether he should see if defendant would settle for what it would cost to have a lawsuit, witness said "yes;" and that defendant wanted $5,000. *Held*, that this testimony went to the credibility of plaintiff, he having averred that defendant did not own any interest or share in the property, and was improperly stricken out.—Hughes v. Rowan, 27 Mont. 500; 71 Pac. 764.

12. Under Code Civ. Proc., § 1310, to determine an adverse claim the complaint need only allege that plaintiff is the owner, and that defendant claims some adverse right, and a complaint is not objectionable because it alleges defendant's claim to be different from that set up in the answer.—Merk v. Mining Co., 31 Mont. 298; 78 Pac. 519.

13. Under Code Civ. Proc., § 1310, a complaint averring that plaintiff "claims to be the owner of the property in question, and "claims title in fee," and that defendant "claims an estate or interest" therein adverse to plaintiff, which claim of defendant is without right, was not objectionable for the first time on appeal, on the ground that it nowhere pleads that plaintiff is the owner of the property, and pleads no better title for plaintiff than that set forth for defendant.—Pollock v. Davenport, 31 Mont. 452; 78 Pac. 768.

QUO WARRANTO.

1. Civ. Prac. Act, Dec. 23, 1867, § 5, providing for actions for the usurpation of a franchise, is the same in effect as the common law information in the nature of quo warranto, and the sufficiency of the complaint thereunder is determinable under the rules of common law.—Territory v. Road Co., 2 Mont. 96.

2. Informations in the nature of quo warranto can never be resorted to to redress a private wrong or for the enforcement of a private right.—Id.

3. Civ. Pr. Act, § 1, wherein is provided a civil action for the enforcement of private rights and the redress of private wrongs, can not apply to informations in the nature of quo warranto, which are purely of a public character, and which are resorted to to redress public wrongs and to enforce public rights.—Id.

4. It is competent to bring an information against a corporation, and at the same time to charge it with usurping its powers.—Id.

5. Under an information against a corporation demanding the forfeiture of its franchise and charging it with usurpation of corporate powers, the question to be tried and determined is whether or not the corporation has forfeited its rights, franchises and privileges, and the corporation must show its title and authority, and the people are not called upon to prove anything.—Id.

6. A complaint for usurpation of office which avers that relator was duly elected county surveyor by the qualified electors of the county, took the oath of office gave his official bond, which was approved, accepted and filed; and that on a day stated defendant, without right, did usurp and intrude into said office, and has wrongfully and unlawfully since that time been exercising the functions thereof; and praying that he be excluded therefrom, and that relator be adjudged entitled thereto and installed therein—is good on demurrer, and states a good cause of action under Comp. Stat., p. 171, § 411, allowing dual prayers.—People v. McIntyre, 10 Mont. 166; 25 Pac. 100.

7. Under Code Civ. Proc., § 1414, which provides that a person claiming to be entitled to a public office unlawfully held by another may bring an action therefor in the name of the state, and § 2010 et seq., which provide that any elector may contest the right of any person declared to have been elected to any office in a county, town or city, the remedy of quo warranto is concurrent with the right to institute an election contest.—State v. Fransham, 19 Mont. 273; 48 Pac. 1.

RAILROADS.

I. Right of Way and Other Interests in Lands, 1.

II. Construction, Maintenance, and Equipment, 2-8.

III. Sales, Leases, Traffic Contracts, and Consolidation, 9-12.

IV. Liens, 13.

V. Operation, 14-44.
A. Duty to operate, 14.
B. Statutory regulations, 15-17.
C. Accidents at Crossings, 18-19.
D. Injuries to persons at or near tracks, 20-22.
E. Injuries to animals on or near tracks, 23-35.
F. Fires, 36-44.

I. RIGHT OF WAY AND OTHER INTERESTS IN LANDS, 1.

1. By a grant of a right of way to a railroad company, grantor reserved certain mining rights not endangering the roadbed of the grantee, and the use of such portions of the right of way as might not be in actual use by the grantee for railroad purposes. *Held*, that the railroad company had a right to maintain its roadbed, and raise and lower the height thereof as its necessary convenience demanded, subject to the reserved rights before mentioned.—M. O. P. Co. v. Mining Co., 20 Mont. 533; 52 Pac. 375.

II. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT, 2-8.

2. Where a spur track of a railroad is on the proposed line of another road, and at the point of crossing the grade of the new road is higher than that of the spur, it is proper to order that the company raise the grade of the spur so as to make a feasable crossing, and leave the spur in a reasonable condition for use.—B. A. & P. Ry. Co. v. Montana Union, 16 Mont. 504; 41 Pac. 232.

3. Where a spur track on the north side of a railroad is on the proposed line of another road, and at the point where the tracks would cross the grades of the roads are different, and it would be more convenient for the business for which the spur was built that it should be on the south side of the track, the court will order that the crossing company, at its own expense, remove the spur to the south side of the track and provide suitable approaches to it for teams.—Id.

4. A railroad company will not be denied the right to cross the tracks of another merely because the crossing will somewhat curtail the storage tracks of the latter.—B. A. & P. Ry. Co. v. Montana Union, 16 Mont. 550; 41 Pac. 248.

5. A railroad company will not be denied the right to cross the tracks of another merely because the crossing will necessitate the raising of the grade of the latter's road 18 inches, where the new grade is necessary because of another crossing.—Id.

6. Where plaintiff railroad company sought to cross defendant's road at a point where the latter maintained moveable rails, the action of the trial court in allowing plaintiff to remove the rails to land not owned by defendant, and to make title in such land in defendant, will be reversed, and plaintiff required to cross elsewhere, though the change will compel plaintiff to make three crossings over defendant's road.—Id.

7. Report of Civil Code Commissioners, § 27, states that the Code was almost entirely taken from the Civil Codes of California and New York. No such section as § 950 of the Civil Code of Montana appears in the New York Code. Sec. 485 of the Civil Code of California provides that railroad companies must make and maintain a sufficient fence on either or both sides of the track, and that, in case they do not do so, if their trains injure any stock on the line of their road which passes through or along the property "of the owners" thereof, they must pay to the owner of such animals a fair market price unless it occurred through the negligence of the owner, but that railroad companies paying to the owner of land through or along which their road is located an agreed price for the making and maintaining of such fence, of paying the cost of it on an award of damages allowed for the right of way "are" relieved from all claims for damages arising from the injuring of any animals of persons who so fail to construct. Sec. 950, Civil Code of Montana, is identical with § 485, except that the quoted phrase "of the owners" thereof is omitted, and the word "are" appears as "and." *Held*, that it was the intention of the legislature to adopt § 485, thereby enacting a law requiring a railroad company, wherever it located a line of road along or through the property of a land owner, to fence the side of its line next the property if laid along the same, or both sides if laid through the property, or to pay the owner for the stock killed unless it occurred through the neglect of the owner, and unless the latter part of the statute has been complied with.—Beaudin v. Oregon Short Line, 31 Mont. 238; 78 Pac. 303.

8. The statute does not require a railroad to fence at a station.—Id.

III. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION, 9-12.

9. Const., art. 15, § 6, provides that no railroad corporation shall consolidate its stock, property or franchise with any other railroad corporation owning or having under its control a parallel or competing line. Civ. Code, § 911, provides that the consolidation may be effected by railroad corporations becoming one under any name adopted, and also as to how the shares may be retired, and how the corporation formed by the consolidation shall succeed to the rights and property of the corporations so consolidated. *Held*, that the lease of a competing road is not forbidden by the Constitution.—State v. Montana Ry. Co., 21 Mont. 221; 53 Pac. 623.

10. Two connecting roads running from Butte to Anaconda, which were controlled by the Northern Pacific, formed a route which was practically as direct a line between the two cities as the line of the railroad company which leased one of the roads. *Held*, that the lessor and lessee roads were competing lines in so far as the power to lease was concerned, though the lessor road was not parallel, and, if it stood by itself, there would be no competition.—Id.

11. Laws 1893, p. 157, Civ Code, § 923, and especially continued in force by Pol. Code, § 5186, passed after the adoption of the Civil Code in 1895, providing, inter alia, that railroads shall have the right to lease other roads without regard to whether the roads are parallel or competing or continuous or connected, repeals Civ. Code, §§ 911, 912, in so far as they are conflicting.—Id.

12. A railroad company organized under the statute has no power to lease another railroad unless it is expressly granted by said statute.—Id.

IV. LIENS, 13.

13. Where parties contract to furnish ties to a railroad company, to be used in the construction of the road, and afterwards sublet the contract to one who contracted with plaintiff to haul and deliver the ties, plaintiff was entitled to a mechanic's lien for his labor.—Eccleston v. Hetting, 17 Mont. 88; 42 Pac. 105.

V. OPERATION, 14-44.

A. DUTY TO OPERATE, 14.
B. STATUTORY REGULATIONS, 15-17.
C. ACCIDENTS AT CROSSINGS, 18-19.
D. INJURIES TO PERSONS AT OR NEAR TRACKS, 20-22.
E. INJURIES TO ANIMALS ON OR NEAR TRACKS, 23-35.
F. FIRES, 36-44.

A. DUTY TO OPERATE, 14.

14. This court has no jurisdiction to issue a writ of mandamus to compel an interstate railroad, the employees of which have gone out on a strike, to operate its line within this state upon a petition alleging that sufficient competent men are available and willing to serve the road for "reasonable compensation."—State v. Great Northern, 14 Mont. 381; 36 Pac. 458.

B. STATUTORY REGULATIONS, 15-17.

15. Laws 1881, p. 71, § 7, requiring railroads to keep their right of way free from combustible material, does not trench on the chartered right of a railroad company, under act of congress.—Diamond v. Northern Pacific, 6 Mont. 580; 13 Pac. 367.

16. Negligence will be presumed from proof of the accident and the injury, and this applies to chartered as well as to other railroads.—Id.

17. Civ. Code, § 400, provided that any domestic corporation existing when the Code took effect might elect, in a manner provided, to continue its existence under the provisions thereof. Sec. 401 provided that no corporation then existing should be affected by pt. 4, div. 1, of the Code, unless they should elect as above, but that the laws under which such corporations were formed and existed should be applicable thereto, and were repealed, subject to the provisions of the section. Secs. 950, 951, require railroad companies to fence their tracks and property, and make them liable for stock killed in default of such fence, or through their negligence. *Held*, that a domestic railroad corporation formed before the Code took effect, and which had not made an election as provided, was not subject to the last two sections.—Menard v. Montana Central, 22 Mont. 340; 56 Pac. 592.

C. ACCIDENTS AT CROSSINGS, 18-19.

18. Under Civ. Code, § 908, making it a misdemeanor for a railroad to permit its trains to approach a crossing without sounding the whistle and ringing the bell, such action is negligence.—Hunter v. Montana Central, 22 Mont. 525; 57 Pac. 140.

19. Deceased, killed at a railroad crossing, and two of his companions, lived near the crossing, and, with the driver, were familiar with it. The driver passed it frequently; once before on that day. He was an experienced driver, and his team was gentle. They knew that vision of the track and approaching trains was obstructed to within 45 feet of the track, and that they could not turn out at that point. They trotted their team to within 30 feet of the track, on a dark night, before they noticed a train which was then upon them. They had neither stopped, looked nor listened. *Held*, that an action would not lie against the company, notwithstanding it failed to ring the bell and blow the whistle.—Id.

D. INJURIES TO PERSONS AT OR NEAR TRACKS, 20-22.

20. The evidence being conflicting as to whether a whistle was blown and bell rung on a train approaching a crossing, the court properly assumed that signals were not given in instructing a verdict for the company because of plaintiff's contributory negligence.—Hunter v. Montana Central, 22 Mont. 525; 57 Pac. 140.

21. The fact that a railroad company which operated a spur track a mile in length to a mine tolerated the use of the track as a foot path by the mine employees in going to and from work, without any expressed or implied invitation to so use it, did not entitle such employees to the rights of licensees.—Egan v. Montana Central, 24 Mont. 569; 63 Pac. 831.

22. Defendant operated a spur track extending to a mine about a mile from town. Plaintiff and other employees were in the habit of walking into town on the track, and plaintiff, while so walking with other employees, was knocked down by a train. The engineer was looking back for a signal, and did not see the man, and the noise of the train was drowned by the mine whistle. *Held*, that plaintiff was properly non-suited, since he was a trespasser, and defendant was not obliged to keep a lookout to avoid injuring him.— Id.

E. INJURIES TO ANIMALS ON OR NEAR TRACKS, 23-35.

23. In an action against a railroad company to recover for injuries to stock, the admissions of an agent of the company, acting within the scope of his authority and with knowledge of the circumstances, that he had ordered the animal killed and the beef sold for the benefit of the company, established a prima facie case of the admission of negligence by the company under Comp. Stat., p. 829, § 717, providing that in case of injury to stock the body of the animal shall belong to the company unless the owner thereof shall elect to take the same in lieu or in part payment of damages.—McCauley v. Montana Central, 11 Mont. 483; 28 Pac. 729.

24. The grazing by plaintiff of his horses on the public domain was not, of itself, contributory negligence precluding him from recovering for their loss by reason of defendant's negligence.—McMaster v. Montana Union, 12 Mont. 163; 30 Pac. 268.

25. Where there is conflicting evidence as to the state of the weather at the time and place of the killing of stock on a railroad, whether clear or thick, and the engineer neither sounded alarms nor applied brakes, the jury were rightly instructed that it was "the duty of the engineer to keep a lookout for obstructions on the track, and to use all appliances at his command to avoid accident; that if he failed to see an animal when he should see it, and thereby injures it, or if, seeing it, he does not use the appliances at his command to avoid injuring it, then the company is liable.—Id.

26. Where plaintiff's cattle, while being driven through a narrow canyon, occupied by a railway track and the highway, at the time when no regular trains were due, were killed by a special train running 35 miles an hour, plaintiff was not guilty of contributory negligence in endeavoring to drive his cattle over the track, on hearing the whistle when the train was a quarter of a mile away, instead of leaving his cattle and riding towards the train in order to warn the engineer.—Snook v. Clark, 20 Mont. 230; 50 Pac. 718.

27. In an action for the killing of cattle by a train, where plaintiff alleged negligence on the part of the defendant in not maintaining a

fence or cattle guard between the track and the highway, and defendant contended that it was impracticable to do so at the place in question, as it would practically obstruct the highway, on account of the narrowness of the canyon occupied by such track and highway, the practicability of maintaining such fence or cattle guard was a question of fact.—Id.

28. The fact that the owner is a dairyman can not be considered in assessing damages against a railroad for killing cows, no recovery being sought for loss to the business.—Parrin v. Montana Central, 22 Mont. 290; 56 Pac. 315.

29. Under Laws 1891, p. 267, providing that any railroad corporation which fails to fence its track shall be liable for stock killed by reason of the want of such fence, and that in order to recover, it shall be necessary to prove only the injury and damage, a complaint must state that the animals were killed by reason of the want of a fence.—Menard v. Montana Central, 22 Mont. 340; 56 Pac. 592.

30. In an action against a railroad company for the killing of stock, evidence that the animals were found dead or dying near the track, and that the company's employees, as part of their regular duty, skinned the animals, does not warrant the direction of a verdict for plaintiff.—Id.

31. In an action against a railroad under the statute, failure to deny an allegation of the answer that the place where the killing occurred was a public station amounted to an admission of such fact.—Beaudin v. Oregon Short Line, 31 Mont. 238; 78 Pac. 303.

32. In an action under Civ. Code, § 950, no allegation of negligence in the operation of the train is necessary.—Id.

33. It is necessary that the petition allege plaintiff's ownership or possession of land along or through which the railroad runs, and that the stock was killed at such place.—Id.

34. Where, in an action under Civ. Code, § 950, the only evidence was that the animals were found near the track, one dead and the other injured so that it had to be killed, and no showing was made as to the character of the injuries, except that one had its legs broken, such evidence was insufficient to show that the animals were killed by an engine or cars of defendant.—Id.

35. In an action against a railroad company for killing cattle, the engineer testified that a curve in the track prevented his seeing the cattle until he was about 200 feet from them; that the train was running between 41 and 42 miles an hour, and was equipped with air brakes, which were in first class condition; that on seeing the cattle he made an "emergency application of the brakes" and gave the stock alarm; that he did all he could to prevent striking the cattle; that he stopped the train within 600 feet; and that to stop within 1,000 feet would be a good stop. *Held*, that this testimony, being uncontradicted, and there being no evidence of negligence, a verdict for defendant should have been directed.—Carman v. Montana Central, 32 Mont. 137; 79 Pac. 690.

F. FIRES, 36-44.

36. The ordinary care which a railroad is required to use to keep its right of way clear of combustible material is the ordinary care of an expert engineer or railroad servant, and should be so explained.—Diamond v. Northern Pacific, 6 Mont. 580; 13 Pac. 367.

37. Under Laws 1881, p. 71, § 7, requiring railroads to keep their right of way free from dead grass, weeds, or any dangerous or combustible material, it is as much the duty of a railroad company to so keep its right of way as it is to use proper means to prevent the emission of sparks.—Id.

38. Where the evidence in an action against a railroad company shows that a fire was started by sparks from a locomotive, a prima facie case of negligence is made out, and the burden is upon the railroad company to show that the locomotive was furnished with suitable appliances to prevent the escape of sparks, and that its agents in charge of such locomotive were free from negligence.—Id.

39. In an action for damages against a railroad company resulting from sparks of fire emitted or scattered by one of its engines, it is competent for plaintiff to show that about the time when the fire took place sparks were scattered by an engine or engines of defendant, without predicating such engine to be the one which occasioned the fire in question.—Id.

40. In order to warrant recovery under Comp. Stat., p. 830, § 719, for damages for failure to keep right of way free from combustibles, it must be shown that there was sufficient combustible material upon the right of way to indicate to common prudence a danger from fire, and a refusal so to charge is error.—Spencer v. Montana Central, 11 Mont. 164; 27 Pac. 681.

41. An instruction that on the railroad company's failure to keep its track clear of combustible material as required by Comp. Stat., p. 830, § 719, the statute makes it "liable for any damage that may occur from any fire emanating from operating the railroad," was error, since it failed to charge that the damage which will warrant recovery must have resulted from two causes,—the operation of the railroad, and the faiure to keep the right of way clear of combustible matter.—Id.

42. A complaint against a railroad company for destroying property by fire alleged that "on account of defendant not keeping free from dried and dead grass and other such combustible material its right of way, * * * and on account of not providing suitable spark arresters," the defendant's locomotive emitted sparks which set fire to the dried grass on the right of way, "which fire was then and there communicated to the said standing grass in plaintiff's enclosure, and to said hay and wood," and burned up all of said property. *Held*, that where no demurrer was raised, but defendant answered, and evidence was introduced as to how the fire was communicated to plaintiff's property, the above averment will be held sufficient on appeal, under Comp. Stat., p. 85, § 100, which requires pleadings to be "liberally construed."—Id.

43. A railroad company is not relieved of liability for the burning of goods in a warehouse because the owners of the goods are stockholders in the warehouse company—it being a corporation—though by its lease from the railroad company it waived all claim for damages from destruction of the warehouse by acts of the railroad company.—Orient Ins. Co. v. Northern Pacific, 31 Mont. 502; 78 Pac. 1036.

44. In an action for the burning of property by sparks from a locomotive a witness may testify how the quantity of sparks thrown by the engine at the time compared with that thrown by the other engines along the road.—Id.

RAPE.

I. Offense and Responsibility Therefor, 1.
II. Indictment and Information, 2-4.
III. Evidence, 5-18.
IV. Instructions, 19.

I. OFFENSE AND RESPONSIBILITY THEREFOR, 1.

1. Under Pen. Code, § 450, subd. 1, defining rape as sexual intercourse with a female under the age of 16 years, it is not necessary that the act be accomplished by force.—State v. Bowser, 21 Mont. 133; 53 Pac. 179.

II. INDICTMENT AND INFORMATION, 2-4.

2. Under Comp. Stat., p. 509, § 46, defining rape as "an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under" certain circumstances, it is not necessary to allege that the female was not the defendant's wife.—State v. Williams, 9 Mont. 179; 23 Pac. 335.

3. An information charging defendant with rape of a female "under the age of 16 years, to-wit, of the age of 14 years and upwards," was not confusing as to the meaning of the language employed.—State v. Jones, 32 Mont. 442; 80 Pac. 1095.

III. EVIDENCE, 5-18.

4. In an information charging rape of a female under 16 years of age, the words "against the consent of said" prosecutrix, are merely surplusage, the law presuming that such a child is incapable of giving consent, and but one offense is charged.—Id.

5. The testimony of the girl, who was 9 years old, was unsupported, and was contradicted by defendant and his wife and a hired man, who were in the house when the alleged crime was committed. The girl also testified that she had frequent conversations with her mother about this offense, and that her mother told her what to swear to, and how to say it on the witness stand; that her testimony was given in the case more from the recollection of what her mother told her to say than from her memory of the actual occurrences. *Held*, that the conviction could not be sustained.—State v. McMillan, 20 Mont. 407; 51 Pac. 827.

6. Evidence of the relationship between prosecutrix and defendant is competent in a prosecution for rape.—State v. Bowser, 21 Mont. 133; 53 Pac. 179.

7. The age of a prosecutrix may be proven by her own testimony.—Id.

8. It is not error, in a prosecution for rape, to refuse defendant's counsel permission to examine prosecutrix as to her knowledge of her age, on direct examination, where counsel is given full opportunity to do so on cross examination.—Id.

9. Where the indictment in a rape case charges defendant with criminal knowledge of a female under 16, violently and against her will, and there is ample evidence that the female was under 16, it is not incumbent on the state to also prove that she resisted defendant's assault, and that he violently overcame her resistance, even though it has been so alleged.—State v. Mahoney, 24 Mont. 281; 61 Pac. 647.

10. In a prosecution for rape of a female under the age of consent, evidence of acts of intercourse between the parties prior to that charged is admissible to corroborate the prosecutrix.—State v. Peres, 27 Mont. 358; 71 Pac. 162.

11. In a prosecution for statutory rape it appeared that the offense was committed on Friday; that prosecutrix made no disclosure thereof until the next Wednesday, when, in response to questioning, she told her teacher of the offense, declaring it to have been accomplished by force; and that on the next Monday she told all her teachers. Prosecutrix testified that she did not tell her stepmother, because they were not on good terms, and the stepmother knew of previous illicit relations between prosecutrix and accused; and that she did not tell her father because she feared he would believe she had consented. *Held*, that prosecutrix' delay in making the statement would not, in view of her testimony, warrant the exclusion of evidence thereof.—Id.

12. As the statement was not in the nature of a confession or admission, its voluntary character would not be a ground of objection to evidence thereof, but would only affect its weight.—Id.

13. In a prosecution for statutory rape it appeared that the offense was committed on Friday; that on Monday and Tuesday prosecutrix appeared at school, nervous and tearful, evaded her teacher's questions, and on the latter day was excused from recitation; and that on Wednesday, when found crying by the teacher, and on being urged to disclose the trouble, told of the crime. *Held*, that this statement was not objectionable, as being involuntarily made.—Id.

14. The rule which requires a prosecutrix raped by force to make immediate outcry or disclosure, or stand discredited on the trial, has no application to a prosecution for the rape of a female under the age of consent.—Id.

15. Code Civ. Proc., § 3390, subd. 2, provides that the jury are not bound to decide in conformity with the declarations of any number of witnesses not convincing their minds against a less number satisfying their minds. *Held*, that the fact that prosecutrix was contradicted, or that conflicting impeaching evidence was given against her, would not overthrow a conviction of statutory rape, the evidence being sufficient to support the verdict.—Id.

16. Prosecutrix' uncorroborated evidence is sufficient, under Code Civ. Proc., § 3120, to sustain a conviction of statutory rape.—Id.

17. In prosecutions for rape, evidence of previous good character, even in doubtful cases, is never conclusive, as a matter of law, in favor of defendant, and does not of itself raise a presumption in his favor.—State v. Jones, 32 Mont. 442; 80 Pac. 1095.

18. In a prosecution for rape, where the jury beieve the testimony of prosecutrix, no additional evidence is necessary to support the verdict.—Id.

IV. INSTRUCTIONS, 19.

19. In a prosecution for rape, an instruction that if, from a consideration of the evidence, the jury believed defendant guilty beyond a reasonable doubt, they should so declare, notwithstanding they might be satisfied that prior to committing the offense of which he was accused defendant was a man of good reputation and character, was correct.—State v. Jones, 32 Mont. 442; 80 Pac. 1095.

RECEIVERS.

I. Nature and Grounds of Receivership, 1-10.
II. Appointment, Qualification, and Tenure, 11-18.
III. Title to and Possession of Property, 19-21.
IV. Management and Disposition of Property, 22-26.
V. Actions, 27-28.
VI. Accounting and Compensation, 29-47.
VII. Wrongful Receiverships, 48-55.

I. NATURE AND GROUNDS OF RECEIVERSHIP, 1-10.

1. Under Comp. Stat., p. 115, § 229, providing that a receiver may be appointed in an action between partners or others jointly owning or interested in any property or fund, such appointment is authorized where plaintiff, having sold to defendant an interest in property, and having conveyed to him the entire property to enable him to sell it, and, defendant having sold it, there is a dispute as to the proper distribution of the fund received by defendant from the sale.—McIntosh v. Perkins, 13 Mont. 143; 32 Pac. 653.

2. A complaint in an action to recover possession of land, with damages for withholding it, and rents, alleged plaintiff's ownership of the premises withheld by defendant; that defendant was renting the premises and collecting the rents; that the premises were mortgaged, and that plaintiff needed the rents to pay interest falling due on the mortgage. *Held*, not to show grounds sufficient for the appointment of a receiver pending the action.—State v. District Court, 13 Mont. 416; 34 Pac. 609.

3. Comp. Stat., p. 115, § 229, subd. 1, authorizes the appointment of a receiver in an action by a vendor to vacate a fraudulent purchase, "or" by a creditor to subject any fund to his claim, "or" between partners or others jointly owning or interested in any property, "on appication" of plaintiff or of any party whose right or interest in the property is probable, "and" where the property is in danger of material injury. *Held*, that such appointment is authorized only in the cases mentioned in the first part of the section, and the words after the phrase "on application" merely show when, in the case before mentioned, the receiver may be appointed, and do not provide an additional case; and hence a receiver of property attached by different parties in actions at law for the recovery of money only can not be appointed, though the property is in danger of material injury.—State v. District Court, 14 Mont. 577; 37 Pac. 969.

4. Comp. Stat., p. 116, § 229, subd. 6, authorizing the appointment of a receiver in all other cases where receivers have heretofore been appointed by the usages of the court of equity, does not authorize such appointment in a simple law action on debt.—Id.

5. Under Code Civ. Proc., § 951, a showing that there was imminent danger that property in the possession of defendant would be removed beyond the jurisdiction of the court, and unlawfully disposed of, unless a receiver was appointed ex parte, is sufficient to give the court jurisdiction to appoint such receiver, without notice of the application therefor.—State v. District Court, 22 Mont. 241; 56 Pac. 281.

6. Mere colorable ouster on the part of a tenant in common who is in possession of a mining claim by the consent of a co-tenant who has brought a suit for partition, and the mere fact that the care of the property involves considerable expense, will not authorize the appointment of a receiver pending the final hearing of the suit.—Heinze v. Kleinschmidt, 25 Mont. 89; 63 Pac. 927.

7. Under Code Civ. Proc., § 950, subd. 6, authorizing courts to appoint receivers in all cases "where receivers have heretofore been appointed by the usages of courts of equity," the lessee of a certain mine, the operation of which was enjoined pending the settlement of a dispute as to title between the lessor and others, was not entitled to the appointment of a receiver, with power to remove ore, on the ground that his lease would expire before final adjudication, and hence be rendered valueless by the injunction, since the receivership was not necessary to the preservation of the rights of the parties.—Hickey v. Copper Co., 25 Mont. 164; 64 Pac. 330.

8. Certain parties claiming title to a mine sued for a writ of injunction restraining certain others and their lessee from working the mine. The lessee's estate would terminate before a final adjudication of the matter could be had, and the restraining order sought would do him great injury. *Held*, that a receiver could not be appointed on the ground that the bond which would be required on granting the restraining order, suit on which would be the lessee's only remedy, would not afford such lesee adequate protection, since it would be presumed that the bond required would be sufficient to protect the lessee from any loss occasioned by such order.—Id.

9. The court would not appoint a receiver because the damages the lessee would suffer by reason of such restraining order would be difficult of ascertainment and proof.—Id.

10. Where a party claiming title to certain mining property was in possession thereof, that fact of itself was not sufficient to entitle him to the appointment of a receiver over the objection of another party claiming title to such property.—Id.

II. APPOINTMENT, QUALIFICATION, AND TENURE, 11-12.

11. Under Code Civ. Proc., § 951, the appointment of a receiver, at chambers, on the application of minority stockholders of a mercantile corporation, to take charge of all of the property of such corporation and practically wind up its business, immediately on the filing of a complaint which stated no grounds therefor, without notice, and before service had been made on such corporation in such action, was without any authority of law.—State v. Clancy, 20 Mont. 284; 50 Pac. 852.

12. Where the appointment of a receiver is void for want of jurisdiction, the court has no authority to direct a third person, not a party to the proceedings, to pay over to the receiver moneys which the receiver has deposited with him.—State v. District Court, 21 Mont. 155; 53 Pac. 272.

13. Where a receiver was imposed on a corporation at the instance of minority stockholders because of its having illegally transferred its stock and property to another corporation, and on motion of the two corporations and their directors to vacate the order appointing the receiver they offered in evidence a deed of reconveyance and bill of sale previously executed, and offered to allow a decree to be entered properly restraining the directors from voting for a transfer, and restraining the company from making a transfer, and declaring the reconveyance valid, it was error to refuse to admit the deed in evidence on the ground that Laws 1899, p. 146, only authorized consideration of facts existing when the order appointing a receiver was made on an appeal from an order refusing to vacate the appointment.—Forrester v. Mining Co., 24 Mont. 148; 60 Pac. 1086; 61 Pac. 309.

14. An order of this court staying proceedings under an order appointing a receiver requires the immediate return of the property to the person from whom it was taken.—Rumney v. Donovan, 28 Mont. 69; 72 Pac. 305.

15. In an action to recover for professional services by an attorney in contesting a will, the court, prior to the trial, appointed a receiver to receipt to the administrator of the decedent's estate for the defendants' shares therein, and to preserve them pending the determination of the action. Afterwards judgment went for de-

fendants. *Held*, proper to discharge the receiver pending an appeal.—Harris v. Root, 28 Mont. 159; 72 Pac. 429.

16. Under Code Civ. Proc., §§ 951, 3100, 3104, 3320, an ex parte order appointing a receiver can not be based on the complaint alone, unless it satisfies the requirements of an evidential affidavit by a verification on affiant's own personal knowledge. A verification upon "knowledge, information and belief," under Code Civ. Proc., § 731, is insufficient.—Benepe-Owenhouse Co. v. Scheidegger, 32 Mont. 424; 80 Pac. 1024.

17. Where a complaint for an accounting, and asking as ancillary relief the appointment of a receiver and an injunction, fails to state a cause of action for an accounting, the ancillary relief must be denied.—Id.

18. Under Code Civ. Proc., § 951, the burden is on an applicant for the appointment of a receiver to show that there is such immediate danger of the removal, loss or destruction of the property or fund as to authorize the appointment ex parte; and when the case is brought before a court of review such showing must affirmatively appear upon the record.—Id.

III. TITLE TO AND POSSESSION OF PROPERTY, 19-21.

19. A receiver in charge of property in litigation is to be regarded as an officer of the court which appointed him. He stands as an indifferent person, clothed with the power of receiving and preserving the property and assets involved in the suit wherein he was appointed, for the benefit of whoever may finally be declared to be entitled to them.—Gardner v. Caldwell, 16 Mont. 221; 40 Pac. 590.

20. A temporary restraining order granted on filing of complaint and affidavit, without notice to defendants, was properly vacated on motion, where the evidence showed that a receiver for plaintiff had been theretofore appointed and had qualified in another case, since Code Civ. Proc., § 955, invests a receiver with power to sue in his own name, as receiver, and, in absence of a showing that such appointment was not in force, the affairs and property of plaintiff were not custodia legis, and plaintiff had no legal capacity to sue.—Boston & M. C. C. & S. M. Co. v. M. O. P. Co., 24 Mont. 142; 60 Pac. 990.

21. Where a receiver was appointed for a corporation, but a stay was granted pending a hearing in this court, the corporation had full power to bring suit until such receiver took possession, and after his discharge to prosecute to completion an action so commenced during the stay.—Boston, etc. Mining Co. v. M. O. P. Co., 27 Mont. 431; 71 Pac. 471.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY, 22-26.

22. A corporation, on the appointment of a receiver for it, applied to have plaintiffs required to indemnify it against damages in case such appointment was wrongful, which application was denied from time to time. After a bond was ordered, plaintiffs were granted further time in which to file it; and in the meantime the receiver obtained an order, at chambers, without notice, and without any showing of necessity therefor, to sell the property of the corporation, for cash, and to pay certain alleged preferred claims, without ascertaining whether they were correct or not. A request on behalf of the corporation that such order of sale be suspended until after a bond had been given was denied. *Held*, that such case was disposed of in an arbitrary and most unjudicial manner, and all the proceedings would be set aside.—State v. Clancy, 20 Mont. 284; 50 Pac. 852.

23. A receiver can not be allowed fees for counsel to a superintendent in charge of the corporation's property, or for other employees.—Forrester v. Mining Co., 30 Mont. 181; 76 Pac. 2.

24. Where orders appointing a receiver and directing a sale of property are reversed on appeal, the purchaser of the property at a sale had pending the appeal can recover purchase money paid, although the purchase of the property in his possession has been subjected to the payment of the debts of the corporation for which the receiver was appointed.—Lutey v. Clark, 31 Mont. 45; 77 Pac. 305; 84 Pac. 73.

25. Where a corporation prosecuted an appeal from orders appointing a receiver and authorizing the sale of certain of its property, on which such orders were reversed, such appeal constituted an election by the corporation to have the property restored to it or applied to its benefit, and the application of such property to judgments recovered against the corporation constituted an application of the property to the corporation's benefit.—Id.

26. A receiver is entitled, as a matter of right, to the benefit of counsel, when the nature of the trust requires it; and, while he usually selects his own counsel, he can not make any contract for their compensation that is binding as it is the function of the court to determine both the necessity for counsel and the compensation to be allowed therefor.—Hickey v. Copper Co., 32 Mont. 143; 79 Pac. 698.

V. ACTIONS, 27-28.

27. A receiver of a water company, appointed after the excavation has been filled, but before the occurrence of an accident resulting from its negligence in making the fill, is liable for such injuries, though he has no notice of the defect, since the appointment cast on him the duty of repairing the street, and he is presumed to have knowledge of the defect.—Robinson v. Mills, 25 Mont. 391; 65 Pac. 114.

28. Under 25 U. S. Stat. 435, § 3, authorizing suits against federal receivers without the consent of the appointing court in respect to any act of the receiver in carrying on the business, an action may be brought without consent against the receiver of a water company, who continued its business, for his failure to put a street in a safe condition, though it was excavated and defectively filled by the company before his appointment.—Id.

VI. ACCOUNTING AND COMPENSATION, 29-47.

29. A receiver of property in controversy in an action can not recover judgment for his services against all the parties, by a motion in the original suit. He is an officer of the court, and his compensation should be allowed out of the property in his hands and taxed as costs.—Hutchinson v. Hampton, 1 Mont. 39.

30. Where no exceptional facts appear, the costs of the receivership must be taxed against the party in whose favor all the equities were found, and it does not matter how or why the receiver was appointed.—Ervin v. Collier, 2 Mont. 605.

31. Where a receiver should have been discharged on a certain date, when defendant corporation offered, in writing, to do the very things that plaintiffs prayed the court to enforce, he was entitled to a reasonable compensation for services rendered prior to such date, and to be recompensed for reasonable and

proper expenses incurred prior thereto, but was entitled to nothing for expenses or services rendered after that date, except, perhaps a reasonable sum for services of a bookkeeper aiding in rendition of accounts to the court.—Forrester v. Mining Co., 30 Mont. 181; 76 Pac. 2.

32. A defendant in a receivership should not have its property taken to pay expenses of a receiver unjustly and unlawfully kept in office as an officer of the court, where justice requires his discharge.—Id.

33. Where a receiver was only in actual possession of the corporation's property for five days, and was free to act as receiver not more than 15 days altogether, an allowance of $200,000 was excessive.—Id.

34. Acts of violence exhibited towards the receiver by the agents of the corporation do not justify an excessive allowance of fees to the receiver.—Id.

35. No motion lies for new trial on issues involved in the matter of a claim for compensation and expenses of a receivership, and there can be no appeal from an order denying such a motion.—Id.

36. An appeal lies from a judgment allowing the compensation and expenses of a receiver.—Id.

37. It is the duty of a receiver to transact his business in such a manner, and to keep his books and vouchers in such shape, that he may be ready for examination at any time.—Hickey v. Copper Co., 32 Mont. 143; 79 Pac. 698.

38. Where a receiver is legally appointed, he is entitled to compensation for his services actually rendered, although the order of appointment be vacated or reversed.—Id.

39. Where extra duties are required of a receiver, such as the giving of a bond or the employment of counsel, he is entitled to extra compensation, in addition to that to which he would be entitled merely for the management of the property.—Id.

40. Where the receiver is entitled to reasonable compensation for the management of the property, the fact that he is employed by the court, and not by the owner of the property, does not entitle him to any greater compensation than that which would be reasonable if he had been employed by the owner.—Id.

41. In determining the compensation to be allowed a receiver, the circumstances and environments of the particular receivership should be considered.—Id.

42. A receiver is not entitled to compensation or allowance for attorneys' fees for any new business transacted after the receivership has been terminated by reversal of the order of appointment.—Id.

43. In fixing the compensation of a receiver, the considerations that should control the court are the value of the property in controversy, the practical benefits derived from the receiver's efforts, the time, labor and skill needed or expended in the proper performance of his duties, and the degree of activity, integrity and despatch with which the work of the receivership is conducted.—Id.

44. Where a receiver is improperly appointed, the party who procured his appointment is liable for his compensation.—Id.

45. After an order appointing a receiver had been reversed on appeal, and more than a year after the termination of the receivership, the receiver and the defendant, without the consent of the party who had procured the appointment of the receiver, stipulated that defendant's objections to the receiver's reports should be referred. *Held*, that the party who procured the appointment of the receiver was not liable for the fees of the attorneys representing the receiver on the reference.—Id.

46. Where the court has personal knowledge of the services rendered by attorneys for a receiver, it is not always necessary that it should hear evidence as to the amount which it should allow for attorneys' fees, as the court is presumed to know the value of attorneys' services, but such evidence may be admitted to inform the court what is just and reasonable under the circumstances.—Id.

47. Where a receiver's appointment was valid, and the court on a former appeal held that he should be retained pending the appeal, unless the district court otherwise ordered, and in ordering the discharge of the receiver reversed the order of appointment without prejudice to the receiver's right to be reimbursed out of the trust estate for any amounts he might have properly expended or become liable to pay, and to be compensated for his services, such decisions constituted the law of the case, and entitled the receiver to payment for services for the time he was actually engaged in efforts to obey the directions of the district court when not stayed by the supreme court, and for services when actually in possession of the property, together with a nominal amount for the time during which his efforts were stayed, and for the time he was in office after he turned the property back to the owners, notwithstanding he should have been discharged on a former date, when defendant offered in writing to comply with plaintiff's demands in the suit in which the receiver was appointed.—Hinds v. Mining Co., 32 Mont. 240; 79 Pac. 1061.

VII. WRONGFUL RECEIVERSHIPS, 48-55.

48. Persons who wrongfully procure the appointment of a receiver for a going and solvent corporation become, after the appointment is judicially declared void, trespassers ab initio, and liable for the damages caused by their wrongful acts.—Thornton v. Bretherton, 32 Mont. 80; 80 Pac. 10.

49. It is not necessary, in order to recover damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, to show that the appointment was procured maliciously, and without probable cause.—Id.

50. In an action for damages caused by the wrongful appointment of a receiver for a going and solvent corporation, where plaintiff did not claim either interest, prospective profits, or exemplary damages, allegations of the complaint concerning the extent of the business of the company, and the conduct of defendants tending to show fraud, oppression, or malice, must be considered as surplusage.—Id.

51. In such action, where the theory of the trial was that plaintiff could not recover without showing malice or want of probable cause, it was proper to admit as introductory evidence the opinion of this court in the receivership proceedings, reversing the order appointing the receiver, though the invalidity of the appointment was admitted by defendants.—Id.

52. Evidence of the loss of an account through the receivership and limitations is admissible, although no action has been brought to collect the account.—Id.

53. The measure of damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation is defined by Civ. Code, §§ 4270, 4330, 4333, 4334.—Id.

54. Under Civ. Code, §§ 4333, 4334, the fact that accounts and bills belonging to a corporation, which were not collected owing to the wrongful institution of receivership proceedings by defendants, were taken possession of

by an attachment to satisfy an indebtedness of the corporation, does not affect the measure of the corporation's damages for the wrongful receivership.—Id.

55. In an action for damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation, plaintiff may show as an item of damage the amount of a good and collectible account which was lost by reason of the receivership.—Id.

RECEIVING STOLEN GOODS.

1. Evidence of larceny will not sustain a conviction for receiving stolen goods, knowing the same to have been stolen.—State v. Kinder, 22 Mont. 516; 57 Pac. 94.

RECOGNIZANCES.

1. Suit on a forfeited recognizance should be brought in the name of the territory, the provision of the statute that all actions should be in the name of the real party in interest not applying to such case, in which the territory becomes the trustee of the money recovered, and the law declares to whom it shall go.—Territory v. Hildebrand, 2 Mont. 426.

RECORDS.

1. After a bill had passed the senate and come into the hands of the secretary to be transferred to the house, he talked with an opponent of the bill about it, and the opponent picked it up and left it with him, and he winked at the opponent, who had said a few days previously that if the opponents of the bill could not talk it to death they would have to get rid of it some other way. The bill was defeated because not transferred to the house before its adjournment, after which the secretary put it in a desk of the clerk of the house, and stated that the clerk "got away" with the bill. *Held*, that a verdict finding the secretary guilty of secreting a public record under Pen. Code, § 230, was sustained.—State v. Bloor, 20 Mont. 574; 52 Pac. 611.

2. Where a bill was placed in the hands of the secretary of the senate after its passage in the senate, to be transferred by him in his official capacity to the house, and he wilfully withheld it, he was guilty of secreting a public record under Pen. Code, § 230, though he was not an officer required by law to take charge of bills.—Id.

3. An indictment under Pen. Code, § 230, for wilfully secreting a public record need not allege an intent to injure any particular person, in view of § 7, providing that an act may be done "wilfully" without any intent to injure another.—Id.

4. Where one appears of record to be the owner in fee of real estate, one alleging the contrary must prove the same by clear and convincing proof.—Swain v. McMillan, 30 Mont. 433; 76 Pac. 943.

REFERENCE.

1. The terms of the order of reference determine the scope of a referee's authority, and a reference to state an account gives him no authority to try and determine the whole issue.—Bradshaw v. Morse, 20 Mont. 214; 50 Pac. 554.

2. Code Civ. Proc., § 1139, providing for the filing in court of a referee's report within 10 days, is directory.—Emerson v. Bigler, 21 Mont. 200; 53 Pac. 621.

3. Attorneys in an action for the dissolution of a partnership stipulated that the case should be submitted to a referee, who should have power to take testimony, and report findings thereon, and to state a complete account between the parties, and that the cause, together with such report and testimony, and the books of account of the firm, might be argued before and submitted to the court. *Held*, that the court was not required to enter a formal order setting aside the findings of the referee before proceeding to determine the cause on the evidence, findings and reports submitted, since the referee was not authorized by the stipulation to hear and determine the issues, and as the findings were advisory only, and not conclusive on the court.—Murphy v. Patterson, 24 Mont. 575; 63 Pac. 375.

4. Code Civ. Proc., § 1141, provides that, when a referee is to report the facts, the findings reported shall have the effect of a special verdict. *Held*, that where the reference provided that a referee should take testimony, and state a complete account between the parties, but did not authorize him to hear and determine the issues, his findings can not be given the effect of a special verdict, since the scope of the referee's authority must be determined by the terms of the order of reference.—Id.

REFORMATION OF INSTRUMENTS.

1. In the absence of power conferred by statute, a court of equity has no jurisdiction to reform the deed or mortgage to which a married woman is a party, on account of a defective description of the land.—McAdow v. Black, 6 Mont. 601; 13 Pac. 377.

2. In an action for the specific performance of a written contract, whereby the parties agreed to locate a claim on disputed land to defeat a suit of other claimants, the expenses incurred thereby, and in contesting the suit, to be shared by the lot owners proportionately, and each lot owner to receive a conveyance of his share of the contested land on the successful termination of the suit, it appeared that money had been collected and expended in defraying the expenses of the suit and locating the claim, under advice of counsel, that defendants knew of such expenditures, and received part, asserting that they did so for their associates; that the contract was drawn up at the instance of one of defendants, by their attorney, and read over to them, and, after receiving the approval of the representative of the other lot owners, was signed by one of defendants; that the alleged mistake set up in defense of the action was discovered two years before this suit, but no effort to have it reformed was made. Neither defendants nor their attorney testified as to the execution of the contract, nor how the alleged mistake happened. *Held*, that such contract would not be reformed on the ground of mistake.—Fitscher v. Thomas, 9 Mont. 52; 22 Pac. 450.

3. On foreclosure of a mortgage for default in the payment of interest the complaint alleged that the mortgage provided for foreclosure for principal and interest in case of such default. *Held*, that the allegations that the parties agreed that the mortgage should not be foreclosable on default in the interest; that they intended that the written agreement should express this agreement, and that the mortgage, by a mutual mistake, contained a provision making it subject to foreclosure on non-payment of annual interest—are sufficient to

sustain a cross-complaint for reformation.—Gassert v. Black, 11 Mont. 185; 27 Pac. 791.

4. In an action by a purchaser of land at a sheriff's sale to reform a deed to the land to the judgment debtor, the wife of the judgment debtor, who was a party to the suit in which the judgment was rendered under which the land was sold, is not a necessary party.—Power v. Burd, 18 Mont. 22; 44 Pac. 1094.

5. A complaint which sets out a written agreement reciting that, "in consideration of the further fact that there are now and will be moneys in the hands of (plaintiff) due to (defendant's debtor, plaintiff) agrees to pay said judgment within 30 days after the entry" thereof, and which alleges a mutual understanding between the parties that plaintiff was not a guarantor, or bound to pay any sum except what should have been due from him to said debtor, but which does not allege any fraud, imperfection or mistake, does not entitle plaintiff to a reformation of the contract, since that relief will not be granted on the ground that the parties to a written contract understood and intended to interpret it in a sense contrary to its language.—Gaffney v. Hopkins, 21 Mont. 13; 52 Pac. 561.

6. One who signed a contract to take up and pay a stated balance due on certain goods under protest that the sum stated was larger than the unpaid balance, can not import into the agreement as a ground for reformation a contemporaneous oral promise to give him credit for what was already paid, unless such agreement was omitted by fraud, accident or mistake.—Sanford v. Gates, 21 Mont. 277; 53 Pac. 749.

7. Allegations that the buyer of chattels under a lease reserving title to the seller had verbally agreed to pay for them such sum as remained due and unpaid by a former buyer who had defaulted on his payments, and allowed the seller to retake them, and that the buyer had signed a contract agreeing to pay a certain sum, relying on the seller's fraudulent representation that it was the sum due, and that, if any credits had been omitted, they would be properly aplied, will be sufficient, if true, to entitle the seller to a reformation of the contract so as to express the real indebtedness.—Id.

8. In an action to have a deed decreed a mortgage, an agreement executed concurrently with the deed, whereby the grantee agreed to reconvey on certain conditions, was properly admitted in evidence.—Morrison v. Jones, 31 Mont. 154; 77 Pac. 507.

9. In an action to have a deed declared a mortgage the court may, on defendant's motion for nonsuit, decree the instrument to be a deed, though there is no technical nonsuit in an equitable action.—Id.

RELEASE.

I. Requisites and Validity, 1-3.
II. Construction and Operation, 4-12.
III. Pleading, 13.

I. REQUISITES AND VALIDITY, 1-3.

1. A release founded upon a sufficient consideration is valid without a seal, unless it affects real estate.—Collier v. Field, 1 Mont. 612.

2. Courts will not, as a matter of public policy, enforce a release of a liability of a cashier of a bank, obtained by him in consideration of a loan to the promissor of notes of the bank.—Bank v. Opera House Co., 23 Mont 1; 57 Pac. 440.

3. An agreement to release a cashier of a bank from a personal obligation, based upon an agreement by him to loan the promissor bank notes, is without consideration.—Id.

II. CONSTRUCTION AND OPERATION, 4-12.

4. It is not possible to discharge one of the joint and several obligors upon a promissory note and mortgage and retain a legal obligation against the others.—Collier v. Field, 1 Mont. 612.

5. Where two or more persons are bound jointly, the claimant may release one and reserve his remedy against the others, with their consent.—Id.

6. A covenant not to sue one of several joint obligors does not release the others.—Id.

7. The release of one or more joint obligors is a release of all.—Collier v. Field, 2 Mont. 205.

8. The release of one of several joint debtors is a release of all.—Id.

9. Where two or more persons are bound jointly, the claimant may release one and reserve his remedy against the others, with their consent.—Id.

10. A covenant not to sue one of several joint obligors does not release the others.—Collier v. Field, 2 Mont. 320.

11. Plaintiff was riding in a caboose on defendant's train, when it broke, injuring him. He set the brakes and stopped the cars. Thereafter, on request of plaintiff, defendant issued him a round trip pass on account of "services rendered on account stopping train broken in two." *Held*, that whether the pass was accepted as full compensation for injuries received as well as for services rendered was for the jury.—Rogan v. Montana Central, 20 Mont. 503; 52 Pac. 206.

12. Defendant railway company entered on plaintiff's mining claim, and diverted the waters of a creek which crossed the claim. Afterwards plaintiff conveyed to defendant a 40-foot strip across his claim, and across the old bed of the creek, and released "all claim for any damages that may arise or be caused to the land adjoining such railroad, on either side thereof, in consequence of the use of said premises for its road." *Held*, that such conveyance did not release plaintiff's claim for damages for the trespass previously committed in diverting the creek.—Sweeny v. Montana Central, 25 Mont. 543; 65 Pac. 912.

III. PLEADING, 13.

13. A release of a cause of action is not available unless it is specially pleaded.—Collier v. Field, 1 Mont. 612.

REPLEVIN.

I. Right of Action and Defenses, 1-8.
II. Parties, 9-11.
III. Proceedings for Taking and Redelivery of Property, 12-14.
IV. Pleading and Evidence, 15-27.
V. Damages, 28-30.
VI. Trial, Judgment, Enforcement of Judgment, and Review, 31-45.
VII. Liabilities on Bonds and Undertakings, 46-60.

I. RIGHT OF ACTION AND DEFENSES, 1-8.

1. Where property of the plaintiff was unlawfully taken by defendants under an attachment, no demand by plaintiff was necessary before replevin.—Griswold v. Boley, 1 Mont. 545.

2. A right to immediate possession of personal property is essential to enable plaintiff to maintain an action for claim and delivery.—Lanbenheimer v. McDermott, 5 Mont. 512; 6 Pac. 344.

3. The right to the possession of personal property is essential in the plaintiff in an action for claim and delivery.—Bach v. Montana L. & P. Co., 15 Mont. 345; 39 Pac. 291.

4. Where a contract of sale of chattels in the form of a lease reserving title in the seller provided that in case of default of payment the seller might retake the goods, and the payments made should be forfeited as damages for the use of the goods, a default entitles the seller to maintain replevin notwithstanding such forfeiture is unconscionable.—Sanford v. Gates, 21 Mont. 277; 53 Pac. 749.

5. To maintain an action in claim and delivery, plaintiff must plead and prove his right to the immediate possession of the property at the time of the commencement of the action.—Cameron v. Wentworth, 23 Mont. 70; 57 Pac. 648.

6. A demand was sufficient to sustain an action on claim and delivery, where such demand was for the payment of the balance of the purchase money, or that the article purchased be delivered up, and the reply being that it could be obtained by a lawsuit.—Bennett v. Tam, 24 Mont. 457; 62 Pac. 780.

7. Plaintiffs allege that, being owners of certain capital stock in defendant company they deposited it with the company, to be sold by defendant and the proceeds used in paying its debts, in consideration of an agreement with plaintiffs to hold certain offices of defendant until its business should be in successful operation; that defendant violated its agreement, and ejected plaintiffs from the offices, and had sold and issued the stock to others, and refused and failed to deliver it to plaintiffs, or to pay plaintiffs value thereof, though requested to do so. The prayer was for recovery of possession of the stock, or its value in case recovery could not be had. *Held*, that the complaint did not state a cause of action in claim and delivery, as the statement that defendant had disposed of the stock showed that, at the commencement of the action, defendant did not wrongfully retain possession of the property from plaintiffs.—Glass v. Mining Co., 31 Mont. 21; 77 Pac. 302.

8. In an action in claim and delivery plaintiff must recover upon the strength of his own title, and not upon the weakness of defendant's title, and an instruction authorizing a verdict for plaintiff, if there were some particular defects in the justification relied upon by defendant, is erroneous.—Gallick v. Bordeaux, 31 Mont. 328; 78 Pac. 583.

II. PARTIES, 9-11.

9. In an action of claim and delivery, several defendants having separate and distinct liens arising out of separate contracts, can not join in setting up such liens to defeat plaintiff's right of possession.—Underwood v. Birdsell, 6 Mont. 142; 9 Pac. 922.

10. Under Code Civ. Proc., § 588, the court can not make an order substituting a claimant of property for defendant in a claim and delivery action, on application of defendant, who has no control of the property, because of its previous delivery to the sheriff, and no power to deliver it on the court's order.—State v. District Court, 28 Mont. 445; 72 Pac. 867.

11. The action of claim and delivery lies only against the party in possession, and when brought against a constable for the wrongful seizure of property under a writ of execution the sureties on his official bond are improperly joined as parties defendant, where they were not in any manner concerned in the seizure or detention of the property.—Gallick v. Bordeaux, 31 Mont. 328; 78 Pac. 583.

III. PROCEEDINGS FOR TAKING AND REDELIVERY OF PROPERTY, 12-14.

12. Proceedings in replevin give a right to the temporary possession of the property, without any title, until the right of possession is tried and determined, and do not impair the lien of an attachment that has been levied on the property.—Caldwell v. Gans, 1 Mont. 570.

13. Under Rev. Stat., p. 67, § 157, requiring an undertaking in replevin to be conditioned "for the prosecution of the action without delay and with effect," an undertaking is sufficient which provides "for the prosecution of the action," omitting the words "without delay and with effect."—Parrott v. Scott, 6 Mont. 340; 12 Pac. 763.

14. Although a bond signed by defendants in replevin as principals and two other persons as sureties for a delivery of the property replevined is not in compliance with Rev. Stat., p. 69, § 163, which requires an "undertaking signed by two or more sufficient sureties," the statute not requiring the principals to sign, yet it is a good common law bond, and not being prohibited by statute nor against public policy, an action may be maintained thereon upon failure of the defendant in replevin to comply with the terms of the judgment in the replevin suit.—Hedderick v. Pontet, 6 Mont. 345; 12 Pac. 765.

IV. PLEADING AND EVIDENCE, 15-27.

15. In an action of claim and delivery, even when the taking is not wrongful, proof of demand is not necessary when the pleadings admit it.—Francisco v. Benepe, 6 Mont. 243; 11 Pac. 637.

16. In an action of claim and delivery, a complaint which alleges that plaintiff was the owner and in possession of certain goods, "of the value of $4,000," is not deficient for containing no ad damnum clause.—Woods v. Berry, 7 Mont. 195; 14 Pac. 758.

17. In an action of claim and delivery, where it is not denied in the answer that the plaintiff is the real party in interest, and there is no issue on that point, questions put by the defendant, in order to show that plaintiff was not the party in interest, are properly disallowed.—Id.

18. In claim and delivery for ore taken from plaintiffs' mining claim, defendants' answer denied the existence of the claim, and denied taking ore from it. *Held*, that defendants, having denied plaintiffs' title, could show title to the ore in a third person.—Driscoll v. Dunwoody, 7 Mont. 394; 16 Pac. 726.

19. Under a denial of title, in an action to recover personal property from a sheriff, it can not be shown that, after a sale thereof to plaintiff by the debtor, there was no change of possession, for the purpose of proving fraud.—Bickle v. Irvine, 9 Mont. 251; 23 Pac. 244.

20. It is error to render judgment on the pleadings where defendants deny plaintiffs' right to the possession of the goods, though

the other denials in the answer are defective.—Bach v. Montana L. & P. Co., 15 Mont. 345; 39 Pac. 291.

21. In an action of claim and delivery, where the complaint contains only general allegations of title and right of possession, without setting forth the origin of the title or the facts on which it is based, evidence of any fact tending to destroy or rebut plaintiff's claim, though including proof of a fraud, is admissible under a general denial.—Gallick v. Bordeaux, 22 Mont. 470; 56 Pac. 961.

22. In an action in claim and delivery for property wrongfully seized under execution defendant could, under a general denial of plaintiff's ownership of the goods seized, show that a sale under which plaintiff claimed was void.—Gallick v. Bordeaux, 31 Mont. 328; 78 Pac. 583.

23. In an action in claim and delivery for property wrongfully seized by a constable under an execution, where plaintiff claimed title by virtue of a sale from the execution defendant, the burden of proof, which was upon him to establish a bona fide sale, was not shifted by mere proof of notice of claim to the constable at the time of levy.—Id.

24. In an action in claim and delivery for property wrongfully seized by a constable under execution, where plaintiff alleged that he was the owner of the goods when seized, which the answer denied, the burden was upon plaintiff to prove the ownership or right of possession, and in relying upon a sale from the execution defendant it was incumbent upon him to show a valid sale.—Id.

25. A complaint alleging that defendant at divers times prior to and within one year before a certain date wrongfully and without plaintiff's consent took certain cattle from his possession; "that on the 10th day of March, 1902, plaintiff was, ever since has been, and now is the owner of the following described cattle * * * of the value of $1,200;" that before the commencement of the action, on March 10, 1902, plaintiff demanded of defendant possession of the cattle; and that defendant still unlawfully withholds them from plaintiff's possession—was good as against a general demurer.—McGregor v. Lang, 32 Mont. 568; 81 Pac. 343.

26. In an action in claim and delivery for furniture of plaintiff seized by defendant under an alleged lien for rent, it was only incumbent on plaintiff, in making her case in chief, to prove ownership of the furniture, and the taking and detention by defendants against her consent, the burden of justification being on defendants, and, after introduction of their evidence, plaintiff might in rebuttal show the eviction, and that no rent was due.—Osmers v. Furey, 32 Mont. 581; 81 Pac. 345.

27. In ascertaining the market value of personalty in claim and delivery the cost price, though not conclusive evidence, may be considered as one fact tending to establish it.—Id.

V. DAMAGES, 28-30.

28. In an action in the nature of replevin to recover certain mules and harness, a party is entitled to the property, and the value of its use, from the time he was deprived of it to the day of trial. (Affirmed, Gans v Woolfolk, 2 Mont. 465.)—Morgan v. Reynolds, 1 Mont. 163.

29. In an action in the nature of replevin to recover mules and harness, a party is entitled to the property, and the value of its use, from the time he was deprived of it to the day of trial. Legal interest on their value during the period of detention is not the measure of damages.—Id.

30. The measure of damages for unlawful detention of property is its rental value for the time it is so detained.—Chauvin v. Valiton, 8 Mont. 451; 20 Pac. 658.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW, 31-45.

31. Where an answer in replevin denies the ownership and right of possession, and sets up title and right of possession in defendant, and claims damages, on a general verdict for defendant on these issues, an order for return and judgment for costs follows as a matter of course, either under the statute or at common law.—Anderson v. O'Laughlin, 1 Mont. 81.

32. In replevin the verdict was, "We, the jury in the above cause, find for the defendant." *Held*, sufficient, and that a judgment for costs and the return of the property would follow.—Id.

33. Judgment for costs and a return of the property is properly rendered against a plaintiff, who brings an action for the recovery of personal property and dismisses after he has obtained the same by means of process.—Dahler v. Steele, 1 Mont. 206.

34. The sureties in an undertaking on replevin must return the property after a judgment has been rendered for such return, if it is in their power to do so; and they are entitled to the property, if they pay the judgment in the suit in which the property has been attached.—Caldwell v. Gans, 1 Mont. 570.

35. In an action of claim and delivery, where there is an issue as to the title and right of possession, and a finding in favor of defendant, judgment for the return of the property follows as a matter of course, even if the complaint does not contain a formal prayer for the return thereof.—Lavelle v. Lowry, 5 Mont. 498; 6 Pac. 337.

36. In an action to recover possession of personal property, with damages for wrongful detention, where no special damage is alleged, it is prejudicial error to instruct that the measure of damages is "the reasonable value of the use or hire of the property while in possession of the defendant from the time of the demand," without also directing attention to the consideration of whether the plaintiff could have kept such property constantly employed at a given rate, either by hiring to others or by employment at home, or whether the gross earnings would have been diminished by expenses of keeping.—Brunell v. Cook, 13 Mont. 497; 34 Pac. 1015.

37. Where, in replevin, on a verdict, "We, the jury, find for defendant," a judgment for defendant is rendered for a return of the property, plaintiff can not complain that the verdict was not in the alternative.—Wheeler v. Jones, 16 Mont. 87; 40 Pac. 77.

38. In replevin for certain property, including two horses, if evidence is introduced proving the ownership of the two horses in plaintiff, she can recover them or their value, even though the rest of the property in question was found to have been transferred to her in bad faith.—Collier v. Fitzpatrick, 19 Mont. 562; 48 Pac. 1103.

39. Under Code Civ. Proc., § 1103, providing that in replevin, if the property has not been delivered to plaintiff, or if defendant claimed a return, the jury, if their verdict be for plaintiff, or if, being in favor of defendant, they find he is entitled to a return, shall find the value of the property and assess the damages, the verdict need not be in the alternative.—Hynes v. Barnes, 30 Mont. 25; 75 Pac. 523.

40. Code Civ. Proc., § 1193, provides that in an action to recover personal property, judg-

ment for plaintiff may be for possession, or the value in case a delivery can not be had, and damages for the detention, and that judgment for defendant may be for a return of the property, if it has been reclaimed by plaintiff, or for the value in case a return can not be had. Sec. 1190 requires the clerk to enter judgment in conformity to the verdict. *Held*, that the judgment in an action of replevin must be in the alternative.—Id.

41. In an action in claim and delivery for property wrongfully seized under execution, an instruction authorizing a verdict for defendant unless the sale under which plaintiff claimed was followed by "an actual and continued change of possession" was improperly modified by striking out the words "and continued."—Gallick v. Bordeaux, 31 Mont. 328; 78 Pac. 583.

42. Where, in replevin to recover certain cattle, both parties claimed under the same seller, a requested instruction that plaintiff, whose purchase was prior in time, was not entitled to recover any of the cattle except such as had been delivered and "paid for by him," was properly refused, plaintiff not being required to pay for the cattle in order to make the transaction valid.—Ettien v. Dunn, 32 Mont. 311; 80 Pac. 369.

43. A general verdict for plaintiff in claim and delivery implies a finding on each material issue, and it is not necessary that there be an express finding that plaintiff was the owner or entitled to possession of the property at the time of the commencement of the action.—McGregor v. Lang, 32 Mont. 568; 81 Pac. 343.

44. In an action for claim and delivery, the jury found by general verdict that plaintiff "is the owner and entitled to the possession of the following described animals: 26 steers branded ‖ on left side, and fish or dove tail earmarks; * * * 10 heifers branded ‖ on left side, and fish or dove tail earmarks." The judgment ordered that plaintiff have and recover the property described in the verdict. *Held*, that the judgment was not so vague and uncertain in the description of the property as to render it impossible to identify the animals and enable defendant to make a return thereof.—Id.

45. The amount plaintiff in claim and delivery may recover, in case redelivery can not be had, is the market value of the property when the taking occurred or the wrongful detention began.—Osmers v. Furey, 32 Mont. 581; 81 Pac. 345.

VII. LIABILITIES ON BONDS AND UNDERTAKINGS, 46-60.

46. The sureties in an undertaking in replevin are released from their obligation to return the property, if it is taken by due process of law, without their fault, and held and sold, so that a return is rendered impossible.—Caldwell v. Gans, 1 Mont. 570.

47. In replevin, the law in regard to the judgment which a party may recover, does not enter into and form a part of the contract which sureties enter into in an undertaking in such action, so as to vary the same; the sureties are bound by the contract they sign, and their liability can not be extended or made less by any such statute. (See 22 Wall. 208.—Lomme v. Sweeney, 1 Mont. 584.

48. Where a party has been directed by the judgment to return a bulky and cumbersome article he is not required to tender it to the adverse party wherever found, like money, and, after such adverse party refuses to designate a place for delivery, the party seeking to make the return has the right to designate such place of delivery, with a reasonable regard for the convenience of the other party, and there deliver the goods.—Gans v. Woolfolk, 2 Mont. 458.

49. Where one of the conditions of the undertaking in replevin is for the prosecution of the action, a dismissal of the action by the plaintiff is a breach of the condition, and entitles the judgment creditor to sue upon the bond for such damages as he may be entitled to.—Parrott v. Scott, 6 Mont. 340; 12 Pac. 763.

50. It is not competent for the sureties, in a replevin undertaking, to prove that the owner had no attachable interest in the property, or that the attaching creditor was not injured by their failure to return the same.—Caldwell v. Gans, 1 Mont. 570.

51. L commenced an action against K, procured the issuance of a writ of attachment, and the sheriff, under such writ, levied upon certain property belonging to K. Afterwards W brought an action of replevin against the sheriff and got possession of said property. In this latter action S entered into an undertaking to the sheriff conditioned for a return of the property or payment of judgment. L recovered judgment against K, and the sheriff recovered judgment against W. There was no assignment of the undertaking by the sheriff, but it was *held*, that L had a right to bring an action on the bond in his own name and that he was a proper party plaintiff. (See 22 Wall. 208.)—Lomme v. Sweeney, 1 Mont. 584.

52. It is not necessary that a plaintiff should have a writ retorno habendo issued and returned unsatisfied before he can bring an action on the replevin bond.—Id.

53. It is a good defense in an action on a replevin bond to recover the value of property replevined in default of its return, to show that the plaintiff had taken such property into his possession by other process prior to judgment in the replevin suit. A plaintiff can not have the property and a judgment against the sureties for its value at the same time.—Demers v. Clemens, 2 Mont. 385.

54. The failure of a judgment creditor to execute to the sheriff, who is about to levy an execution on the judgment, the indemnifying bond provided for by Rev. Stat., p. 99, § 309, does not prevent him from suing on the bond given by claimants and their sureties who replevied the property levied upon by the sheriff.—Parrott v. Scott, 6 Mont. 340; 12 Pac. 763.

55. Where the property of a judgment debtor, levied upon to satisfy the judgment, is replevied from the sheriff by third parties, who fail to prosecute the replevin action, in an action by the judgment creditor on the undertaking in replevin, his right to recover rests upon his right to have the replevied property applied to the payment of the judgment in the original action; and, when the complaint alleges that an execution had issued on the judgment, but does not allege that the judgment has not been satisfied, it is fatally defective.—Id.

56. In an action for breach of a replevin bond, conditioned to prosecute the action in replevin, it is not necessary to allege that the sheriff, defendant in replevin, did not consent to the dismissal of the action, and waive all right or claim to the return of the property and damages.—Id.

57. The complaint is defective when it fails to alege that the undertaking was delivered.—Id.

58. It is not necessary that the complaint in a suit for breach of a replevin bond should allege the assignment of the undertaking, by the officer in whose favor it is made, to the plaintiff.—Id.

59. It is not necessary to allege in the com-

plaint, in a suit for breach of a replevin bond, the assignment of such bond, by the officer in whose favor it is made, to the plaintiff.—Hedderick v. Pontet, 6 Mont. 345; 12 Pac. 765.

60. The failure of plaintiff in a replevin suit to file a redelivery bond with the clerk of the court, does not defeat the right to recover thereon.—Id.

REVIEW.

1. An order of the district court, which it is without jurisdiction to make, though in a proceeding from which an appeal lies, is subject to review and annulment by writ of review.—State v. District Court, 18 Mont. 481; 46 Pac. 259.

2. Where an order is made by the district court, without jurisdiction, requiring a special administrator to pay out money of the estate, such administrator is "a party beneficially interested," within the meaning of Code Civ. Proc., § 1942, authorjzing such party to obtain a writ of review.—Id.

3. Where a writ of review is taken to an order of the district court, which afterwards amends the order, and the original order and the amendment are both in the record, the several orders may be considered together.—State v. District Court, 25 Mont. 33; 63 Pac. 717.

ROBBERY.

I. Indictment and Information, 1-6.

II. Evidence, 7-11.

III. Trial, 12-16.

I. INDICTMENT AND INFORMATION, 1-6.

1. An insufficient description of money alleged to have been stolen, in an indictment for robbery, is cured, if the indictment recites that a more particular description of the money is unknown to the grand jury.—Territory v. Bell, 5 Mont. 562; 6 Pac. 60.

2. Pen. Code, § 390, defines robbery as the felonious taking of personal property in the possession of another, from his person or immediate presence, or against his will, "by means of force or fear." Sec. 391 defines the fear necessary. *Held*, that an information which charged the robbery to have been committed by "force and intimidation," and by putting one C in fear, was sufficient, though it did not define the kind of fear by which the taking was accomplished.—State v. Clancy, 20 Mont. 498; 52 Pac. 267.

3. Pen. Code, § 2109, providing that on a trial for larceny of money, bank notes, certificates of stock, etc., the allegations of the indictment are sustained if defendant be proved to have stolen any money, etc., though the particular species thereof be not proved, is also applicable to a prosecution for robbery, except that the taking must be by force or fear.—State v. Rodgers, 21 Mont. 143; 53 Pac. 97.

4. An information for robbery sufficiently alleged the time when the property in question was taken from the owner, where it alleged the assault to have been made on a certain day specified, and, after describing the property as then and there in the possession of prosecutor, charged that defendant did feloniously steal, take and carry away said property, "with the intent then and there to deprive" prosecutor thereof.—State v. Gill, 21 Mont. 151; 53 Pac. 184.

5. An allegation, in an information for robbery, that defendant on prosecutor made an assault, "and the said" prosecutor "in bodily fear and danger of his life then and there feloniously did put," was a sufficient allegation of fear, under Pen. Code, § 391, which specifies "fear of a felonious injury to person or to property" as a necessary element of such offense.—Id.

6. The intent to deprive the owner of the property in question was sufficienty alleged in an information for robbery which, after describing the property as being owned by prosecutor, charged that such property was stolen "with the intent then and there to deprive" prosecutor "thereof."—Id.

II. EVIDENCE, 7-11.

7. The only evidence for defendant was his own testimony that he bought the property in a gambling house, of one who said he needed the money to leave the country, and who, after selling the watch and a knife, told defendant he had better take the key, as he might hear of someone looking for them. Defendant testified that several, whom he did not know, were present when he bought the property; but no other evidence was offered in his behalf. *Held*, that a conviction would not be disturbed for insufficiency of the evidence.—State v. Sullivan, 9 Mont. 174; 22 Pac. 1088.

8. On a trial for robbery it appeared that the prosecuting witness A, and a friend were in a saloon; that A had $200 in his pocketbook, and offered a $10 bill in payment for liquor. A testified that defendant and several others threw him on the floor of the saloon and stole his money; that he could not say which one of the assailants took the money, because they held him by the throat and he could not see; that while he was on the floor defendant and two or three others were on top of him. Defendant, and those indicted with him, testified that A was the assaulting party, and denied the robbery. All the circumstances tended to corroborate the evidence for the state. *Held*, that a request for a new trial, on the ground that the conviction was against the evidence, was properly refused.—State v. Roach, 11 Mont. 227; 28 Pac. 260.

9. Where defendant, while engaged in attempting to rob the safe of a train, robbed the mail clerk, on a prosecution for robbery of the mail clerk it was proper to admit evidence as to all the details of the attempted robbery of the train; and a conspiracy therefor.—State v. Howard, 30 Mont. 518; 77 Pac. 50.

10. On a prosecution for robbery the state introduced a letter written by defendant which stated that, while the writer had been informed that the person addressed had caused the writer's arrest, no one would ever have any occasion to say that the writer "ditched" anyone. *Held*, that the letter was irrelevant.—Id.

11. On a prosecution for robbery, the fact that the money taken was in prosecutor's possession is sufficient evidence of ownership to sustain a conviction.—Id.

III. TRIAL, 12-16.

12. Evidence that prosecutor was knocked down and robbed of a watch, a key and money; that the watch and key, and a larger sum of money, were found on defendant's person soon afterwards; that the watch was in his hip pocket; that he made no statement respecting the property when he was arrested and the property found; and that defendant was about the size of the assailant—is sufficient to submit to the jury as to defendant's guilt.—State v. Sullivan, 9 Mont. 174; 22 Pac. 1088.

13. Under Comp. Stat., p. 495, § 491, providing that "the court shall decide all matters of law which may arise during the trial, but shall not charge the jury as to questions of fact," it is error to charge, in a prosecution for robbery, that the possession of goods, recently stolen, "when unexplained, or not satisfactorily accounted for, by defendant, tends strongly to establish the guilt of a defendant found in possession of the goods."—Id.

14. An instruction defining robbery, which omits the word "feloniously" as to the taking of the property, is prejudicial error, which is not cured by a subsequent instruction: "It is not necessary, to find a verdict. * * * that the money or property was taken from the person of another, but, if you find that the money or property was taken feloniously from the immediate presence of another," etc.—State v. Oliver, 20 Mont. 318; 50 Pac. 1018.

15. In a prosecution for robbery, an instruction that, since fear was not charged in the information, the state must prove beyond a reasonable doubt that the crime was committed by force, is not erroneous for failure to state that a felonious intent is necessary, where robbery has been clearly defined in a previous instruction.—State v. Rodgers, 21 Mont. 143; 53 Pac. 97.

16. Under Pol. Code, § 390, defining robbery as the felonious taking of personal property in the possession of another from his person or immediate presence, and against his will, "accomplished" by means of force or fear, an instruction defining robbery in the same terms, except using the word "accompanied," is reversible error.—State v. Johnson, 26 Mont. 9; 66 Pac. 290.

SALES.

I. Requisites and Validity of Contract, 1-8.
II. Construction of Contract, 9-12.
III. Modification or Rescission of Contract, 13-22.
IV. Performance of Contract, 23-29.
V. Operation and Effect, 30-36.
VI. Warranties, 37-41.
VII. Remedies of Seller, 42-47.
VIII. Remedies of Buyer, 48-52.
IX. Conditional Sales, 53-64.

I. REQUISITES AND VALIDITY, 1-8.

1. One who buys and receives, from the possessor, quartz mill machinery, the title to which is in litigation, and executes a note in payment, commits a fraud on the vendor by delivering possession and executing a conveyance of his rights to another claiming the same on demand, without any legal compulsion, and can not afterwards plead as a defense, in an action brought on the note, the false representations of the vendor in respect to the title to the property.—First Nat'l Bank v. How, 1 Mont. 604.

2. A verdict in an action to recover personal property and damages for its retention, that the sale was not induced by fraudulent representations as to the purchaser's financial condition, is supported by evidence that, at the time of such representations and sale, the seller, after full examination, and with full knowledge of the buyer's financial condition, compromised his claims against the buyer at 50 cents on the dollar, and agreed to extend future credit.—Ellison v. Barker, 14 Mont. 96; 35 Pac. 722.

3. In replevin of goods, on rescission of a sale, against B, doing business as B & Co., a bank which had attached B's stock, and the sheriff, it appeared that the reports of the commercial agencies contained statements of the financial standing of B's firm, but omitted to mention a note of $60,000 owing by B to such bank; that in a letter by B, in the firm's name, he referred plaintiff to the reports of the commercial agencies, and said they were the reports of the firm; and that plaintiff relied on such statements in selling B goods. *Held*, that a judgment for plaintiff was sustained by the facts, though the president of such bank, who, in such reports, was not stated to be a member of the firm, was in fact a member, and was to take care of such note.—Farwell v. Boyce, 17 Mont. 83; 42 Pac. 98.

4. In replevin, on a rescission of a sale of the property, it was not error to admit in evidence old commercial reports, for the purpose of showing that a large indebtedness of defendant had always been omitted in his statements, in connection with evidence that in the later reports he had stated that there was no change in the financial condition of his firm.—Id.

5. A proposal to sell 10 cars of potatoes for winter use is not accepted by an order of 8 cars for winter storage.—Brophy v. Provision Co., 31 Mont. 279; 78 Pac. 493.

6. A proposal to sell 10 cars of potatoes is not accepted by an order for potatoes which requires the cars to average 30,000 pounds, but such condition constitutes a variance from the proposal.—Id.

7. An order for "choice" potatoes is not an acceptance of a proposal to sell "nice white potatoes (Peerless stock.)"—Id.

8. Where a proposal offered for sale 10 cars of "nice white potatoes (Peerless stock)," an order of purchase requiring the seller to select the stock and send no small ones constituted a variation from the proposal, and was not an acceptance.—Id.

II. CONSTRUCTION OF CONTRACT, 9-12.

9. On the sale of a horse, an agreement that if it should win a certain race, for which the buyer might or might not enter it, at his option, the seller was to get an extra sum, does not entitle the seller to retain possession until that contingency is determined.—Murray v. Larabie, 8 Mont. 208; 19 Pac. 574.

10. Under a contract for the sale of a stock of goods providing that the buyer is to pay "75% of the present wholesale cost at the present time, with freight added at present rates and classification," the buyer must pay the entire freight, not 75% of it only.—Morris v. Edwards, 10 Mont. 298; 25 Pac. 1030.

11. The words, "Don't sell we to exchange any goods that don't sell; credit for same," in a contract of sale, are mercantile terms; and, in construing a contract in which they appear, evidence of their meaning may be received, under Comp. Stat., p. 225, § 633, providing that, when terms have a technical or otherwise peculiar signification, evidence of such signification is admissible.—Newell v. Nicholson, 17 Mont. 389; 43 Pac. 180.

12. Under a complaint for breach of an express contract, in writing, whereby plaintiff agreed to deliver to defendant 125,000 pounds of barley, to be paid for on completion of delivery, the breach being failure to pay, recovery can not be had on proof of delivery of 17,805 pounds, without allegation or proof of an excuse for not furnishing the balance.—Stotesbury v. Power, 27 Mont. 469; 71 Pac. 675.

III. MODIFICATION OR RESCISSION OF CONTRACT, 13-22.

13. Plaintiff bought from defendant a one-fourth interest in a business concern for $2,500, with an option for rescission after one year. The concern was merged in a new company by consent of the parties, and corporate stock of the new company, at the par value of $1 per share, was issued to plaintiff, defendant, and other owners, in proportion to the money respectively invested. In an action to compel a rescission of the contract, the case was tried on the theory that the stock issued to the owners represented their title in the property. *Held*, that a tender of 2,500 shares by plaintiff was all that was necessary to put defendant in statu quo.—Schultz v. O'Rourke, 18 Mont. 418: 45 Pac. 634.

14. Where one purchased stock in a business corporation under an option for rescission after one year, a tender of the stock made before the expiration of the year, is premature.—Id.

15. Where one has purchased 2,500 shares of stock and seeks to rescind the contract, it is no defense to the action that he has sold a part of the identical shares to a third person, since other shares of equal value could be returned in their stead.—Id.

16. A wholesale house sold goods to a customer through its traveling salesman, who made an absolute and unconditional contract of sale. *Held*, that this was not modified by the fact that invoices thereafter sent provided: "All bills become due when parties suspend payment, assign or sell out. All goods dated ahead are merely consigned and subject to replevin until dating has expired. Retention of the goods will be considered acceptance of all the terms thereon."—the purchaser not assenting to these provisions.—Brittain v. Birkenfeld, 20 Mont. 347; 51 Pac. 263.

17. The fact that a seller, after receiving a report from a commercial agency concerning a buyer's financial responsibility, based on statements of the buyer to the agency, received other information affecting the standing of the buyer, raises no presumption of law that, in afterwards shipping the goods, the seller did not rely on the commercial agency's report.—Richardson v. Goodkind, 22 Mont. 462; 56 Pac. 1079.

18. False representations by the buyer as to his financial responsibility, which induced a sale, entitle the seller to rescind, though the buyer intended to pay for the goods, and was solvent when such representations were made.—Id.

19. A seller applied to a commercial agency for the buyer's rating, and was furnished with a report based on false statements made to the agency by the buyer. Two months later the seller delivered the goods without making further inquiry, which, if made, would have disclosed the buyer's condition. *Held*, that whether the seller was negligent, so as to preclude him from rescinding the sale, as against the buyer's assignee for the benefit of creditors, was for the jury.—Id.

20. Where, in an action to rescind a sale for the buyer's false financial statements to a commercial agency, the proof shows that the report of such statements was the only one ever communicated to the seller, an instruction that, if the seller subsequently obtained other information, changing or affecting the buyer's standing, there was no such reliance on the statement made by the buyer to the agency as would authorize a rescission, was properly refused.—Id.

21. A seller, three days after shipping goods on the positive assurance of the buyer as to his solvency, received a report that the buyer was generally believed to be heavily in debt and to owe more than he stated; but, still relying on his statement, the seller permitted goods to be delivered. *Held*, that failure to stop the goods in transit, or to retake them from the buyer, was not a waiver of the right to rescind, and to retake them from the buyer's assignee.—McDonald v. Goodkind, 22 Mont. 491; 56 Pac. 967.

22. Where a contract provided that, if the purchaser of property should become dissatisfied, she should be entitled to a return of the purchase price on surrender of the property sold, the fact that, pending suit to enforce such agreement, she assigned the contract, is immaterial, since Code Civ. Proc., § 22, authorizes the continuance of a suit in the name of the original party, or substitution of the transferee, where plaintiff's claim is transferred pendente lite.—O'Rourke v. Schultz, 23 Mont. 285; 68 Pac. 712.

IV. PERFORMANCE OF CONTRACT, 23-29.

23. Where plaintiff consigned potatoes to defendants by bill of lading, and defendants presented the bill to the carrier, received the potatoes, and afterwards admitted an indebtedness for them, the sale and delivery are complete.—Herbert v. Winters, 15 Mont. 552; 39 Pac. 906.

24. Ewe sheep, which are pregnant in October and November, are not in a healthy condition, within a contract of sale of ewes which requires them to be "in healthy condition at the time of delivery."—Olson v. Live Stock Ass'n, 18 Mont. 392; 45 Pac. 549.

25. A contract to ship goods by a certain railroad on or about a certain date is complied with by putting the goods on board a car on such railroad on such date, though the car does not leave until a later day.—Clark v. Lindsay, 19 Mont. 1; 47 Pac. 102.

26. A cashier, personally indebted to the bank, at the request of a director, and to secure his indebtedness, executed a bill of sale of property in another town. The bill of sale was deposited in the vault by the cashier, with the knowledge of the director, and a clerk notified of its whereabouts. No other officers of the bank were present, or cognizant of the transaction. A few hours later the bank closed its doors, insolvent. *Held*, that there was a delivery and acceptance of the property as security sufficient to pass title to the bank.—Street v. Conrow, 19 Mont. 104; 47 Pac. 640.

27. In an action against a constable and the sureties on his bond to recover property seized by him under an execution, and damages, a plea of justification under the writ authorizes evidence that the alleged sale of the property seized, prior to the seizure, was constructively fraudulent because of a want of immediate delivery followed by a continued change of possession, or that the sale was actually fraudulent and designed to hinder the creditors of the seller, or that the sale was designed to operate as security for money advanced by the buyer.—Gallick v. Bordeaux, 22 Mont. 470; 56 Pac. 961.

28. R sold personal property to C and took a mortgage for the purchase price. After C had paid a part of the purchase price, he, with the consent of R, sold his interest in the property to H, who agreed to pay R the balance of the price agreed by C to be paid to R. *Held*, that it was not necessary that R should have possession to convey title to H.—Reynolds v. Fitzpatrick, 23 Mont. 52; 57 Pac. 452.

29. Defendant ordered of plaintiff lime which he wished to use September 6. Plaintiff did not place the lime in the car until Septem-

ber 12, and after he had loaded it he received a letter from defendant countermanding the order. He could have recalled the shipment any time within 24 hours after receiving such letter, but did not. Plaintiff did not send defendant the bill of lading, having kept it, as he testified, until he could "see what was going to happen." *Held*, that the lime was not delivered, and defendant was not under any obligation to accept it on its arrival.—McKelvey v. Perham, 31 Mont. 602; 79 Pac. 253.

V. OPERATION AND EFFECT, 30-36.

30. The mere shipment of goods, in pursuance of a contract between the consignor and the consignee, whereby the former was to pay the freight, and the latter, after he had sold the goods, was to credit the proceeds to the account of the consignor, does not vest the title of the property shipped in the consignee, in the absence of a bill of lading or notice of the shipment to him.—First Nat'l Bank v. McAndrews, 5 Mont. 325; 5 Pac. 879.

31. The fact that the vendee of a horse and wagon employed the brother of the vendor to drive it and subsequently, for a short time, employed the vendor, is not conclusive evidence that the possession of the purchaser was not continuous.—O'Gara v. Lowry, 5 Mont. 427; 5 Pac. 583.

32. Delivery of goods by consignor to a common carrier prima facie vests the right to the immediate possession thereof in the consignee.—Walsh v. Blakeley, 6 Mont. 194; 9 Pac. 809.

33. A mining company agreed with a bank, in consideration of advances, to ship to the bank its products of bullion, which were to be delivered to certain common carriers as the agents of the bank; the proceeds thereof, upon sale being made, to be credited to the company on account. *Held*, that a delivery to the carrier in accordance with this agreement vested the title to the property in the consignee, and such property, while in the hands of the carrier, was not subject to attachment at the instance of creditors of the consignor.—First Nat'l Bank v. McAndrews, 7 Mont. 150; 14 Pac. 763.

33a. In an action for the price of goods sold, the defendants showed that defendant ordered goods from plaintiff on board cars at plaintiff's place of business. Plaintiff shipped the goods, taking the bill of lading in its own name, which it sent to a bank in defendant's town, attached to a sight draft on defendant for collection. Defendant refused to accept the goods. *Held*, that the evidence was insufficient to overcome the presumption that plaintiff retained title to the goods after shipment, arising from its taking the bill of lading in its own name.—William M. Co. v. Fussy, 15 Mont. 511; 39 Pac. 738.

34. Plaintiff, by contract in writing, purchased a flock of lambs, and branded each with his own brand, and at the same time entered into an agreement by which the vendor was to care for them, as plaintiff's agent. Thereafter the vendor kept the lambs separate from others, and marketed the wool separately. *Held*, that there was a sufficient delivery and parting with the ownership, and that the contract was valid as to attaching creditors of the vendor.—Cady v. Zimmerman, 20 Mont. 225; 50 Pac. 553.

35. Where plaintiff claimed title to one-half the proceeds of all ore in certain bins, under a bill of sale purporting to convey one-half the ore in the bins at the time the bill was executed, evidence that, after such execution, additional ore was placed in the bins, was admissible to defeat plaintiff's claim to one-half the proceeds of all ore in the bins.—Yank v. Bordeaux, 29 Mont. 74; 74 Pac. 77.

36. Under Civ. Code, § 1540, testimony of S that he sold 32 head of cattle to M at a certain amount per head; that he bargained to sell him all of a certain brand, and told him there were about 56, but that the person who went out for them gathered only 32, and that was all he sold to M; and testimony of M that S told him he had 56 head of cattle to sell him, and he said he would buy them, and S gave him a bill of sale for 56 head to be delivered in the spring; that 32 head were afterwards delivered, and he then gave S credit therefor; and that it was the understanding that no credit should be given or money paid until they were delivered,—is insufficient to show that the agreement amounted to an actual sale, wherein title passed at once, instead of being merely an executory contract of sale, so as to make M indebted to S on account thereof, when, prior to the delivery, he promised S to retain money from the purchase price and pay it to A, to whom S was indebted.—Adlam v. McKnight, 32 Mont. 349; 80 Pac. 613.

VI. WARRANTIES, 37-41.

37. In an action for the price of property which, at the time of the sale, was not in the possession of the vendor, the defense of failure of title is not available to the defendant, in the absence of fraud or deceit, because of an affirmation by the vendor that he was the owner of the property sold. An express warranty must be shown.—Budd v. Power, 8 Mont. 380; 20 Pac. 820.

38. Cattle running on the range, which is common pasturage for everybody, are in the actual possession of no one, and the constructive possession accompanies the title.—Budd v. Power, 9 Mont. 99; 22 Pac. 499.

39. Plaintiff saw some wheat in defendant's store, and said that if he knew it was spring wheat he would buy it for seed. He was told by the clerk that they were selling it for chicken feed but they could find out if it was spring wheat. One of the proprietors then said that he would write and inquire. Plaintiff asked once or twice if they had heard about the wheat, and was told they had not. Again he inquired and the clerk said "We have. It is spring wheat." *Held*, that the representations of the clerk did not amount to an express warranty that it was spring wheat, and that the rule of caveat emptor applied.—Kircher v. Conrad, 9 Mont. 191; 23 Pac. 74.

40. No form of words is essential to constitute an express warranty in the sale of chattels. —Id.

41. The clerk of a storekeeper, in charge of his principal's business, has power under his employment to make an express warranty of the quality of grain sold by him.—Id

VII. REMEDIES OF SELLER, 42-47.

42. In an action on an account for goods sold and delivered, the denial of the indebtedness raises no material issue.—Higgins v. Germaine, 1 Mont. 230.

43. Unless it is shown that the seller had knowledge of the insolvency of the buyer, he may not exercise the right of stoppage in transitu.—Walsh v. Blakely, 6 Mont. 194; 9 Pac. 809.

44. When the carrier takes possession from the seller the transit begins; when it divests itself of possession as a carrier to the buyer the transit ends; and the stoppage by the seller, to be effective, must occur between these two points.—Id.

45. In an action by a vendor on a note for the price of cattle, an answer that plaintiff falsely represented that he was the owner of the cattle is not sufficient to sustain the charge of frand or deceit in making the sale.—Budd v. Power, 8 Mont. 380; 20 Pac. 820.

45a. In assumpsit on contract of sale and purchase, the action not being for money had and received by defendant through the sale of goods unlawfully taken from plaintiff, it is not necessary to allege or prove a sale of the converted property.—Galvin v. Mining Co., 14 Mont. 508; 37 Pac. 366.

45b. A complaint for the price of goods, which fails to allege indebtedness of defendant or delivery by plaintiff, is fatally defective.—Herbst Imp. Co. v. Hogan, 16 Mont. 384; 41 Pac. 135.

45c. A complaint alleging indebtedness on a balance for goods sold and delivered to defendant in a given month, and assignment of such account to plaintiff, and that defendant has not paid the same, or any part thereof, though due and payable, is good on general demurrer.—Id.

46. Where, in an action for breach of contract to purchase certain milk, the complaint alleged that plaintiff was then and there able, ready and willing, and offered to perform, all the conditions of the contract to be performed by him during the term of the contract, and was and would be during the entire continuance of the contract able, ready and willing to perform the same, and had offered so to do, etc., it was not objectionable for failure to allege in terms that plaintiff had "fully complied with all the terms and conditions of the contract by him to be kept and performed."—Brazell v. Cohn, 32 Mont. 556; 81 Pac. 339.

47. In an action for breach of a contract to purchase all of the milk of plaintiff and his assignor for a period of five years from November, 1899, defendants having repudiated the contract, plaintiff was entited to recover the difference between the market and the contract price of milk he would have produced during the contract period, regardless of the fact that after defendants' breach plaintiff disposed of his milk business, and was therefore unable thereafter to perform the contract on his part.—Id.

VIII. REMEDIES OF BUYER, 48-52.

48. In an action for damages for breach of waranty of sale of chattels, evidence as to what the vendee subsequently received for a part of the property is inadmissible.—Hogan v. Shuart, 11 Mont. 498; 28 Pac. 969.

49. The measure of damages for a breach of warranty on the sale of chattels is the difference between the actual value of the article sold and the value of the same article if it had been such as the vendor warranted it to be.—Id.

50. In an action for breach of warranty as to the age of sheep sold, an instruction that if defendant knew the ages, and had means of knowledge, the jury should consider these facts, with all other facts in evidence, in determining whether he stated such ages as his opinion or as facts, is proper.—Id.

50a. Where the seller agrees to refund the price if the purchaser reconveys the property sold, in case the latter is dissatisfied after a certain time, and the seller after that time declares that he will not receive a reconveyance, a tender of the reconveyance is not necessary before suing to recover back the price.—Shultz v. O'Rourke, 18 Mont. 418; 45 Pac. 634.

51. In an action for the price of a stove, the defense of which is based on a breach of warranty, the jury should be instructed that mere statements by the salesman made at the time of the sale, and by which was expressed a favorable opinion of the stove, or by which the salesman indulged in an expression of opinion concerning the merits of the stove, does not constitute a warranty, and is for the jury to determine from all that was said by the parties at the time of the sale whether the statement of the salesman about the stove was made as one of fact or of mere opinion.—Lander v. Sheehan, 32 Mont. 25; 79 Pac. 406.

52. Where the defense in an action for the price of a stove is framed to the measure of damages for breach of warranty of the fitness of the article sold, as provided by Civ. Code, § 4314, it is misleading to instruct the jury on the measure of damages, under § 4313, for the breach of warranty of the quality of the article sold.—Id.

IX. CONDITIONAL SALES, 53-64.

53. A sale and delivery of chattels, on condition that title shall not pass until payment of the purchase price, vest no title in the purchaser or a bona fide purchaser from him until performance of the condition.—Heinbockle v. Zugbaum, 5 Mont. 344; 5 Pac. 897.

54. Where property is delivered to the purchaser on condition that the title shall remain in the seller until the entire purchase price is paid, the property is not subject to attachment for the purchaser's debts.—Id.

55. A sale and delivery on condition that no title shall pass until payment of the purchase price vests no title in the purchaser or a bona fide purchaser from him until performance of the condition, and the condition is not waived by the seller's merely taking the purchaser's notes for the price.—Id.

56. If the seller, at the time of the delivery of the property, takes a note from the purchaser for the purchase price, and takes a mortgage on other property to secure the note, then the sale is an absolute sale, notwithstanding an agreement between the parties that no title shall pass until the note was paid.—Silver Bow M. & M. Co. v. Lowry, 6 Mont. 288; 12 Pac. 652.

57. In an action of claim and delivery for goods alleged by plaintiff to have been sold on condition that the title should not pass until the purchase money was paid in full, but claimed by defendant to have been sold absolutely, where it appears that the property was delivered to the purchaser, that he was charged up with the purchase price on plaintiff's books, that he gave to plaintiff a note for the amount of the purchase money and a mortgage on other chatels than those purchased to secure the note, and that the cattle when levied on under writs of attachment against the purchaser, were found in his possession,—it will be *held*, that the sale was absolute and that the property was subject to attachment for the purchaser's debts.—Id.

58. Where a party buys cattle, and has the bill of sale made out in his own name, and leases the cattle to another at a certain rent, with the understanding that the tenants might purchase the same at any time during the hiring, at a certain price, by paying the difference between the rent paid and the price, title meanwhile to remain in vendor, the transaction is valid as a lease with privilege of purchase, and the chattels leased are not liable for the debts of the lessee.—Miles v. Edsall, 7 Mont. 185; 14 Pac. 701.

58a. Where a conditional vendee of property, after part performance of the contract,

transfers his interest, the conditional vendor agreeing with the transferee that payment of the balance due shall vest the title in him, and the vendor and vendee, by fraudulently representing that the balance due is greater than it really is, procure that amount to be inserted in the contract between the vendor and transferee, and the vendor, on failure of the transferee to pay the amount specified in the contract, replevies the goods, an answer alleging the fraud and that the balance actually due has been paid sets up a good defense.—Sanford v. Gates, 18 Mont. 398; 45 Pac. 559.

59. In an action to recover goods to which plaintiff had reserved title on a conditional sale, where there was no evidence authorizing it, it was prejudicial error to charge that every sale, unless accompanied by an immediate delivery, and followed by an actual change of possession, was conclusive evidence of fraud, as against the creditors or subsequent purchasers. —Goodkind v. Gilliam, 19 Mont. 385; 48 Pac. 548.

60. The seller of goods is not estopped as against a creditor of the buyer from claiming title to them, on a conditional sale, by the fact that he accepted a chattel mortgage on them from the buyer in possession, foreclosed it on default, as shown by the records, and can deliver to the buyer under the original contract; the validity of the conditional sale and the mortgage being unquestioned.—Id.

61. It is a conditional sale, and not an absolute sale with retention of lien, where the contract provides that the condition of the sale is that title, ownership, or right of possession does not pass until the note taken for the articles is paid, and that in case of default, or attempt to dispose of the articles without consent of the sellers, they shall have the right to retake them, and in such case all money paid on the purchase price shall belong to them as stipulated damages; that they also have power to declare the note due and take possession of the articles at any time they deem themselves insecure; and that the full, absolute and complete title to the articles shall pass to the purchaser on full payment of the purchase money. —Bennett v. Tam, 24 Mont. 457; 62 Pac. 780.

62. A contract of conditional sale is not within Civ. Code, §§ 3861-3865, prescribing the requirements to be observed in executing a mortgage, and providing that the omission of them shall render the mortgage void as to innocent third parties, or § 3871, extending such provisions to all such conveyances of chattels as shall have the effect of a mortgage or lien thereon.—Id.

63. Even if a contract of conditional sale be void, it does not avail the purchaser, or one claiming under him, in an action by the seller for the chattels, as title remains in the seller. —Id.

64. One making a conditional sale of chattels does not lose his right to retake them for non-payment of the purchase price by failing to act immediately on learning of a resale to another, and by thereafter collecting part of the purchase price from the original purchaser. —Id.

SCHOOLS AND SCHOOL DISTRICTS.

I. Establishment, School Lands and Funds, and Regulation in General, 1-2.
II. Existence, 3.
III. Government, Officers, and District Meetings, 4-7.
IV. District Property and Contracts, 8.
V. Debt, Secureties, and Taxation, 9-18.
VI. Actions Against Districts, 19.
VII. Teachers, 20-26.
VIII. Text Books, 27-28.

I. ESTABLISHMENT, SCHOOL LANDS AND FUNDS, AND REGULATION IN GENERAL, 1-2.

1. The School Law (Comp. Stat., p. 1183, §§ 1886, 1907), requires the clerk of each school district to take a census at stated intervals of all the children of a given age within his district, and the county superintendent is then to apportion the school moneys to the several districts according to the number of children they contain. *Held*, that where the census returns, as residents of one district, children whose fathers reside and who attend school in other districts, it is proper for the superintendent to transfer them to the latter districts, and apportion the money accordingly. —School District v. Patterson, 10 Mont. 17; 24 Pac. 698.

2. Const., ord. 1, § 4, and art. 11, § 1, require the legislature to maintain a general, uniform and thorough system of public schools. *Held*, that Laws 1897, p. 136, amending Pol. Code, §§ 1770-1782, classifying school districts with reference to population for the purpose of electing trustees, and providing different methods of election in the different classes, does not destroy the system required by the Constitution, and does not otherwise violate said provision, since the classification is reasonable, and the operation of the act is reasonable and uniform on all districts within the classification, although in the present year the classification extends to only a few districts.—State v. Long, 21 Mont. 26; 52 Pac. 645.

II. EXISTENCE, 3.

3. In an action against a county treasurer and the trustees of a school district, to enjoin a special tax levied by such district, a complaint which alleges facts which, if true, show that such district never had any legal existence, states a cause of action.—Green Mountain S. R. Co. v. Savage, 15 Mont. 189; 38 Pac. 940.

III. GOVERNMENT, OFFICERS, AND DISTRICT MEETINGS, 4-7.

4. School district officers, not having power to levy taxes, have no power to incur indebtedness for the purpose of keeping the schools open beyond the time for which funds are provided.—Jay v. School District, 24 Mont. 219; 61 Pac. 250.

5. Under Const., art. 16, § 5, and Pol. Code, § 1101, where there was a tie vote on an election for school superintendent of a county, such vote did not render the office vacant; the previous incumbent being entitled to hold the same until a superintendent was regularly elected.—State v. Acton, 31 Mont. 37; 77 Pac. 299.

6. Pol. Code, § 1744, declaring that no person shall be qualified for the office of county superintendent of schools unless he or she holds a certificate of the highest county grade, and is a citizen of the United States, etc., applies to men and women alike.—Id.

7. Under Const., art. 9, §§ 2, 10, the office of county superintendent being an office created by the Constitution, it was incompetent

for the legislature to prescribe by Pol. Code, § 1744, as an additional qualification to those prescribed by the Constitution, that an aspirant to such office should be the holder of a certificate of the highest county grade.—Id.

IV. DISTRICT PROPERTY AND CONTRACTS, 2.

8. Comp. Stat., p. 1182, § 1885, relating to schools, provides that a board of trustees shall have power to build or remove school houses, and purchase or sell school lots, when the trustees may be directed by a vote of the district to do so. *Held*, that such statute applies to the removal of the schools, as well as school houses, and the board of trustees had no authority to remove a school from the established school house of their district to another part of such district without direction so to do by a vote of the district.—State v. Marshall, 13 Mont. 136; 32 Pac. 648.

V. DEBT, SECURETIES, AND TAXATION, 9-18.

9. Under Comp. Stat., p. 1202, § 1950, as amended by Laws 1893, p. 55, the question which the school trustees may decide to submit to the electors, and upon which the electors shall vote is, whether authority shall be given to the trustees to issue bonds in a certain amount, bearing a certain rate of interest, and payable and redeemable at certain times and for certain purposes. And a notice of election which states only the amount of the bonds, and the purposes for which the money is to be used, wholly omitting the rate of interest, the time when payable and the time when redeemable, is insufficient, and the issuance and delivery of bonds pursuant to the election held thereunder should be enjoined.—State v. School District, 15 Mont. 133; 38 Pac. 462.

10. A bill to restrain the collection of a special school district tax, which alleges that plaintiff, a corporation, did not have its place of business in the district where the tax was levied, states a cause of action.—Green Mountain S. R. Co. v. Savage, 15 Mont. 189; 38 Pac. 940.

11. Under Comp. Stat., p. 1203, § 1951, providing that bonds issued by a school district shall be signed by the chairman of the board of trustees, and shall be countersigned by the clerk, a warrant drawn by the trustees on the county treasurer, and signed by the chairman and clerk of the board, is sufficient in form.—State v. Dickerman, 16 Mont. 278; 40 Pac. 698.

12. Where a school district contracted for a loan on bonds which were afterwards declared to be void, it is liable for money advanced in good faith under the contract, which was used for school purposes.—Id.

13. Act Feb. 18, 1895, providing that money loaned on school bonds, afterwards declared by this court to be void, may be paid out of the proceeds of sale of subsequent school bonds, does not conflict with Const., art. 13, § 3, providing that money borrowed for public school purposes shall be used only for the purpose specified in the law authorizing the loan.—Id.

14. Under Laws 1897, p. 134, § 1940b, providing that the trustees of any school district may, when advisable, submit to the electors the question whether a tax shall be raised to purchase lots and furnish additional school facilities, or for building one or more school buildings, or for the purchase of appliances, a tax raised on submission of the question, "Shall a tax be raised to furnish additional school facilities?" may be used to pay salaries of teachers where the regular fund is exhausted.—State v. Cave, 20 Mont. 468; 52 Pac. 200.

15. Under Pol. Code, § 5162, providing that, if the provisions of any title therein conflict with the provisions of any other title, the provisions of each title must prevail as to all questions arising out of such subject matter of such title, § 1940, as amended by Act Mar. 8, 1897, §§ 1940b, 1941, contained in tit. 3, relating exclusively to "education," which provides for the levy of school taxes on a different basis of taxation than that provided for other taxes in §§ 3670-4083, in tit. 10, relating to "revenue," but which contains no provision for the collection of the tax, or by which the roll on which such tax is computed can get upon the regular assessment roll of the county, provided for in tit. 10, is inoperative and void.—Hilburn v. Railroad Co., 23 Mont. 229; 58 Pac. 551, 811.

16. Pol. Code, § 1940, amended by Act Mar. 8, 1897, §§ 1940b, 1941, providing for the submission to the voters of the district of the question whether school taxes, not to exceed 10 mills on the dollar, should be levied, which requires a notice stating the amount to be raised, but which does not provide for a determination of such amount, but only of the rate, before the submission of the question, and which provides, in mandatory terms, for the form of ballot in which the rate, and not the amount, is to be inserted, is inoperative and void, since it contains conflicting provisions, with no means of carrying either into execution.—Id.

17. Under Pol. Code, § 1940, declaring that notices of the holding of school elections, at which it is proposed to authorize bond issues, shall contain a statement of the time and place of holding the election, a notice not specifying the place is insufficient when attacked before the bonds are issued.—Hauswirth v. Mueller, 25 Mont. 156; 64 Pac. 324.

18. Where a notice of school election, at which it is proposed to authorize a bond issue, is insufficient for failure to designate the polling places, as required by Pol. Code, § 1940, such insufficiency is not remedied by the fact that the notice of registration specifies the polling places, since Pol. Code, § 1784, requiring notice of registration, does not require such notice to designate the polling places.—Id.

VI. ACTIONS AGAINST DISTRICTS, 19.

19. Under Comp. Stat., p. 1187, § 1902, providing that it shall be the duty of county commissioners to levy an annual tax on all taxable property within their respective counties for school purposes, such commissioners have power to levy a tax to satisfy a judgment against the trustees of a school district within their county, where the amount belonging to such district is insufficient to satisfy the same, and the levy of such tax may be compelled by mandamus.—State v. Yellowstone, 12 Mont. 503; 31 Pac. 78.

VII. TEACHERS, 20-26.

20. A person engaged as "supply teacher" at $70 per month, an amount equal to that paid some of the regular teachers, made no application for pay during the first four months of the year, during which she was called on to teach only seven times, and nothing was paid her, though the teachers were paid monthly. There was also evidence that during that time she applied for a position as regular teacher at $70 per month. *Held*, that under the arrangement she was to receive pay only for the time she taught at the rate of $70 per month.—Case v. School District, 14 Mont. 138; 35 Pac. 906.

21. Action of school trustees in dismissing a teacher without a hearing is waived by his appearing and asking for and being granted a hearing on the charge made against him, resulting in his being found guilty.—Kellison v. School District, 20 Mont. 153; 50 Pac. 421.

22. Where school trustees dismiss a teacher on sufficient evidence of immoral conduct, their action, on a rehearing, of finding him innocent, will authorize his recovery of salary only from the time thereof.—Id.

23. Under Pol. Code, § 1756, as amended by Laws 1897, p. 129, providing that the school board of any district who shall employ any teacher for a period of more than three months, or who shall not hold a legal certificate in full force, shall be deemed guilty of a misdemeanor, the board has no authority to contract with a teacher who has not a certificate, or to employ a teacher holding a certificate for more than three months. Hence a contract for the employment of a teacher holding a certificate for a school year of nine months is of no effect.—Jay v. School District, 24 Mont. 219; 61 Pac. 250.

24. A court will not enforce an invalid contract of employment of a school teacher by a school board merely because its failure to do so will result in the closing down of the schools of a school district.—Id.

25. Pol. Code, § 1803, providing that the board of trustees of any school district shall be liable, in the name of the district, for any judgment against the district for any salary due any teacher on contract, and that they shall pay such judgment out of any moneys to the credit of such district, does not authorize the entry of a judgment against the school district for unpaid salary of a school teacher, where the district admits the claim, and the only reason that it does not pay it is that it has no funds applicable to the purpose, since, until it has funds on hand with which to pay, failure or refusal to pay is in violation of no duty.—Id.

26. The fact that Pol. Code, § 1756, as amended by Laws, 1897, p. 129, prohibits the employment of teachers not holding certificates for a period exceeding three months, does not obviate the necessity of teachers making annual reports to the county superintendent as is required by Pol. Code, § 1841, or, if the employment be for only three months, at the end of such term.—Id.

VIII. TEXT BOOKS, 27-28.

27. Const., art. 11, § 1, imposing on the legislature the duty of establishing and maintaining "a general, uniform and thorough system of public, free common schools," does not necessarily require that body to establish a uniform series of text books throughout the state for use in the public schools.—Campana v. Calderhead, 17 Mont. 548; 44 Pac. 83.

28. Where the legislature has failed to establish a uniform series of books for use in the common schools of the state, and has not conferred special authority on any officer or board so to do, the trustees of the school districts, under Pol. Code, § 1797, which gives them power to prescribe rules, not inconsistent with law, for the government of schools under their supervision, may designate text books for use in the common schools of their districts.—Id.

SCIRE FACIAS.

1. The Civil Practice Act, abrogating the common law forms of procedure, including scire facias, renders a complaint necessary in all civil actions, and therefore an action on a forfeited undertaking can not be begun by scire facias.—United States v. Ensign, 2 Mont. 396.

SET-OFF AND COUNTERCLAIM.

I. Nature and Grounds of Remedy, 1-2.
II. Subject-Matter, 3-14.
III. Operation and Effect, 15-16.

I. NATURE AND GROUNDS OF REMEDY, 1-2.

1. C, an insolvent, secured judgment against W in an action for personal injuries. W secured judgment against C upon a promissory note. *Held*, that C's insolvency gave W the right, under equity, to have his claim set off against that of C.—Wells v. Clarkson, 2 Mont. 230.

2. An action brought to recover damages for the wrongful issuance of an execution upon a judgment previously recovered against plaintiff by defendant, but alleged by him to have been satisfied, and on account of the levy of such execution upon money in the hands of the sheriff, is founded in tort, and the fact that plaintiff claims judgment only for the amount seized, with interest, does not alter its nature, and defendant can not, under Rev. Stat., p. 56, § 87, set up in his answer, by way of counterclaim, an indebtedness of her to the plaintiff upon an account.—Davis v. Frederick, 6 Mont. 300; 12 Pac. 664.

II. SUBJECT-MATTER, 3-14.

3. In an action on a promissory note against two joint makers, one of them can not plead as a counterclaim an individual debt due him from the payee, unless he shows that the payee is insolvent or sets up some other equitable ground of defense.—Kemp v. McCormick, 1 Mont. 420.

4. A claim for liquidated damages is not a proper set-off against a claim founded on a contract.—Wells v. Clarkson, 2 Mont. 379.

5. The words "subject of the action," as used in the statute providing that a counterclaim must arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the "subject of the action," do not relate to the thing itself, about which the controversy has arisen, but rather to the origin and ground of plaintiff's right to recover or obtain the relief sought.—Collier v. Ervin, 3 Mont. 142.

6. An individual claim can not be set up as a counterclaim to a joint indebtedness without alleging that the plaintiff is insolvent.—Id.

7. An express verbal contract for the sale of real estate being void under the statute of frauds, such contract can not be the basis for a counterclaim or cross-action. (See 116 U. S. 491.)—Ryan v. Dunphy, 4 Mont. 342; 1 Pac. 710.

8. In an action against an agent for rents collected from a married woman's separate estate, such agent can not set off against such rents a claim for money expended in behalf of plaintiff's husband, for whom she is administratrix.—Rutherford v. Talent, 6 Mont. 132; 9 Pac. 821.

9. Where an attorney in fact has conveyed to himself land covered by his power of attorney, an answer, in a suit by his principal to set aside the deeds, that the land was originally

bought by him and plaintiff, he furnishing the money for plaintiff's share, though title was taken in plaintiff's name, sets up new matter connected with the subject of the action within Comp. Stat., p. 82, §§ 89, 90, and is therefore a good defense or counterclaim.—Davis v. Davis, 9 Mont. 267; 23 Pac. 715.

10. Under Comp. Stat., p. 82, §§ 89, 90, permitting a defendant, by answer, to plead an existing counterclaim as new matter constituting a defense, it is error for the court to permit defendant by amendment to plead a counterclaim maturing after the action is commenced. —McGuire v. Edsall, 14 Mont. 359; 36 Pac. 453.

11. An answer in replevin, that plaintiff is estopped from claiming the goods because he permitted defendant to take possession thereof as assignee for benefit of creditors of one claiming to be the owner, and acquiesced in defendant's disposal thereof as such assignee, does not plead a counterclaim, within Code Civ. Proc., § 691, defining a counterclaim as a cause of action in favor of defendant, tending to defeat or diminish plaintiff's recovery.—Babcock v. Maxwell, 21 Mont. 507; 54 Pac. 943.

12. Civ. Code, § 1982, makes an endorsee of a non-negotiable contract subject to all equities existing at the time of the endorsement. Secs. 690-692 provide that, in an action on an assigned contract, not a negotiable bill or note, a demand existing against the party thereto at the time of the assignment, and belonging to defendant in good faith, before notice of assignment, must be allowed as a counterclaim. *Held*, that a demand against the assignor could not be set off against the assignee, unless due and payable when the assignment was made, and that notice was unnecessary to prevent set-off of a demand becoming payable subsequently.—Stadler v. Bank, 22 Mont. 190; 56 Pac. 111.

13. Civ. Code, § 1982, provides that the endorsee of a non-negotiable written contract shall have all the rights of the assignor, subject to all equities existing in favor of the maker at the time of the endorsement. Sec. 571, being a part of the remedial law, and inserted under the head of "Parties to Civil Actions," provides that an action by an assignee of a non-negotiable thing in action is without prejudice to any set-off existing at the time of, or before notice of, the assignment. *Held*, that the latter section did not enlarge the former, so as to permit the set-off against the assignee of a demand against the assignor arising intermediate the endorsement and notice thereof.—Id.

14. Under Code Civ. Proc., § 691, such counterclaims only are allowed as tend in some way to diminish or defeat plaintiff's recovery. *Held*, in an action in claim and delivery for furniture of plaintiff seized by defendant lessor under an alleged lien for rent, wherein defendant set up a counterclaim for rent, damages to the leased premises, etc., that as a claim for a money judgment, whether arising out of the transaction set forth in the complaint or not, in no way tended to defeat or diminish plaintiff's right to recover possession of the property, an instruction to disregard evidence in support of defendant's counterclaim, except so far as showing rent due at the time of the taking, which would be a justification therefor, was correct.—Osmers v. Furey, 32 Mont. 581; 81 Pac. 345.

III. OPERATION AND EFFECT, 15-16.

15. Where defendant sets up a counterclaim and such counterclaim is admitted by the replication of plaintiff, and the jury returns a verdict for plaintiff, the amount of such counterclaim should be deducted from the amount returned by the jury.—Story v. Maclay, 3 Mont. 480.

16. A set-off, made up of diferent items, should be credited as of the dates of the respective items.—Goodell v. Sanford, 31 Mont. 163; 77 Pac. 522.

SHERIFFS AND CONSTABLES.

I. Appointment, Qualification, and Tenure, 1.
II. Compensation and Reimbursement, 2-8.
III. Powers, Duties, and Liabilities, 9-26.
IV. Liabilities on Official Bonds, 27-30.

I. APPOINTMENT, QAULIFICATION, AND TENURE, 1.

1. Pol. Code, § 4597, providing that "the whole number of deputies allowed the sheriff is one under sheriff, and * * * in counties of the 7th * * * class, one (deputy)," and § 4603, providing that "the officers entitled to deputies must * * * file a certificate of appointment of the deputies,"—do not repeal Act Mar. 9, 1893, amending Act 1891, § 4, authorizing the county commissioners to determine the number and compensation of deputy sheriffs.—Jobb v. Meagher, 20 Mont. 424; 51 Pac. 1034.

II. COMPENSATION AND REIMBURSEMENT, 2-8.

2. Where the sheriff is authorized to confer the custody of the jail and prisoners on a jailer in case of his own absence or disability, he can not claim compensation for the jailer's services without showing such necessity.—Platner v. Commissioners, 5 Mont. 458; 6 Pac. 365.

3. Where a sheriff, at the request of an attaching creditor's attorney, employed a custodian for the goods attached, the fact that the attaching creditor paid several hundred dollars as compensation to the custodian raises the presumption that he authorized such employment, and the sheriff can recover the balance of the compensation paid the custodian.—McDermott v. Murphy, 11 Mont. 122; 27 Pac. 334.

4. Where a sheriff, at the request of an attaching creditor's attorney, employed a custodian for the goods attached, the sheriff can recover the costs of employing such custodian, though he did not render a bill therefor before the rendition of a judgment in favor of the attaching creditor; and the fact that, some time after the employment of the custodian, he refused to substitute for him another, employed and offered by the attaching creditor, is immaterial, since, being responsible for the goods, he has the right to chose a custodian therefor.—Id.

5. Comp. Stat., p. 873, § 856, providing that it shall be the duty of the sheriff, under sheriff and deputies to keep and preserve peace, to quiet and suppress riots and unlawful assemblies, for which purpose they may call to their aid such persons as they deem necessary, and § 864, providing that no sheriff shall directly or indirectly ask or receive for any service to be by him performed in the discharge of any of his official duties any greater fees than are allowed by law, do not prevent a sheriff from recovering from a railroad company money paid men who, at the request of the company, and on its agreement to pay therefor, were sworn in as deputy sheriffs and put into its yards and placed under its control, to prevent injury to

its property, apprehended by it from its striking employees, there being at the time no riot, and the sheriff having assured the company that he was able and willing to prevent any trouble with his regular force, and his offer to put the strikers out of the yards having been refused.—Sullivan v. Railway Co., 11 Mont. 236; 28 Pac. 307.

6. Under Pol. Code, § 4634, allowing a sheriff commissions for receiving and paying over money on execution or other sales, he is entitled to such commissions where, on foreclosure, he sells the property to the mortgagee, and simply credits the sum paid on the mortgage debt.—Jurgens v. Hauser, 19 Mont. 184; 47 Pac. 809.

7. Pol. Code, § 2311, relating to the cost of taking an insane person to the asylum, and the expenses allowed the sheriff therefor, was repealed by Pol. Code, § 4604.—Proctor v. Cascade, 20 Mont. 315; 50 Pac. 1017.

8. The fee of a sheriff for transporting an insane patient to the state asylum is governed by Pol. Code, § 4604, which provides that the sheriff shall receive 10 cents per mile for each and every mile travelled, and, "for transporting any person by order of court, he shall receive 10 cents additional per mile, the same to be in full for transportation and dieting of such person during such transportation."—Id.

III. POWERS, DUTIES, AND LIABILITIES, 9-26.

9. Where a third person claims attached property by virtue of a prior sale, and the officer attempts, in his answer, to justify his levy by impeaching such sale for fraud, such answer must show that the attachment was regularly issued by a court having jurisdiction.—Hootman v. Bray, 3 Mont. 409.

10. An officer seeking to justify a seizure of property, by attacking a sale of it as fraudulent, must prove not only the execution, but a valid judgment as well.—Ford v. McMaster, 6 Mont. 240; 11 Pac. 669.

11. In an action against a sheriff for a wrongful seizure of property, if the sheriff attacks a sale of the property as fraudulent, but fails to show a valid judgment on which the execution was issued, evidence as to the possession of the property at the time of the levy is properly excluded.—Id.

12. In an action against a constable for wrongully attaching property in the hands of bailees, as property of such bailees, there being no evidence that the property had been concealed to hinder and defraud the creditors of the bailees, an instruction that, if the property had been covered up, the jury should find for the defendant, was unwarranted.—Brownell v. McCormick, 7 Mont. 12; 14 Pac. 651.

13. In an action by a wife against a sheriff for levying executions against her husband on her property, issued on judgments defective and void, plaintiff can attack the judgments, when offered in justification of the levies.—Palmer v. McMaster, 8 Mont. 186; 19 Pac. 585.

14. In an action by a wife against a sheriff for wrongfully levying executions against her husband on her separate property, the record of a judgment recovered many years before by the wife against a former sheriff for levying like executions on her property, alleged to be the same as that in controversy, is inadmissible in evidence.—Id.

15. In an action against a sheriff for the conversion of personal property, where he justifies under an execution, and the judgment under which the execution issues is void, it is not error to reject an amendment to the answer alleging more fully the indebtedness on which the original action was brought, and setting forth the petition and writ of attachment, as the lien of the attachment merges in the judgment.—Palmer v. McMaster, 10 Mont. 390; 25 Pac. 1056.

16. In an action against a sheriff for the conversion of personal property, where the defendant justifies under an execution against the property of a third person, alleging him to be the real owner, it is not error to exclude the execution unless defendant proves or offers to prove the existence of a valid judgment on which the execution issued.—Id.

17. Comp. Stat., p. 1071, § 1546, provides that before mortgaged chattels can be attached the officer must pay or tender to the mortgagee, or deposit for him, in the county treasurer's office, the amount of the mortgage debt. *Held*, that the constable who attached mortgaged goods without complying with such provision is liable to the mortgagee for the value of the property, to an amount not exceeding the mortgage debt, and the expenses incident to the wrongful seizure, but he is not liable for the amount of the mortgage debt.—Rocheleau v. Boyle, 12 Mont. 590; 31 Pac. 533.

18. Under Comp. Stat., p. 105, § 184, et seq., requiring a sheriff, on receiving an attachment, without delay to attach all of defendant's non-exempt property, including debts, named in the writ, and (§ 188) on receiving information in writing from plaintiff or his attorney that any person has any credits or other personal property of defendant, or is owing him any debt, to serve on such person a copy of the writ, and notice that such property is attached, a sheriff who has attached the debtor's stock in trade, and taken possession of his books of account, is liable for failure to furnish those who appear therein as debtors, without written notice from plaintiff or his attorney.—Montana M. Co. v. Jeffries, 14 Mont. 143; 35 Pac. 908.

19. Under Comp. Stat., p. 200, § 533, providing that in an action against a sheriff for an act done by virtue of his office, if he give written notice thereof to the sureties on any bond of indemnity to him, the judgment shall be evidence of his right to recover against such sureties, where the sheriff notified sureties on an indemnity bond in an attachment suit of a suit against him and his successor by the owners of the attached property, and such sureties appeared and defended the suit, he could maintain an action against them for the sum paid by him on the judgment recovered, though he only held the property about two months, and turned it over to such successor, by whom it was sold.—Tuttle v. Hardenberg, 15 Mont. 219; 38 Pac. 1070.

20. Where a constable applied on a judgment money voluntarily paid by a garnishee after a disclosure admitted the indebtedness, an action of assumpsit for money had and received was the proper form of action against him by one to whom the principal defendant had previously given an order on the garnishee for the amount of the debt, and who had notified the constable of the claim, and demanded the same from the garnishee before payment by him.—Merchants & M. Nat'l Bank v. Barnes, 18 Mont. 335; 45 Pac. 218.

21. Where an officer levies on, under execution, and sells, property which is not that of defendant in execution, he is not liable to plaintiff in execution if he surrenders the property levied on, and returns the proceeds to the purchaser at execution sale.—McCarthy v. O'Marr, 19 Mont. 215; 47 Pac. 953.

22. A refusal of an Indian agent to consent to entry by a sheriff on the reservation to levy execution on the property of one not an Indian does not excuse the sheriff from making the

levy.—Stiff v. McLaughlin, 19 Mont. 300; 48 Pac. 232.

23. Advice of a United States district attorney that the sheriff had no right to enter the reservation without the agent's consent does not excuse the sheriff from making the levy. —Id.

24. In an action for conversion against a sheriff, who sold as the property of plaintiff's husband buildings and hay alleged to belong to plaintiff, testimony of her witnesses as to where she secured the lumber that went into the buildings, what it cost, and that it had been paid for by her, is competent on the question of her ownership.—Porter v. Hawkins, 27 Mont. 486. 71 Pac. 664.

25. Where the act of a sheriff in seizing goods under a mortgage from plaintiffs, who were purchasers thereof from the chattel mortgagor, was wrongful in the beginning, no demand was necessary to entitle plaintiffs to sue the sheriff for conversion of the goods.—Stevens v. Curran, 28 Mont. 366; 72 Pac. 753.

26. Where, in an action against a constable to recover money received as the proceeds of the sale of property levied upon, alleged to belong to plaintiff, defendant, in his answer, admitted possession of the money when the demand was made, evidence that at the time of such demand defendant had paid over the money on the executions was properly refused.—Yank v. Bordeaux, 29 Mont. 74; 74 Pac. 77.

IV. LIABILITIES ON OFFICIAL BONDS, 27-30.

27. Under Comp. Stat., p. 1071, § 1550, providing that the mortgagor of chattels may insert in his mortgage a clause authorizing the sheriff of the county to execute the power of sale therein, and that the sheriff shall sell the property in the manner provided in the mortgage, such sale is an official act, and the sheriff's bondsmen are liable for his failure to pay over money as provided by the terms of the mortgage. (See 150 U. S. 128.)—Maddox v. Rader, 9 Mont. 126; 22 Pac. 386.

28. Where the sheriff, on selling property covered by a chattel mortgage, retains property sold on credit, and, treating the bids thereon as cash, receives from the mortgagor a sum equal to the difference between the amount realized at such sale and the amount secured by the mortgagor in full satisfaction thereof, and pays the same to the mortgagees, and tenders the property sold on credit but not called for, their acceptance of such sum is not of itself a ratification of his conduct in such sale, and they were not precluded from bringing action against the sheriff and the sureties on his official bond.—Id.

29. In an action upon a sheriff's bond for his misconduct in a sale under a mortgage, interest on the penalty of the bond may be recovered from the time demand was made upon the sheriff for the payment of the money due the mortgagees.—Id.

30. A judgment against a constable is not even prima facie evidence against the sureties on his bond, conditioned for faithful performance of the duties of his office.—Rodoni v. Lytle, 17 Mont. 448; 43 Pac. 501.

SIGNATURES.

1. The maker of a note whose Christian name is John is estpped to deny that "Jno." is a known and accepted abbreviation thereof, where he signed it "Jno."—Kemp v. McCormick, 1 Mont. 420.

SODOMY.

1. The ordinary common law indictment for the infamous crime against nature is sufficient. —State v. Chandonette, 10 Mont. 280; 25 Pac. 438.

SPECIFIC PERFORMANCE.

I. Nature and Grounds of Remedy, 1-3.
II. Contracts Enforceable, 4-23.
III. Good Faith and Diligence, 24-25.
IV. Proceedings and Relief, 26-45.

I. NATURE AND GROUNDS OF REMEDY, 1-3.

1. In an action for specific performance, it appeared that the sale was negotiated for the owner by a firm of real estate agents, and a bond for a deed given to the purchaser; that afterwards the purchaser assigned the bond to one of the firm, who tendered the balance of the purchase money, and demanded the deed. The jury found that the puchase was not made for the benefit of the agent, and that the purchase price was the value of the land at the time of the sale. *Held*, that specific performance was not properly decreed.—Thornburgh v. Fish, 11 Mont. 53; 27 Pac. 381.

2. Plaintiff may not defeat specific performance of the oral option contract on a mining claim which he gave defendant on the ground that defendant, who went into possession, made but slight expenditures in improvements, where defendant cleaned out the mine, which had been practically abandoned, repaired and replaced apparatus, and ran drifts and crosscuts, discovering bodies of valuable gold in a few weeks where plaintiff had spent a considerable fortune in unsuccessful attempts to find ore in paying quantities.—Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

3. There is nothing inconsistent with defendant's exclusive possession of a mine under an oral option for its purchase from plaintiff, so as to bias his right to specific performance, in the fact that plaintiff's foreman visited the mine several times during defendant's possession, and at one time directed the attention of defendant's foreman to the condition of the shaft.—Id.

II. CONTRACTS ENFORCEABLE, 4-23.

4. The actual and constructive possession of a purchaser under a verbal contract, coupled with the manifest fraud which the admission to the possession would cause to him unless the vendor could comply with the agreement, is such a part performance of the verbal agreement as that its specific performance, when the profits amount to the sum thereby agreed upon as the purchase price, should be enforced. —Southmayd v. Southmayd, 4 Mont. 100; 5 Pac. 318.

5. Every contract must be mutual as to remedy and obligation, and will not be enforced against one who has not the power to enforce it in his own behalf. (See 116 U. S. 491.)—Ryan v. Dunphy, 4 Mont. 342; 1 Pac. 710.

6. An express verbal contract for the sale of real estate being void under the statute of frauds, it can not be the basis of an action in equity to enforce a specific performance.—Id.

7. Where defendant verbally promised to procure a patent to mining ground, and convey a half interest to complainants, in considera-

tion of their relinquishment of claims thereto, there is no mutuality of obligation whereby defendant could have compelled complainants to contribute, had the venture proved unprofitable, and specific performance will be denied. (See 138 U. S. 587.)—Ducie v. Ford, 8 Mont. 233; 19 Pac. 414.

8. In an action for the specific performance of a written contract, whereby the parties agreed to locate a claim on disputed land to defeat a suit of other claimants, the expenses incurred thereby to be borne proportionately by the lot owners, where the defense is an alleged mistake in drawing the contract, and where the answer alleges that the mistake was mutual, and that the real agreement was the one set out in such answer, it is proper to refuse to instruct that if plaintiffs, at the time of entering into the contract, thought they were contracting in regard to all the surface ground, while defendants thought they were contracting only in regard to part, then there was a mutual mistake as to the subject matter, "and consequently no contract."—Fitscher v. Thomas, 9 Mont. 52; 22 Pac. 450.

9. Where a deed absoute in form was given in consideration of the grantees' note for $5,500, and the grantees at the same time executed a bond providing that, if they did not reconvey upon the payment to them of $5,500, with interest at 10%, before a given date, "then this obligation to be void, otherwise to remain in full force," a suit for specific performance can not be maintained, since the obligation is not to reconvey, but to forfeit $5,500 on failure to reconvey.—Kleinschmidt v. Kleinschmidt, 9 Mont. 477; 24 Pac. 266.

10. A bond for the payment of a certain sum of money, with a condition that it shall be void if the obligor shall convey to the obligee certain land for a certain price to be paid by him, is a contract to sell land, which the obligee may have specifically enforced, where he has taken possession of the land, and agreed to convey to third persons, to whom he had delivered possession, and who have erected valuable improvements thereon.—Thornburg v. Fish, 11 Mont. 53; 27 Pac. 381.

11. Though a contract of adoption be invalid as such, a court of equity will enforce a promise therein that the child sought to be adopted should receive a child's share of the estate of the promissor on his death, in return for her companionship, love and obedience.—Burns v. Smith, 21 Mont. 251; 53 Pac. 742.

12. Under Const., art. 8, § 11, providing that district courts shall have original jurisdiction in all cases in law and equity where the claim is for $50 or more a court of equity has jurisdiction to determine a claim of one seeking to enforce specific performance of a contract of adoption against a decedent's estate, notwithstanding Code Civ. Proc., § 2840, which provides that any person claiming to be heir to the deceased, or entitled to distribution of his estate, may file a petition in the matter of such estate, praying the court to ascertain and declare the rights of all persons to whom distribution should be made, and that the court shall thereupon acquire jurisdiction to do so. —Id.

13. A contract to sell one acre out of a larger tract of land is definite and certain after the purchaser has selected and gone into possession of one acre of such tract.—Cobban v. Hecklen, 27 Mont. 245; 70 Pac. 805.

14. An oral contract to sell land, which has been partially performed, is mutual, for both parties are reciprocally bound,—the one to convey and the other to pay the purchase price. —Id.

15. A co-owner of a placer claim, for himself and as agent for other owners, including plaintiff, by oral agreement sold one acre thereof to defendant, the deed to be delivered when patent was obtained; and the purchase price to be paid then. Defendant under such agreement entered into possession and improved such acre. Thereafter plaintiff was informed of such agreement and assured defendant that it would be carried out, and, relying on the agreement and such assurance, he made further valuable improvements. Two years thereafter such claim was partitioned by such owners, plaintiff thereby acquiring the entire legal title to such acre, and brought ejectment to recover it. *Held*, that there was sufficient part performance to take the agreement out of the provisions of Comp. Stat., p. 652, § 219, requiring contracts for the sale of land to be in writing.—Id.

16. Where an oral contract for the sale of land has been so far partially performed as to take the case out of the statute of frauds, such part performance vitalizes it, and by relation makes its terms obligatory from the beginning. —Id.

17. Under Comp. Stat., p. 652, § 221 and Code Civ. Proc., § 3275, a principal, without writing, may be estopped to deny an oral contract of sale, made by his agent, after part performance, and specific performance may be decreed, though a mere ratification of such contract must be in writing.—Id.

18. A contract to sell land is reasonable when the price for which it is sold is not disproportionate to its value.—Id.

19. Where, at the time of the making of an agreement to assign certain mining leases, options and bonds, it was admitted that the assignor had expended at least $54,000 in developing the mine, without exposing any ore of commercial value, when the assignee agreed, in consideration of the assignment, to keep the lease and bonds, continue the development, and, if the property appeared to the assignee to justify its purchase, to pay the assignor $54,000 therefor, without further risk or liability to the assignor, and thereafter the assignee made discoveries of great value in the mine, a finding that the consideration for the contract was not so inadequate as to preclude a decree of specific performance was justified.—Finlen v. Heinze, 28 Mont. 548; 73 Pac. 123.

20. Where it can not be determined from either the pleadings or the evidence as to a contract to purchase property for another at a partition sale whether the purchaser was to furnish the money or not, or whether he was to take the deed in his own name or otherwise, neither would support a decree for specific performance on the part of the purchaser.—Largey v. Leggat, 30 Mont. 148; 75 Pac. 950.

21. Where complainants' entry on defendants' land for the purpose of locating a mining claim was wholly ineffectual as against defendant for that purpose, a contract by which complainants agreed to transfer to defendant an undivided one-third interest in the lead or lode, in consideration of defendant's transfer to plaintiffs of an undivided two-thirds interest therein, together with the necessary amount of real estate covered by the location, etc., in settlement of the rights of the parties' old litigation, was not based on a sufficient consideration to support a suit for specific performance under Civ. Code, § 4417, providing that specific performance can not be enforced against a person unless he has received an "adequate" consideration for the contract.—Traphagen v. Kirk, 30 Mont. 562; 77 Pac. 58.

22. Specific performance of an option contract can not be denied on the ground of want of mutuality where the party holding the option and seeking its enforcement has performed all its terms required to be performed by him.—Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

23. Where there is made out by clear and unambiguous proof a complete agreement for sale of a mine, and all the terms that the parties saw fit to incorporate in it, specific performance may be decreed, though other terms might have properly been incorporated in a contract on such a subject.—Id.

III. GOOD FAITH AND DILIGENCE, 24-25.

24. Where the owner of an undivided portion of a tract of land authorizes his agent to sell a piece of such tract, and after such sale such owner acquired the entire legal title to such piece by partition, he held such title for the benefit of his vendee, and could enforce performance of the contract.—Cobban v. Hecklen, 27 Mont. 245; 70 Pac. 805.

25. A counterclaim for specific performance of the option on a mine, for possession of which plaintiff sues, need not allege a tender of the purchase price, it appearing that plaintiff has denied the contract, and that acceptance of a tender would be refused; but it is enough to allege that defendant has at all times been able, willing and ready to comply with all conditions of the contract, and binds himself to pay the purchase money if he be given a decree for specific performance.—Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

IV. PROCEEDINGS AND RELIEF, 26-45.

26. In an action for specific performance the complaint must set forth fully the nature and character of the consideration for the contract. (See 138 U. S. 587.)—Mayger v. Cruse, 5 Mont. 485; 6 Pac. 333.

27. In an action for specific performance the consideration for the contract, if an entirety, must be fully performed, or a readiness to perform must be alleged.—Id.

28. Under the laws of the United States, reserving mineral rights for citizens and those who have filed their declaration of intention to become such, and requiring an applicant for a patent to have expended $100 yearly up to the time of his application, a complaint to enforce specific performance, which fails to allege citizenship of complainants, or filing of intention, and the required expenditure of money, fails to state a cause of action. (See 138 U. S. 587.)—Ducie v. Ford, 8 Mont. 233; 19 Pac. 414.

29. Where defendant agreed to procure a patent to mining land, and convey a half interest to complainants, in consideration of their relinquishing all claims, a complaint alleging that complainants have paid their purchase money, and also that they are able and willing to pay if the defendant will accept and state how much they owe, but nowhere alleging any time or amount of payment, is contradictory and insufficient.—Id.

30. In an action for the specific performance of a written contract, whereby the parties agreed to locate a claim on disputed land to defeat the suit of other claimants, the expenses incurred thereby and in contesting the suit to be shared by the lot owners proportionately, an allegation in the complaint that the sums contributed by each plaintiff or his grantor aggregated to a specified amount, and a denial in the replication that a greater sum had been expended, as alleged in the answer, make a sufficient showing that plaintiffs had paid their respective contributions.—Fitscher v. Thomas, 9 Mont. 52; 22 Pac. 450.

31. In an action for the specific performance of a written contract, where an alleged mistake in drawing the contract is set up as a defense, an instruction to the jury "that parol evidence was not introduded for the purpose of enabling them to decide what was the original agreement, but merely to enable them to say if there was any mistake in drawing the agreement," is not prejudicial to defendants, when modified by another instruction directing the jury to find for defendants, if from the evidence, they are satisfied that the written agreement does not express the true contract.—Id.

32. A complaint praying specific performance of a contract for the sale of land need not allege that plaintiff has no adequate remedy in damages.—Ide v. Leiser, 10 Mont. 5; 24 Pac. 695.

33. A complaint praying specific performance of a contract for the sale of land need not allege that the defendant is the owner of the land when the action is brought, where it does allege that he was such owner when he made the offer, and the complaint was filed on the day when plaintiff accepted it.—Id.

34. Although a party brings his suit within the period prescribed by statute of limitations, he may yet be guilty of such laches as will debar his right to relief in strictly equity cases, as in a suit for specific performance of a contract.—Wolf v. Great Falls W. P. & T. Co., 15 Mont. 49; 38 Pac. 115.

35. The unexplained delay of the vendee to sue for the specific performance of a contract for the sale of a town lot for three and one-half years after the vendor refused to comply with the contract, and took possession of the lot, renders him guilty of laches which bar his right to such relief.—Id.

36. The United States patent and mesne conveyances to plaintiff of a mining claim were admissible in evidence to prove its title thereto, so as to show that plaintiff was entitled, by virtue of such ownership, to the conveyance of the strip of land in controversy on the ground that in equity it was a part of that claim, although it had been included in the patent to another.—Montana M. Co. v. Milling Co., 20 Mont. 394; 51 Pac. 824.

37. Where it is sought to compel specific performance of a contract to convey, and it appears that defendant's wife did not join in said contract, the decree for specific performance wil require a convenance by said defendant, reserving to his wife whatever dower she may have in the land.—Jones v. Gieske, 25 Mont. 132; 63 Pac. 1042.

38. A suit was brought to obtain a conveyance of an alleged interest in an invention, and to enjoin defendant from disposing thereof to a third party, based on an agreement to render mutual assistance in obtaining the patent. Plaintiff had procured loans of money in aid of the project, and negotiated a sale of an interest in the machine, the proceeds of which he and defendant agreed to use in taking the machine to the Klondike and operating it. Defendant had violated the agreement, and refused to assign plaintiff any interest in the machine, and threatened to sell the same to a third party, and converted the money procured by a sale negotiated by plaintiff to his own use. *Held*, that it was not necessary for plaintiff to allege an offer to pay a proportionate part of the expense of applying for a patent in defendant's name.—Miller v. Matheson, 28 Mont. 132; 72 Pac. 414.

39. While a party seeking specific performance of a contract is required to set forth the consideration therefor, the burden of proof that such consideration is inadequate is on the party resisting specific performance, under Code Civ. Proc., § 4417.—Finlen v. Heinze, 28 Mont. 548; 73 Pac. 123.

40. Where, in a suit for specific performance, it is alleged that defendants had with-

drawn the deed from escrow, and it appeared that a tender of the balance of the price would not have been accepted and would have been of no avail, and plaintiff tendered the money in court, paid the same to the clerk, and demanded a deed, defendant having removed from the state and being absent at the time plaintiff desired to make payment, it was no objection that the complaint failed to allege a tender of the balance of the price before suit brought. —Christiansen v. Aldrich, 30 Mont. 446; 76 Pac. 1007.

41. Where a complaint alleged breach of a contract to convey land described therein, it was sufficient to raise the presumption that pecuniary compensation would not afford adequate relief, within Civ. Code, § 4410, subd. 2, authorizing specific performance when the act to be done is such that pecuniary compensation for its non-performance would not afford adequate relief, though there was no allegation of special circumstances showing that plaintiff had no adequate remedy at law.—Id.

42. In an action for specific performance of a contract to convey land, it was not necessary that the complaint should allege that defendants were the owners of the land at the time the contract was made, since, if defendants were not the owners, or had placed themselves in such a position that they could not perform their contract, such facts were matters of defense.—Id.

43. An action for specific performance of a contract to convey real estate is a proceeding in personam, which requires personal service of process.—31 Mont. 488; 78 Pac. 967.

44. Where plaintiff sues in ejectment for possession of a mine, but trial is had only on the counterclaim for specific performance of plaintiff's contract to convey the mine to defendant, the answer thereto, and the reply to such answer, the answer to the complaint in ejectment, denying plaintiff's right in the property, is not properly before the court, and so can not affect defendant's right to specific performance.—Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

45. Evidence on a counterclaim for specific performance *held* sufficient to show a complete oral agreement for sale of interests in a mine. —Id.

STATES.

I. Political Status and Relations, 1.
II. Government and Officers, 2-10.
III. Property, Contracts, and Liabilities, 11-16.
IV. Fiscal Management, Public Debt, and Securities, 17-31.
V. Claims Against State, 32-35.
VI. Actions, 36.

I. POLITICAL STATUS AND RELATIONS, 1.

1. Comp. Stat., p. 817, § 697, giving to one employee injured by the negligence of a superior a right of action against the master, was repealed by Const., art. 15, § 11. Const., art. 20, § 9, provides that all causes of action, claims and rights existing at the time of the admission of the state into the union shall be enforced and protected under the laws of the state. *Held*, that rights which had accrued under § 697 prior to its repeal were preserved by the saving clause of the Constitution to be enforced under the laws of the state.—Wastl v. Montana Union, 24 Mont. 159; 61 Pac. 9.

II. GOVERNMENT AND OFFICERS, 2-10.

2. The Enabling Act provides for the admission of certain territories into the union, and § 24 provides that all laws in force made by the territories shall be in force in the states, "except as modified or changed by this act or by the constitution of the states." Ord. No. 2, promulgated by the constitutional convention, and adopted by the people, together with the Constitution, provides (§ 8, that the votes for members of the legislature shall be canvassed by the same board as the vote on the Constitution, which board (§ 5) consists of the secretary of the territory, with the governor and chief justice, or any two of them. *Held*, that Comp. Stat., p. 930, § 1033, which provides for a canvass by the county commissioners, was superceded.—State v. Kenney, 9 Mont. 223; 23 Pac. 733.

3. Const., art. 5, provides that each member of the legislative assembly shall receive certain compensation, and that after the first session their compensation "shall be as provided by law; provided that no assembly shall fix its own compensation." It further provides that no member shall, during his term, receive an increase of compensation under any law passed during such term. *Held*, that as the first assembly made no provision, as contemplated by the Constitution, for compensation of the members of the second assembly, most of whom were members of the first assembly, Laws 1891, p. 130, passed by the second assembly, making the same appropriations for the compensation of its members as was contemplated by the Constitution, merely carries out the intent of the Constitution, and is valid.—State v. Kenney, 10 Mont. 410; 25 Pac. 1022.

4. The members of the state capitol commission created by act Mar. 7, 1895, whose compensation is fixed at $5 per day for each day they are engaged in official duties, which, together with their expenses, shall be certified to the state auditor with vouchers, such warrants to be drawn on the state capitol fund, which is to be derived from the sale of lands granted the state by the federal government for the erection of state buildings, are officers whose compensation is fixed by law, and therefore the state board of examiners are not required to pass on their claims for services.—State v. Cook, 17 Mont. 529; 43 Pac. 928.

5. Pol. Code, § 3530 et seq., creating the arid land commission, for the purpose of enabling the state to accept the offer of the United States relative to the reclamation of desert lands (28 Stat. 422, c. 301), gives the commission power to take all steps necessary to comply with such ofer, fix their term of office, and provides that each shall receive for his services $6 per diem while actually performing his official duties, such compensation to be paid in warrants drawn on the fund thereafter created. *Held*, that such commissioners are officers of the state, with compensation fixed by law, and their per diem is not subject to be passed upon by the state board of examiners. —State v. Wright, 17 Mont. 565; 44 Pac. 89.

6. Pol. Code, § 1002, provides that the governor must commission all officers appointed by him. Sec. 1003 and Const., art. 7, § 18, require the commissions of all officers commissioned by the governor to be signed by the governor, and countersigned or attested by the secretary of state, under the great seal. *Held*, that where the governor properly appoints an officer, and issues him a proper commission, the refusal of the secretary of state to countersign it and seal it with the great seal does not affect the validity of the appointment.—State v. Page, 20 Mont. 238; 50 Pac. 719.

7. Pol. Code, § 470, as amended by act Mar. 4, 1897, provides that the governor, with the

consent of the board of land commissioners, must appoint a state land agent, etc. Sec. 1104 provides that when any office becomes vacant, and no mode is provided by law for filling it, the governor must fill it by granting a commission to expire at the end of the next legislative assembly, or at the next election by the people. *Held*, that where a vacancy occurs in the office of state land agent, it may be filled by an appointment by the governor, with the consent of the board of land commissioners, by granting a commission to expire at the end of the next legislative assembly.—Id.

8. As amended by act Mar. 4, 1897, Pol. Code, §§ 470, 472, provide that the governor, with the consent of the board of land commissioners, must appoint a state land agent, who shall hold his office for a term of four years, or until his successor is appointed and qualified, and fix his annual salary, and provide how it shall be paid. Sec. 1101 provides that the office becomes vacant in the event, before the expiration of the term, of the death of the incumbent, "his resignation," etc. Sec. 1100 provides that resignations must be in writing, and made (subd. 5) "by all other appointed officers, to the body or officer that appointed them." Such section does not specify the state land agent, or to whom his resignation shall be made. *Held*, that where the state land agent sent his resignation in writing to the governor, and the latter accepted it, there was a vacancy in the office, though the board did not consent to the acceptance.—Id.

9. Pol. Code, § 341, provided that "the state land agent is appointed by the governor, with the consent of the state board of land commissioners, and holds his office during the pleasure of the board." Sec. 470 provided that "the governor, with the consent of the state board of land commissioners, must appoint a state land agent, who shall hold his office at the pleasure of the board." Sec. 472 provided that the annual salary of the agent should be $3,000. *Held*, that § 341 was repealed, and §§ 470, 472 amended, by act Mar. 4, 1897, entitled, "An act repealing §§ 470 and 472, * * * of the Political Code, * * *" which act amended § 470 to read: "The governor, with the consent of the board of land commissioners, must appoint a state land agent who shall hold his office for the term of four years, or until his successor shall be appointed and qualified;" and amended § 472 to provide: "The annual salary of the state land agent for the services rendered in any capacity whatever is the sum of $2,500," etc.—Id.

10. The secretary of the senate has custody of all bills, though Pol. Code, § 202, requires the assistant secretary to take charge of them. —State v. Bloor, 20 Mont. 574; 52 Pac. 611.

III. PROPERTY, CONTRACTS, AND LIABILITIES, 11-16.

11. The manager of a publishing house, who was paid a fixed salary, unaffected by the company's contracts, was at the time of an award to his company of a contract for publishing by the state, a member of the legislature. *Held*, not a violation of Const., Art. 5, § 30, providing that no member or officer of any department shall be in any way interested in any contract for supplies.—State v. Rickards, 16 Mont. 145; 40 Pac. 210.

12. Where bidders for the publication and annotation of the codes were given a fair hearing, and the state furnishing board used all reasonable means in its power to determine the ability of each to fulfill the contract, and it appeared certain bidders had not the facilities therefor, the rejection of their bid was not an abuse of discretion.—Id.

13. Where, as between two bids for certain supplies for the state, described in detail in the advertisement therefor, it was impossible to determine which was the lower because each bidder offered some articles at a lower price than the other, but the quality of each article required did not appear, the discretion of the state furnishing board in deciding between the bids will not be reviewed.—State v. Smith, 21 Mont. 46; 52 Pac. 641.

14. A compliance with Const., art. 5, § 30, and Pol. Code, § 710, providing for the approval by the governor and treasurer of a contract with the state for public printing, is indispensable to its validity.—State v. Hogan, 22 Mont. 384; 56 Pac. 818.

15. Pol. Code, § 705, declares that, before any contract for the furnishing of supplies to the state is let, the state furnishing board must advertise for proposals for 20 days in two daily newspapers in the state. Const., art. 5, § 30, ordains that all printing for the state shall be performed under contract to be given to the lowest responsible bidder. *Held*, that where an advertisement for proposals for furnishing the supplies was not made in compliance with § 705, but was made only in a newspaper which had the contract for the public printing, a contention that the publication was lawful because the advertisement was public printing was without merit.—State v. Toole, 26 Mont. 22; 66 Pac. 496.

16. Under Pol. Code, § 707, providing that the state furnishing board must award the contract for supplies for the state to the lowest responsible bidder, where the board regularly accepts a bid for supplies its action in subsequently attempting to rescind the contract because the bidder is shown to be a corporation employing non-union workmen, and hostile to labor organizations, is void.—Id.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES, 17-31.

17. Under Const., art. 7, § 4, declaring that certain state officers shall receive a certain sum as compensation, and art. 5, § 31, declaring that no law shall increase or diminish the salary of a public officer after his election; and art. 5, § 34, declaring that "no money shall be paid out of the treasury except upon appropriations made by law"—the salaries of the officers enumerated are required to be paid, though the legislature has made no appropriation therefor, as the appropriation is made by the Constitution itself.—State v. Hickman, 9 Mont. 370; 23 Pac. 740.

18. Const., art. 12, § 10, provides that no money shall be drawn from the state treasury except upon specific appropriation made by law. Comp. Stat., p. 1094, § 1636, passed before the adoption of the Constitution, provides that the governor and auditor shall examine the itemized account of the contractor for territorial printing, and, if they find it correct, "the auditor shall draw his warrant for the payment of the same." *Held*, that under said constitutional provision, the auditor could not be compelled by mandate to draw such warrant until the state legislature had made an appropriation therefor.—State v. Kenney, 9 Mont. 389; 24 Pac. 96.

19. Taxes levied for a fiscal year must be treated as revenue for that year, though they will not be collected and reach the treasury before the commencement of the following fiscal year, and are to be considered in determining whether the appropriations by the legislature provide for expenditures which exceed "the total tax provided by law," which is prohibited by Const., art. 12, § 12.—State v. Kenney, 10 Mont. 488; 26 Pac. 383.

20. Where the legislature has made an appropriation for a claim against the state, and it has been examined, approved and transmitted to the auditor by the state board of examiners, and the taxes levied for the year are less than the total appropriations, it is the duty of the auditor to issue his warrant on the treasury for the claim. He can not refuse on the ground that there is no money in the treasury for its payment.—Id.

21. Const., art. 12, § 10, provides that no money shall be drawn from the state treasury, except on specific appropriations made by law. *Held*, that in the absence of an appropriation, the state auditor properly refused to issue his warrant on the treasury for the salary due the clerk employed by the code commissioners under Laws 1889, p. 117, § 4, authorizing such commissioners to employ a clerk, and directing his salary to be paid monthly by the auditor on vouchers to be approved by the chairman of the commission.—State v. Kenney, 10 Mont. 496; 26 Pac. 388.

22. Comp. Stat., p. 961, § 1129, in force before the admission of Montana, provides that all territorial warrants issued by the proper authorities or the territory shall draw interest from the date of their presentation until there are funds to pay them in the hands of the treasurer, Const., art. 20, § 1, provides that all laws enacted by the territory of Montana, and in force at the time the state shall be admitted into the union, "not inconsistent with this Constitution," shall remain in full force. Art. 5, § 34, provides that no money shall be paid out of the treasury except upon appropriations made by law, and on warrants drawn by the proper officer in pursuance thereof, except interest on the public debt." *Held*, that the words "public debt" include not only bonded indebtedness, but also other debts for which warrants have been issued.—State v. Hickman, 11 Mont. 541; 29 Pac. 92.

23. Const., art. 7, § 20, provides that no claim against the state, except for salaries of officers, fixed by law, shall be passed on by the legislature without first having been acted on by the board of examiners. *Held*, that where a claim for printing is acted on by the examiners, and, after an appropriation therefor is passed by the legislature, approved by the examiners, and a warrant is drawn for the amount by the auditor, interest begins to run from the date of the warrant, and no further appropriation or approval by the examiners is necessary.—Id.

24. Const., art. 12, § 12, which declares that "no appropriation of public money shall be made for a longer time than two years," is prospective only in its operation, and does not affect the prior appropriation of Laws 1889, p. 218, by the territorial legislative assembly, for the payment of the supreme court reporter. —State v. Kenney, 11 Mont. 553; 29 Pac. 89.

25. Where, during a certain fiscal year, the governor offers a reward for the arrest and conviction of certain criminals, and they are arrested during such year, but not convicted until the following year, after the unused funds appropriated for rewards for such previous year have been transferred by the state treasurer to the general fund, as required by law, the state auditor can not be compelled to issue a warrant, in favor of the person entitled to such reward, on the fund appropriated for rewards for such previous year.—State v. Cook, 13 Mont. 465; 34 Pac. 770.

26. Laws 1893, p. 197, § 10, appropriated $42,000 for the year 1893 and $30,000 for the year 1894, to be used in the construction of the eastern state prison. *Held*, that where only part of the appropriation for 1893 was used during such year, and the balance was transfered to the general fund, the appropriation for 1894 did not thereby lapse, and the state auditor had no authority to transfer the funds apropriated for such year to the general fund at the end of the fiscal year for 1893.—State v. Cook, 14 Mont. 332; 36 Pac. 177.

27. Const., art. 12, § 12, prohibiting appropriations or expenditures by the legislature whereby the expenditures for the state for any fiscal year shall exceed the total tax then provided by law, does not apply to appropriations for the state capitol building, which is to be erected exclusively from moneys received from the sale of lands granted the state by the federal government for such purpose, so as to prohibit the drawing of warrants on the capitol fund in excess of the funds on hand for compensation of the capitol commissioners.—State v. Cook, 17 Mont. 529; 43 Pac. 928.

28. Pol. Code, § 3530, et seq., creating the arid land commission, for the purpose of enabling the state to accept the offer of the United States relative to the reclamation of desert lands (28 Stat. 422, c. 301), provides that money realized from sales of land to actual settlers shall go into the "federal land reclamation fund," which is specially dedicated to the redemption of warrants issued against it under the provisions of the act. *Held*, that there can be no state debt created to pay such warrants, but that the holders thereof must look to the reclamation fund exclusively.—State v. Wright, 17 Mont. 565; 44 Pac. 89.

29. Const., art. 5, § 34, prohibiting the state treasurer from paying out any money, except appropriations made by law, and on warrants drawn by the proper officer, does not prevent him from registering a warrant issued by the arid land commission, without regard to any action by the auditor or state board of examiners, since the fund from which such warrant must be paid is impressed with a trust, under act Congress, Aug. 18, 1894, for the reclamation of desert lands, and is not subject to state control beyond what is consistent with the execution of that trust.—Id.

30. Where contractors working for the state agreed to accept the warrants on a certain fund at par, and in full payment for the work, such action did not preclude their statutory right to interest on the warrants, but merely bound them to accept such warrants at their face value.—State v. Barrett, 25 Mont. 112; 63 Pac. 1030.

31. Where contractors were paid for state work by warrants drawn on a certain fund in the state treasury, and were entitled to interest thereon after presentation, the assignees of such contractors succeeded to all their rights, notwithstanding the warrants were non-negotiable, and were entitled to interest on the warrants.—Id.

V. CLAIMS AGAINST STATE, 32-35.

32. Const., art. 7, § 20, provides that no claim against the state, except for salaries of officers, fixed by law, shall be passed on by the legislature without first having been acted on by the board of examiners. *Held*, that where a claim for printing is acted on by the examiners, and after an appropriation therefor is passed by the legislature, approved by the examiners, and a warrant is drawn for the amount by the auditor, interest begins to run from the date of the warant, and no further appropriation or approval by the examiners is necessary.—State v. Hickman, 11 Mont. 541; 29 Pac. 92.

33. Where no part of the appropriation of funds by the state for the payment of bounties for the destruction of stock destroying animals is unappropriated or available, mandamus to

compel the board of examiners to transmit an allowed claim to the auditor, to authorize him to draw his warrant in payment therefor, will be dismissed.—State v. Rickards, 17 Mont. 440; 43 Pac. 504.

34. In mandamus it appeared that the relator filed certain claims with the state board of examiners under Laws 1893, providing for the payment of bounties for the destruction of stock destroying animals; that said board audited and allowed relator's claims, but refused to endorse or transmit them to the auditor; that appropriations were made by the legislature for the payment of bounties, but that, prior to the approval of the act, appropriations for the fiscal years 1893 and 1894 had already been made in excess of the total revenue of the state; that at the close of 1893 and 1894, whatever parts of the funds which had not been used for the purpose for which they had been appropriated were covered back into the treasury, and had been reappropriated before relator began his proceeding. *Held*, that there was no fund on which the board could direct the auditor to draw warrants in payment of relator's claims. —Id.

35. Laws 1897, p. 58, provide for the issuance of bonds to create a fund for the erection of state university buildings, and creates a building commission, who have authority to draw their warrants on the state treasurer for sums due any building contractor, and the state treasurer is required to pay them out of said fund. *Held*, that a warrant drawn by the commission in favor of a contractor need not be passed on by the state board of examiners, created by Const., art. 7, § 20, which provides that no claims against the state shall be passed on by the legislature without first having been approved by the board, since the university bond fund is a trust entirely different from one arising from taxation, over which the board of examiners would have control.—State v. Collins, 21 Mont. 448; 53 Pac. 1114.

VI. ACTIONS, 36.

36. Where the state furnishing board regularly accepts a bid for the furnishing of supplies to the state, and subsequently refuses to sign the formal contract, a writ of mandate to compel such action is not obnoxious, as being in effect a suit against the state.—State v. Toole, 26 Mont. 22; 66 Pac. 496.

STATUTES.

I. Enactment, Requisites, and Validity in General, 1-8.
II. General and Special or Local Laws, 9-17.
III. Subjects and Titles of Acts, 18-29.
IV. Amendment, Revision, and Codification, 30-39.
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VI. Construction and Operation, 46-93.
A. General rules of construction, 46-80.
B. Particular classes of statutes, 81-84.
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VII. Pleading, 94.

1 ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL, 1-8.

1. An act of the legislature will not be adjudged to be in violation of the Constitution, except when plainly repugnant thereto; the act will be presumed to be constitutional until the contrary is clearly and satisfactorily shown.—People v. Van Gaskin, 5 Mont. 352; 6 Pac. 30.

2. Laws 1891, p. 245, providing that cities of a certain class may incur bonded indebtedness to an amount not exceeding 4% of their assessed valuation, though in conflict with Const., art. 13, § 6, which provides that cities of such class may become indebted only 3% of the value of the taxable property therein, is void only to the extent of the repugnancy in fixing the amount at 4% instead of 3%, and therefore bonds issued by a city under such act are valid, if it appears that the debt created thereby is within the constitutional limit.—Dunn v. Great Falls, 13 Mont. 58; 31 Pac. 1017.

3. Laws 1893, p. 150 (Civ. Code, §§ 978-984), was a Senate Bill, entited "An Act to regulate the sale and redemption of transportation tickets of common carriers." It limits to agents authorized by certificates from the carriers the right to sell tickets, the certificates to be posted for inspection by travelers, and requires each agent, within 10 days after his appointment, to exhibit his certificate to the secretary of state, and obtain a license as ticket seller, and pay to the secretary a fee of $1. The act makes it unlawful for anyone to sell tickets without a license, provides a penalty for violations, provides for the redemption of unused tickets, and makes it unlawful for tickets to be sold at other than the regular rate. *Held*, that the act was a police regulation, and not a bill for raising revenue, within Const., art. 5, § 32, requiring such a bill to originate in the house of representatives.—State v. Bernheim, 19 Mont. 512; 49 Pac. 441.

4. Const., art. 5, § 27, provides that "the presiding officer of each house shall, in the presence of the house over which he presides, sign all bills and joint resolutions passed by the legislative assembly, immediately after their titles have been read, and the fact of signature shall at once be entered upon the journal." The enrolled bill was signed by the presiding officer, but the journal failed to show the fact. *Held*, that the court would not go behind the enrolled bill to ascertain the facts, but would presume regularity.—State v. Long, 21 Mont. 26; 52 Pac. 645.

5. Under the direct provisions of Const., art. 5, § 23, declaring that no bill shall contain more than one subject, which shall be expressed in its title, if any subject is embraced in an act which is not expressed in its title, such act is void only as to so much as is not so expressed. —State v. Courtney, 27 Mont. 378; 71 Pac. 308.

6. Civ. Code, § 681, after providing for the taxation of insurance companies on the excess of premiums over losses and expenses, further provides that insurance companies and corporations are subject to no other taxation under the laws of the state, except taxes on real estate and the fees imposed by law. *Held*, that the invalidity of such further provision did not affect the remainder of the section.—Northwestern Mutual Life Ins. Co. v. Lewis and Clark, 28 Mont. 484; 72 Pac. 982.

7. A proclamation of the governor convened the legislature in extra session in December, 1903, for the purpose of enacting general legislation by which the bias and prejudice of district judges should be made a disqualification of such judges to try any case that may come before them, as well as legislation making suitable provision for the trial of such case or cases in such event. The legislature met and passed act Dec. 10, 1903, amending Code Civ. Proc., § 180, so as to provide that, on the fil-

ing of an affidavit of prejudice against a district judge, he should no longer act, and also amending § 615 so as to provide in such case, if a qualified judge should be called to try the case within 30 days after such disqualification, no change of venue therefor should be had. *Held*, that such legislation was germane to the governor's call, as required by Const., art. 7, § 11.—State v. Clancy, 30 Mont. 529; 77 Pac. 312.

8. The authority of the governor over the legislature is limited to the recommendation of such legislation as he deems expedient, as authorized by Const., art. 7, § 10, the substance of which, in case of extra sessions, are required by § 11 to be enumerated in the proclamation or in the governor's message to the assembly, after which the power of the legislature to enact legislation on such subjects is plenary.—Id.

II. GENERAL AND SPECIAL OR LOCAL LAWS, 9-17.

9. Laws 1887, p. 59, amending Comp. Stat., p. 338, § 253, and reducing the fees of administrators throughout the state, was not a local or special law within the inhibition of act Congress, Jul. 30, 1886, prohibiting territorial legislatures from passing "local or special laws" decreasing fees of public officers during their term of office.—In re Dewar's Estate, 10 Mont. 426; 25 Pac. 1026.

10. Comp. Stat., p. 855, § 794, declaring that all county warrants which are not paid when presented shall draw interest, with the exception of the warrants of Missoula county, is in conflict with the state constitution and 24 Stat. 170, forbidding the territorial legislature to pass local or special laws regulating the rate of interest on money.—Hotchkiss v. Marion, 12 Mont. 218; 29 Pac. 821.

11. Laws 1891, p. 291, providing for the submission to a vote of the question of the permanent location of the seat of government, is not a local or special law within the constitutional inhibition.—State v. Rotwitt, 15 Mont. 20; 37 Pac. 845.

12. Laws 1897, p. 136, amending Pol. Code, §§ 1770-1782, classifying school districts with reference to population for the purpose of electing trustees, and providing that elections in first class districts shall be under the supervision of the county commissioners, and in second class of the school trustees, is not local or special, within Const., art. 5, § 26, since the method of supervision is common to all districts of a class.—State v. Long, 21 Mont. 26; 52 Pac. 645.

13. Code Civ. Proc., §§ 1900, 1901, authorizing any corporation incorporated in the state for guarantying or becoming a surety on bonds to become a sole surety without an affidavit showing qualifications, is not a special law granting to a corporation a special or exclusive privilege, within the prohibition of Const., art. 5, § 26, though such right is not enjoyed by other corporations, and individual sureties must be at least two in number, and must accompany the bond with an affidavit of qualifications.—King v. Elling, 24 Mont. 470; 62 Pac. 783.

14. Code Civ. Proc., §§ 1900, 1901, is not a special law, granting a special or exclusive privilege to a corporation, within the meaning of Const., art. 5, § 26, though it is not enjoyed by other corporations, and individual sureties are required to be two in number and to make a qualifying affidavit.—Id.

15. Const., art. 5, § 26, prohibiting the legislature to pass local or special laws changing the names of persons or "places" applies to changing the name of counties, notwithstanding art. 6, § 4, and art. 16, §§ 1, 3, recognize the power of the legisature to create new counties and to change those already established.—Sackett v. Thomas, 25 Mont. 226; 64 Pac. 503.

16. The local option liquor law (Pol. Code, §§ 3180-3188) is not violative of Const., art. 5, § 26, prohibiting local or special legislation.—In re O'Brien, 29 Mont. 530; 75 Pac. 196.

17. Since Act Dec. 10, 1903, amending Code Civ. Proc., § 180, so as to provide for the disqualification of district judges on the filing of an affidavit of prejudice, is general in its terms and operation throughout the state, and therefore sufficiently complies with Const., art. 8, § 26, requiring all laws relating to courts to have a uniform operation, it is immaterial that it was passed at an extra session, called by the governor for the purpose of relieving an industrial condition existing in only three of the populous cities of the state.—State v. Clancy, 30 Mont. 529; 77 Pac. 312.

III. SUBJECTS AND TITLES OF ACTS, 18-29.

18. Comp. Stat., p. 854, §§ 790, 795, 796, 808, as amended by Laws 1891, p. 225, treating of county finances, bonds and warrants, prescribes in § 790, the time when the bonds shall be redeemable; in § 795, the duty of the commissioners in submitting to the electors the question of incurring indebtedness; in § 796 refers to the notice of election; and in § 808 to the authority of the commissioners to issue bonds to redeem outstanding bonds. *Held*, not obnoxious to Const., art. 5, § 23, forbidding the passage of a law containing more than one subject, which shall be expressed in its title.—Hotchkiss v. Marion, 12 Mont. 218; 29 Pac. 821.

19. Penal Code, as submitted, contained a chapter 9, §§ 360-367, entitled "Gaming," and prohibiting the same. This chapter was stricken out, and §§ 357-369a were added to chapter 8, allowing certain games. The Code as passed contained three chapters 9, under different parts, titles and subdivisions, one of which is entitled "False weights and measures," another "Postponement of a Trial," and the other "Proceedings against corporations." Act Feb. 28, 1895 (passed after the adoption of the Code), entitled "An act to amend chapter 9 of the Penal Code," provides that such chapter be amended by striking out §§ 357-369a, and inserting a section (360), which prohibits opening any game of faro, or any banking or percentage game played with cards, dice or any device for money, etc. *Held*, that such act is in conflict with Const., art. 5, § 23, providing that no bill shall contain more than one subject, which shall be clearly expressed in its title.—State v. Mitchell, 17 Mont. 67; 42 Pac. 100.

20. Laws 1893, p. 150, was entitled "An act to regulate the sale and redemption of transportation tickets of common carriers." *Held*, that the providing of penalties against violations of the act does not violate Const., art. 5, § 23, requiring the subject of every bill to be clearly expressed in its title.—State v. Bernheim, 19 Mont. 512; 49 Pac. 441.

21. Under Const., art. 5, § 23, requiring the subject of every bill to be clearly expressed in its title, Laws 1891, p. 267, entitled "An act requiring railroad companies to pay for damages to stock," is not inoperative because the title thereof is silent as to fences and penalties.—Snook v. Clark, 20 Mont. 230; 50 Pac. 718.

22. Act Mar. 9, 1893, amending act 1891, entitled "An act concerning compensation of county * * * officers," and providing for the payment of sheriffs by salary, and that the commissioners shall fix the number of deputy

sheriffs, is not repugnant to Const., art. 5, § 23, providing that a bill shall not embrace more than one subject, which must be clearly expressed in its title.—Jobb v. Meagher, 20 Mont. 424; 51 Pac. 1034.

23. Act Mar. 7, 1895, entitled "An act to amend §§ 364 and 365 of the Fifth Division of the Compiled Statutes of Montana and the amendments thereto," approved Sept. 14, 1887, relating to the qualifications of mayors and aldermen and declaring the same, does not conflict with Const., art. 5, § 23, declaring that an act shall not embrace more than one subject, which shall be clearly expressed in its title.—Dowty v. Pittwood, 23 Mont. 113; 57 Pac. 727.

24. Laws 1897, p. 245, entitled "An act to amend § 705 of tit. 10 of the Penal Code, to have the cages in mines cased in," makes it unlawful for any corporation to sink or work through any vertical shaft where mining cages are used to a greater depth than 300 feet, unless such shaft shall be provided with an iron bonnet safety cage. *Held*, that the subject matter of the act is sufficiently expressed in the title, within the meaning of Const., art. 5, § 23.—State v. Mining Co., 23 Mont. 498; 59 Pac. 854.

25. By Const., art. 5, § 23, it is only intended that the subject of a bill shall be fairly expressed in the title, and it is not necessary that the title shall embody the exact limitations or qualifications contained in the bill itself, which are germane to the purpose of the legislature, if the general subject of the measure is clearly expressed in the title.—Id.

26. House bill No. 162 of the legislative assembly of 1897 was entitled "An act to amend sections 4063, 4064, 4065, 4068 and 4083 of the Political Code, and to add to art. 2, c. 12, tit. 10, pt. 3, of the Political Code, a section, to be numbered 4084, regarding licenses." The section referred to contained provisions relative to licenses of wholesale and retail liquor dealers and retail merchants, etc. *Held*, that the subject of the act was clearly expressed in its title, so as not to be within the prohibition of Const., art. 5, § 23, declaring that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title.—State v. Courtney, 27 Mont. 378; 71 Pac. 308.

27. Pol. Code, §§ 4024-4026, providing a remedy by action for the recovery of illegal taxes, were contained in an act approved Mar. 18, 1895, entitled "An act providing for unlawful levy and collection of public revenue." *Held*, that such act was not unconstitutional, under Const., art. 5, § 23, the words "providing for unlawful levy," etc., being construed as meaning, "providing a remedy for unlawful remedy," etc.—Western Ranches Co. v. Custer, 28 Mont. 278; 72 Pac. 659.

28. A Senate Bill, which became Laws 1903, p. 110, was entitled "An act to repeal sections * * * of the Penal Code * * * and to provide further protection to birds, etc., as amended by House Bill No. 13, session of 1901, approved March 14, 1901." House Bill No. 13 (Laws 1901, p. 171) was entitled "An act to amend an act entitled an act to repeal * * * and to provide further protection to birds," etc. It appeared from the contents of the Senate Bill that that its purpose was to amend House Bill No. 13. *Held*, that the Senate Bill was void, as in conflict with Const., art. 5, § 23.—State v. Brown, 29 Mont. 179; 74 Pac. 366.

29. Laws 1903, p. 232, § 15, entitled, "An act to create the office of meat and milk inspector for the state of Montana, and prescribing his duties and powers and compensation therefor," imposing a license fee on persons selling milk, and authorizing the collection thereof by the inspector, does not violate Const., art. 5, § 23.—State v. McKinney, 29 Mont. 375; 74 Pac. 1095.

IV. AMENDMENT, REVISION, AND CODIFICATION, 30-39.

30. Act of Feb. 18, 1885 (Laws 1885, pp. 106-7), "To amend an act to regulate the fees of sheriffs for board of prisoners," approved Feb. 10, 1881, and reducing the fees to 75 cents for each prisoner from $1.25, as allowed by the act of 1881, is valid, although the act of 1881 was merely an act repealing and amending a previous act, and the act so repealed is not referred to by its title; there being nothing in the organic law or the statutes of Montana requiring an amendatory act to refer to the amended or repealed act by its title.—Lane v. Commissioners, 6 Mont. 473; 13 Pac. 136.

31. Act of February 1885 (Laws 1885, pp. 106-7), entitled, "An act to amend an act regulating the fees of sheriffs for the board of prisoners," approved Feb. 10, 1881, and providing "that the above recited act be so amended as to read as follows," is valid, although the act intended to be amended is thus recited in the title only.—Carruthers v. Commissioners, 6 Mont. 482; 13 Pac. 140.

32. A bill which subsequently became a law may be amended by a bill introduced before, but passed after, the first bill becomes a law.—Mutual Benefit L. I. Co. v. Winne, 20 Mont. 20; 49 Pac. 446.

33. Under Const., art. 5, § 23, § 14 of the act of 1895 (House Bill No. 291), amending certain sections of the Political Code, pertaining to municipal corporations, and repealing certain sections of an act of 1893, amending the laws relating to municipal corporations, which vested concurrent jurisdiction of misdemeanors committed in cities in police magistrates and justices of the peace, amended and supplemented Pol. Code, § 3466, as originally approved, whereby exclusive jurisdiction of such offenses was vested in police magistrates (now § 4911), though no reference to the section so amended was made in the title to such amendatory act, as the omission thereof was manifestly due to a mere clerical error.—In re Ryan, 20 Mont, 64; 50 Pac. 129.

34. The use of the word "repealing" in the title of an act, instead of "amending," does not violate Const., art. 5, § 23, when the other words of the title clearly point out the section, chapter, title, code, and subject to be affected by the provisions of the bill.—State v. Page, 20 Mont. 238; 50 Pac. 719.

35. Laws 1897, p. 136, entitled, "An act to amend §§ 1770 to 1782, inclusive," of the Political Code, is not invalid, in failing to specifically enumerate the sections between 1770 and 1782.—State v. Long, 21 Mont. 26; 52 Pac. 645.

36. Act Mar. 7, 1895, entitled "An act to amend §§ 364 and 365 of the Fifth Division of the Compiled Statutes of Montana and the amendments thereto," approved Sept. 14, 1887, does not violate Const., art. 5, § 25, providing that no law shall be revised, amended or extended by reference to its title only; but so much as is revised, amended or extended shall be re-enacted and published at length.—Dowty v. Pittwood, 23 Mont. 113; 57 Pac. 727.

37. In view of Pol. Code, § 5160, adopted Feb. 25, 1895, providing that laws passed at the session of the legislative assembly at which the Code was passed must be construed as if both had been passed on the last day thereof, and § 2, providing that the Code shall not take effect until Jul. 1, 1895, Comp. Stat., p. 698,

§ 365, relating to the qualification of aldermen, could not have been repealed or abrogated by the Code before Jul. 1, 1895, and hence the act of Mar. 7, 1895 (Pol. Code, § 4753), amending it, was a valid amendment of an existing law, and became, under Act Mar. 13, 1895 (Pol. Code, § 5180, et seq.), effective as a part of the Code on and after Jul. 1, 1895.—Id.

38. Const., art. 5, § 25, providing that no law shall be revised or amended, or the provisions thereof extended, "by reference to its title only, but so much thereof as is revised, amended or extended shall be re-enacted and published at length," has no application to an act which does not purport to be an amendment to or a revision of a prior act, but is an additional and independent piece of legislation, impliedly amending, and hence repealing, so much of the prior act as is in conflict with it.—King v. Elling, 24 Mont. 470; 62 Pac. 783.

39. Pol. Code, § 4063, declares that every person who sells intoxicating liquors in less quantities than one quart must obtain a license at specified rates therefor. Sec. 4064 provides that every person who, at a fixed place of business, sells any merchandise, wines or liquors, shall pay a license of a smaller sum. Sec. 4065 declares that the sale of liquors by persons licensed under a preceding section must not be in less quantity than one quart. House Bill No. 162 of the session of 1897 was entitled, "An act to amend sections 4063, 4064, 4065, 4068 and 4083 of the Political Code," etc., and § 4063 was in fact amended by putting sellers of all kinds of intoxicating liquors into two classes, to-wit, those who sell in quantities less than one quart, and those who sell in quantities not less than one quart. Sec. 4064, though mentioned in the title of the amendatory act, was not mentioned in the body of the act: but § 4065 was amended so as to leave out all reference to § 4064, and those who sell liquors under the provisions of that section. *Held*, that though not mentioned, § 4064 was amended by implication, so that after the passage of the act of 1897, a person was not entitled to sell liquors under the merchant's license provided for in § 4064.—State v. Courtney, 27 Mont. 378; 71 Pac. 308.

V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL, 40-45.

40. Though a subsequent statute be not repugnant in all its provisions to a prior one, yet, if the later statute was clearly intended to prescribe the only rules which should govern, it repeals the prior one.—Thomas v. Smith, 1 Mont. 21.

41. When two acts have the same object in view and provide different means of accomplishing it, the latter takes the place of the former and repeals it.—Territory v. Gilbert, 1 Mont. 371.

42. Laws 1876, p. 63, entitled, "An act concerning dower," was not repealed by implication from its entire ommission from Revised Statutes of 1879, nor was it expressly repealed thereby: the repealing clause of that compilation (Rev. Stat., p. 671, § B) repealing only acts, "any portion of which is embraced in any section of said codification," and providing that all acts, "no part of which is embraced in said codification, shall not be affected or changed by its enactment."—Chadwick v. Tatem, 9 Mont. 354; 23 Pac. 729.

43. Where two acts relating to the same subject matter are passed at the same session of the legislature, there is a strong presumption against implied repeal, and both acts will be given effect as far as possible.—State v. Rotwitt, 17 Mont. 41; 41 Pac. 1004.

44. One act will not be construed as repealing by implication another act passed at the same session, unless they are irreconcilably repugnant.—Congdon v. Butte C. R. Co., 17 Mont. 481; 43 Pac. 629.

45. Laws 1889, p. 209, establishing a series of text books for use in the pubic schools, and providing that it should continue in force for six years from Jul. 1, 1889, "or until changed in pursuance of law," was repealed by Pol. Code, §§ 5181, 5182, which took effect Jul. 1, 1895, even if such act did not expire on the latter date by its own terms.—Campana v. Calderhead, 17 Mont. 548; 44 Pac. 83.

VI. CONSTRUCTION AND OPERATION, 46-93.

A. General Rules of Construction, 46-80.
B. Particular Classes of Statutes, 81-84.
C. Retroactive Operation, 85-93.

A. GENERAL RULES OF CONSTRUCTION, 46-80.

46. In construing a statute it is the duty of a court, where one of two constructions will render it inoperative, or even merely harsh, and another valid, to give it such construction as will sustain it.—Thomas v. Smith, 1 Mont. 21.

47. It is a primary principal that statutes in pari materia shall be so construed that, if possible, all shall stand.—Id.

48. This court can refer to the history of the territory to ascertain the proper construction of a statute which is ambiguous.—Carpenter v. Rodgers, 1 Mont. 90.

49. A proviso which makes an act inconsistent with any reasonable intention on the part of the legislative body which enacted it, and makes it inconsistent with itself, and is totally repugnant to the body of the act, and destroys its effect altogether, should not stand.—Id.

50. Courts ascertain the intention of legislatures in enacting a statute by considering the object sought and effect of their interpretation, and are not restricted to the words which are used.—Perkins v. Guy, 2 Mont. 15.

51. Courts must construe statutes in accordance with what they conceive to be legal principles, regardless of the hardship which such construction may work. (See 4 Otto 586.)—Sands v. Maclay, 2 Mont. 35.

52. A party can not be convicted of an offense after the statute defining it has been repealed, if there is no legislation excepting acts committed or actions pending.—Territory v. Ashby, 2 Mont. 89.

53. Statutes should be their own interpreter. Courts must look at the language used, and the whole of it, and derive therefrom the intention of the legislature. Where this intention is obvious there is no room for construction. Where the language is plain, simple, direct and without ambiguity, the act construes itself, and courts must presume the legislature intended what it plainly says.—Smith v. Williams, 2 Mont. 195.

54. The meaning of words and the grammatical construction of the English language, so far as established by the rules and usages of the language, are matters of law to be construed by the court. Only when words are used in a peculiar and unusual signification is testimony admissible for explanation.—Kennon v. King, 2 Mont. 437.

55. Courts must find the intent of the legislature in the statute itself, and unless some ground can be found in the statute restricting or enlarging the meaning of its general words,

they must receive a general construction, and the courts can not arbitrarily subtract therefrom or add thereto.—Hope Mining Co. v. Kennon, 3 Mont. 35.

56. Each section of a statute, if possible, should be made to harmonize with every other section, and only when the words are ambiguous and uncertain can resort be had to anything outside of the statute itself.—Id.

57. Statutes must be construed so as to give effect to the legislative intent.—Northern Pacific v. Majors, 5 Mont. 111; 2 Pac. 322.

58. The construction of a statute must be made upon the whole act, including the preamble, and not alone upon disputed parts of it.—Id.

59. Rev. Stat., p. 497, § 433, providing that a county treasurer shall execute a bond before entering upon the discharge of his duties, prevails over § 457, providing that every county officer shall execute his bond within 20 days after the commencement of his term of office, as the special provision controls the more general.—Carland v. Commisioners, 5 Mont. 579; 6 Pac. 24.

60. Where the legislature adopts a statute from another state, it will be presumed to have adopted that statute as interpreted by the courts of such other state; and adopting the statute as it was originally enacted, disregarding a subsequent amendment, it will be presumed to have adopted the interpretation of the statute as made prior to the amendment.—Lindley v. Davis, 6 Mont. 453; 13 Pac. 118.

61. It is both a common law and a statutory rule of construction of statutes, that the intention of the legislature must be discovered, and, if possible, pursued.—Power v. Commissioners, 7 Mont. 82; 14 Pac. 658.

62. Whether or not an alleged common error in construing a statute existed, as well as its effect, are questions to be determined by the court, and not the jury.—O'Donell v. Glenn, 9 Mont. 452; 23 Pac. 1018.

63. Comp. Stat., p. 519, § 86, makes it an offense for any person to "mark, brand, alter, or deface the mark or brands of any horse," etc., with intent to steal the same, or prevent the identification thereof by the owner. *Held*, that since the statute as published, with a comma after the word "alter" and the second "brand," is senseless, but with them stricken out, and one inserted after the word "of" following the second "brand," has a sensible meaning, the latter construction must be adopted.—State v. Pilgrim, 17 Mont. 311; 42 Pac. 856.

64. Where two acts passed at different sessions are subsequently re-enacted in a revision of the statutes, they will be construed as the acts of one legislature, and effect, so far as possible, given to each.—Congdon v. Butte C. R. Co., 17 Mont. 481; 43 Pac. 629.

65. By adopting the statute of another state, the legislature adopts the construction placed thereon by the courts of such state.—Largey v. Chapman, 18 Mont. 563; 46 Pac. 808.

66. Where two statutes, enacted at the same session of the legislature, provide remedies for the same cause of action, both should be given effect, if possible.—State v. Fransham, 19 Mont. 273; 48 Pac. 1.

67. The word "manufacturer," in Pol. Code, § 4082, requiring a manufacturer to pay a license fee, should be construed in its popular sense, under Code Civ. Proc., § 3462, requiring non-technical words to be construed according to the "approved usage of the language."—State v. Johnson, 20 Mont. 367; 51 Pac. 820.

68. The rule of interpretation that general words are to be restricted by particular terms used in connection with them, is subject to the further rule that the intent of the legislature is to be ascertained from the words of the statute and should be enforced.—State v. Cave, 20 Mont. 468; 52 Pac. 200.

69. Where a state enacts a statute of another state, which has been construed by the latter's courts, the former state is not bound by such construction, when not in harmony with the spirit of its legislation and decisions.—Oleson v. Wilson, 20 Mont. 544; 52 Pac. 372.

70. Conceding that Laws 1897, p. 136, amending Pol. Code, §§ 1770-1782, relating to the election of school trustees, provides that the trustees shall be elected for three years, in violation of Const., art. 16, § 6, which limits the terms of such officers to two years, the entire act would not thereby be vitiated.—State v. Long, 21 Mont. 26; 52 Pac. 645.

71. The fact that Laws 1897, p. 136, amending Pol. Code, §§ 1770-1782, relating to the election of school trustees, violates Const., art. 5, § 31, which provides that no law shall increase the salary of any officer after his election, does not invalidate the entire act.—Id.

72. When the legislature borrows a statute from another state, the legislature will ordinarily be presumed to have adopted the statute with the interpretation theretofore given it by the courts of that state, which interpretation will be departed from only for the strongest reasons.—Stadler v. First Nat'l Bank, 22 Mont. 190; 56 Pac. 111.

73. The rule, in construing statutes, that, where it is manifest on the face of the act that an error has been made in the use of words, the court may correct it, and read the statute as corrected, to give it the obvious intention of the legislature, does not justify the court in reading such a change into a statute as that the effect will be to abrogate a specific provision made therein.—Hilburn v. Railroad Co., 23 Mont. 229; 58 Pac. 551, 811.

74. Courts will sustain the acts of the legislature in every case in which it is possible to do so under the recognized rules of interpretation. It is only where, after an act has been subjected to the test of all the standards of interpretation, and the intention can not be discerned, or the means of carrying it out are not provided or are inadequate, or it is so conflicting and inconsistent in its provisions that it can not be executed, that it will be declared inoperative and void.—Id.

75. In construing a statute the courts will endeavor to give effect to the purpose and intent of the legislature, and for that purpose will apply the ordinary rules of grammar.—Jay v. School District, 24 Mont. 219; 61 Pac. 250.

76. In those cases where the public or persons possess the right to require that the power conferred in a statute by the word "may," the word is imperative and mandatory, being the equivalent of "shall" or "must."—M. O. P. Co. v. Lindsay, 25 Mont. 24; 63 Pac. 715.

77. Where one state adopts a statute from another state, after a judicial interpretation thereof by the courts of the parent state applicable to the conditions of the adopting state, the legislature will be presumed to have adopted the interpretation with the statute.—Butte & B. C. M. Co. v. M. O. P. Co., 25 Mont. 41; 63 Pac. 825.

78. Pol. Code, § 4063, declares that every person who sells intoxicating liquors in less quantities than one quart must obtain a license at specified rates therefor. Sec. 4064 provides that every person who, at a fixed place of business, sells any merchandise, wines or liquors shall pay a license of a smaller sum. *Held*, that as § 4064 was impliedly amended, so as to remove wholesale liquor dealers from the pur-

view of that section, there is no conflict between it and § 4063, so that § 5165, declaring that, if conflicting provisions are found in different sections of the same chapter or article, the provision of the section last in numerical order must prevail, does not apply to the two sections.—State v. Courtney, 27 Mont. 378; 71 Pac. 308.

79. The decision of the court of another state construing a statute thereof will not be followed by a court of a state borrowing such statute, unless the decision appeals to it as founded on right reasoning.—A. O. H. v. Sparrow, 29 Mont. 132; 74 Pac. 197.

80. The construction put upon a statute by the decisions of the courts of the state from which it is borrowed will not be followed where it appears that such decisions are founded on unsound reasoning, or will tend to the denial of a constitutional right.—State v. Mott, 29 Mont. 292; 74 Pac. 728.

B. PARTICULAR CLASSES OF STATUTES, 81-84.

81. The attachment law is a remedial statute and should be liberally and beneficially expounded.—Cope v. Upper, etc. Co., 1 Mont. 53.

82. The statute of this territory, giving mechanics and others liens, is in derrogation of common law, and provides an extraordinary remedy, yet it is a remedial statute and should be so construed as to further the object intended.—Black v. Appolonio, 1 Mont. 342.

83. Legislative grants should be construed liberally in favor of the grantee, and in such manner as to give them a full and liberal operation, so as to carry out the legislative intent, where that can be ascertained.—Robertson v. Smith, 1 Mont. 410.

84. A statute requiring foreign corporations, before doing any business of any kind within the state, to file certain papers in certain public offices, and prescribing penalties against the corporation which attempts, or commences, to do business in the state without first having filed the necessary papers, is, in a sense pertaining to construction, a "penal" statute, and is to be construed strictly,—not liberally.—Manhattan Trust Co. v. Davis, 23 Mont. 273; 58 Pac. 718.

C. RETROACTIVE OPERATION, 85-93.

85. Sec. 6, act of congress amending the Organic Act of this territory, approved Mar. 2, 1867, did not have a retroactive effect and give full force to a law from the time of its first enactment, which had been annulled by congress and re-enacted by a subsequent legislature of Montana.—Carpenter v. Rodgers, 1 Mont. 90.

86. Under Comp. Stat., p. 649, § 209, providing that "no action, plea, prosecution, civil or criminal, pending at the time any statutory provisions shall be repealed, shall be affected by such repeal, but the same shall proceed in all respects as if such statutory provisions had not been repealed," the act passed Sept. 15, 1887, which declares that instructions given, and the refusal to give instructions, shall be deemed excepted to, is not applicable to an action pending at the time of its passage. (See 149 U. S. 17.)—Gassert v. Bogk, 7 Mont. 585; 19 Pac. 281.

87. An amended statute is to be construed as if it had read from the beginning as it does amended.—Peters v. Vawter, 10 Mont. 201; 25 Pac. 438.

88. The 1889 amendment to Comp. Stat., p. 332, § 229 (Laws 1889, p. 146), requiring all partnership assets to be applied to payment of the firm creditors "alike," and giving no preference, except to lienholders, is not retroactive as to attachments levied before its passage.—Ryan v. Maxey, 14 Mont. 81; 35 Pac. 515.

98. Comp. Stat., p. 649, § 209, providing that no action pending at the time any statutory provision shall be repealed shall be affected by such repeal, but shall proceed the same as if the provision were not repealed, refers only to provisions which affect the action, and not the place of trial.—Bookwalter v. Conrad, 15 Mont. 464; 39 Pac. 573.

90. Code Civ. Proc., § 3455, providing that no actions pending or rights accrued before the new Codes took effect should be affected by their provisions, did not apply to statutes relating merely to the remedy by declaring that certain rules of evidence should govern the courts in the trial of cases.—Baxter v. Hamilton, 20 Mont. 327; 51 Pac. 265.

91. Civ. Code, § 2245, making void provisions of contracts by which the jurisdiction of courts over controversies therein is ousted, does not apply to contracts made before its adoption.—Cotter v. Grand Lodge, 23 Mont. 82; 57 Pac. 650.

92. Laws 1899, p. 115 amended Civ. Code, § 3996, so as to allow negotiable instruments to contain a provision for reasonable attorney's fees. The bill for this amendment, when introduced in the Senate, provided that the negotiability of all instruments outstanding, the terms and conditions of which were unfulfilled, should be determined by the amendment. This provision was stricken out in the House, and the bill finally passed without it. *Held*, that the amendment did not apply to notes given prior to its passage.—Bullard v. Smith, 28 Mont. 387; 72 Pac. 761.

93. Civ. Code, § 3842, providing that a mortgage can be created, renewed or extended only by writing with the formalities required in case of a grant of real property, since it did not take effect until Jul. 1, 1895, and since by § 4651 no part of the Civil Code is retroactive unless expressly so declared, has no application to a mortgage renewed by extension of the note which it secured in 1890.—Wilson v. Pickering, 28 Mont. 435; 72 Pac. 821.

VII. PLEADING, 94.

94. Where the statute of another state is relied upon as a defense it must be pleaded by setting out in terms so much thereof as may be applicable, and an averment that a contract is by the laws of another state illegal and void, is insufficient.—Bank v. Fuqua, 11 Mont. 285; 28 Pac. 291.

STIPULATIONS.

1. A stipulation that defendant consents and agrees to withdraw all pleas and defenses, and will interpose no objections to the taking of judgment, is sufficient to warrant entry of judgment against him, though the only summons in the case has been quashed for defective service.—Kleinschmidt v. Morse, 1 Mont. 100.

2. The necessity for a statement on motion for new trial can not be obviated by a verbal stipulation between the attorneys for the parties.—Rankin v. Campbell, 1 Mont. 300.

3. The necessity for a statement on appeal can not be obviated by a verbal stipulation between the attorneys for the parties.—Id.

4. In the transcript on appeal appeared the clerk's entry to the effect that, "the statement on motion for a new trial being settled this day by the court," the parties waived the engross-

ing of the same for use at the hearing of the motion. Instead of perfecting the transcript on apneal by procuring a certificate of settlement of the statement, the parties to the appeal stipulated orally on the hearing to waive objections tnereto on that acount. *Held*, that while oral agreements of attorneys are to be disregarded, an entry of them by the clerk gives them no additional validity, the respondents having admitted the statement in the transcript to be the one settled by the judge below and referred to on motion for a new trial, the court would consider the errors assigned on it, though the practice was bad and should not be considered as a precedent.—Stewart v. Miller, 1 Mont. 301.

5. A court may amend an agreed statement of facts by inserting the amount for which judgment was to be entered as of a certain date in the event of plaintiff's recovery; such amount and date having, by inadvertance of counsel, been omitted, and it requiring no proof or inquiry to ascertain them, they being of record in the court, in a judgment referred to in the statement.—Montana Milling Co. v. Jefferis, 16 Mont. 559; 41 Pac. 712.

6. Defendant's allegations as to the value of the property converted by plaintiff were stricken out as immaterial. At the trial counsel agreed that no proof need be offered to sustain plaintiff's allegations as to value. On appeal the court determined the question of value to be material. *Held*, that the stipulation would be construed as made for the purposes of that trial only.—Chicago T. & T. Co. v. O'Marr, 18 Mont. 568; 46 Pac. 809.

7. Under Code Civ. Proc., § 398, subd. 1, and district court rule 21, requiring agreements by counsel to be in writing, unless made in open court and entered on the minutes, the court has no power to make an order extending a stay of proceedings, with consent of counsel given orally out of court.—Beach v. Water Co., 21 Mont. 184; 53 Pac. 493.

8. Where, on a bill by stockholders against directors to cancel a transfer of all the corporation property, the directors consent that the decree be entered adjudging their acts, so far as they relate to a sale or attempted sale, to be null and void, and that the deed be declared "null and cancelled," they can not complain of a decree declaring the deed "null and void" on the ground that it is voidable only.—Forrester v. Mining Co., 29 Mont. 397; 74 Pac. 1088; 76 Pac. 211.

9. A stipulation that certain streets within the boundaries of plaintiff's mining claim were used as public highways prior to the location of such claim, and had ever since been used as such, was, in effect, an admission by plaintiff of defendant's claim that the ground was occupied as a public highway at the time of the location of the claim.—Murray v. Butte, 31 Mont. 177; 77 Pac. 527.

STREET RAILROADS.

1. In an action against a street railroad company for personal injuries, it appeared that the driver of one of its cars was about 15½ years old, who lacked the strength needful for his employment; that the horses were trotting at the rate of seven miles per hour, in violation of a city ordinance; that, when the car approached a crossing, plaintiff, a man 31 years old, attempted to cross; that some vehicles obstructed his view; that plaintiff passed safely between the vehicles, and partially over the railroad track, when he was struck in the breast by the pole of the car, knocked down, and dragged a distance of 30 or 40 feet; that a competent driver could have stopped the car, under these circumstances within 15 feet of the point of collision, and within a less distance if the rate of speed had been under six miles an hour. *Held*, that a verdict for plaintiff would be sustained.—Wall v. Railway Co., 12 Mont. 44; 29 Pac. 721.

2. An ordinance granting a street railway company the right to construct and operate lines in certain streets, and providing that, if the company shall not construct and operate a certain portion of the line within a certain time, the right shall be forfeited, as to the parts where the failure occurs, does not impose on the company the duty to continue the operation of any portion of the line; and mandamus can not issue to compel it to do so.—State v. Light Co., 22 Mont. 391; 56 Pac. 685.

3. Comp. Stat., p. 824, § 707, declaring that a judgment against any railroad corporation for any injury to person or property shall be a lien superior to that of any mortgage or trust deed, being a part of act Mar. 3, 1887, relating exclusively to steam railroads, has no application to street railroads.—Daly Bk. & Tr. Co. v. Railway Co., 32 Mont. 298; 80 Pac. 252.

SUBMISSION OF CONTROVERSY.

1. Where the agreed case submitted to the court without action, as allowed by Comp. Stat., p. 184, § 468, fails to show what the controversy was, or that there was a controversy between the parties, the decision of the court on the question submitted is not appealable.—Jefferson v. Gilliam, 17 Mont. 333; 42 Pac. 852.

2. Where a complaint is filed giving jurisdiction, and a stipulation is then filed, treated by the court and parties as amending the complaint and raising an issue, the case is not an agreed case, which has to be submitted with the formalities required by Code Civ. Proc., § 2070 et seq., to give jurisdiction.—Bickford v. Kirwin, 30 Mont. 1; 75 Pac. 518.

SUBROGATION.

1. A bona fide purchaser of property for value from a pledgee of the same, who sold it in violation of the pledge, succeeds to all the rights of the pledgee, and, under Civ. Code, § 4602, a purchaser from a chattel mortgagee will likewise succeed to the rights of his grantor with respect to the property purchased, on the principle of subrogation, although there is no contract of assignment between him and his grantee.—Potter v. Lohse, 31 Mont. 91; 77 Pac. 419.

2. Subrogation, an equitable defense, may be pleaded to a legal cause of action.—Id.

3. In an action for conversion by the mortgagor of a chattel against a purchaser from the mortgagee, who has theretofore become subrogated to the rights of the mortgagee by operation of law, the mortgagee is not a necessary party to give defendant complete protection against plaintiff.—Id.

SUBSCRIPTIONS.

1. A delinquent subscriber's repeated promises to pay need not be followed by work done in reliance thereon; the action being on the original subscription, not on the promises.—Kane v. Downing, 14 Mont. 343; 36 Pac. 355.

2. When defendant pleads that his subscription was intended for another enterprise, plaintiff may show that the nature of the enterprise was fully and entirely explained to defendant when he subscribed, and that the trustees proceeded with the enterprise, relying on the subscription.—Id.

SUNDAY.

1. Service of summons on Sunday is void. —Hauswirth v. Sullivan, 6 Mont. 203; 9 Pac. 798.

2. Where a bridge in a city street is destroyed, the duty of the city to repair the street or give warning of the danger to travelers is not affected by the fact that the day after the defect was caused happens to be Sunday.—Snook v. Anaconda, 26 Mont. 128; 66 Pac. 756.

TAXATION.

I. Nature and Extent of Power in General, 1-6.
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I. NATURE AND EXTENT OF POWER IN GENERAL, 1-6.

1. U. S. R. S., § 5219, providing that shares of any national banking association may be taxed as other personal property in the state in which such association is located, and the taxation thereof may be regulated by the legislature of such state, subject to the restriction that the taxation shall not be greater than is assessed on other moneyed capital in the hands of individual citizens of such state, extends and applies to territories as well as states, and the shares of national banks in Montana are taxable as other personal property. (See 139 U. S. 438.—Commissioners v. Davis, 6 Mont. 306; 12 Pac. 688.

2. Mining claims, being real estate, are a different class of property from the stock of national banks; and the fact that taxes are laid upon the claims belonging to mining corporations under 12th Session Laws, p. 67, and not upon the stock of such corporations, and that such claims are assessed at the rate of $5 per acre and without regard to their market value, while stocks of national banks are assessed at their market value, is not a discrimination within the meaning of U. S. R. S., § 5219.—Id.

3. Code Civ. Proc., § 592, having provided that, for certain trespasses upon or injuries to property held in joint tenancy or tenancy in common, the party aggrieved shall "have his action for the injury" in the same manner as though such joint tenancy or tenancy in common did not exist, whereas the former statute provided in such case that he should "have his action of trespass or trover for the injury," the latter statute must be construed as an enlargement of the remedies given to include any appropriate action for the injury.—Anaconda C. M. Co. v. Mining Co., 17 Mont. 519; 43 Pac. 924.

4. Under U. S. R. S., §§ 5214, 5219, requiring national banking associations to pay a certain duty "in lieu of all existing taxes," but permitting the taxation of the shares of such associations as the property of the respective owners or holders thereof by authority of the state, personal property owned by any such association is not subject to taxation under state laws.—First Nat'l Bank v. Province, 20 Mont. 374; 51 Pac. 821.

5. The fact that an Indian post trader is licensed by the government to trade with Indians does not exempt his stock in trade from state and county taxation, such trader being a mere licensee, and not an agent of the government.—Cosier v. McMillan, 22 Mont. 484, 56 Pac. 965.

6. Indian reservations are not without the jurisdiction of the state for the purposes of taxation of personal property, in which Indians are not interested, held upon such reservation. —Id.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS, 7-10.

7. A statute which provides for the taxation of the shares of stock of a corporation and also for the products of the mine belonging to such corporation, is valid, even if it works a hardship and results in double taxation.—Hope Mining Co. v. Kennon, 3 Mont. 35.

8. Under Code Civ. Proc., § 592, providing that, if any person shall assume and exercise exclusive ownership over any property held by tenancy in common, the party aggrieved shall have his action for the injury, the same as though such tenancy in common did not exist, where a mining company, which is part owner of a mining claim, from its own shaft on another claim is extracting ore from a vein on the claim owned in common, though in a proper manner, not constituting waste, such action is an assumption and exercise of exclusive ownership, by which its co-tenant is aggrieved; and the co-tenant may maintain an action to enjoin such use, that being an appropriate remedy for the injury.—Anaconda C. M. Co. v. Mining Co., 17 Mont. 519; 43 Pac. 924.

9. The fact that an inheritance tax law exempts estates of a certain sum does not render it void as being unequal.—Gelsthorpe v. Furnell, 20 Mont. 299; 51 Pac. 267.

10. Civ. Code, § 681, applies to domestic as well as foreign insurance companies, and hence complies with Const., art. 12, § 11, providing that taxes shall be uniform on the same class of subjects.—Northwestern M. L. I. Co. v. Lewis and Clark, 28 Mont. 484; 72 Pac. 982.

III. LIABILITY OF PERSONS AND PROPERTY, 11-25.

A. PRIVATE PERSONS AND PROPERTY IN GENERAL, 11-16.

B. CORPORATIONS AND CORPORATE STOCK AND PROPERTY, 17-18.

C. PUBLIC PROPERTY AND INSTITUTIONS, 19.

D. EXEMPTIONS, 20-25.

A. PRIVATE PERSONS AND PROPERTY IN GENERAL, 11-16.

11. Revenue Act, approved Jan. 12, 1872 (Code Stat., c. 85), does not exempt calves from taxation, and, while calves are not included in the expression "heifers and steers," they are included under "other property."—Milligan v. Jefferson Co., 2 Mont. 543.

12. In Code Stat., 1872, p. 601, § 4, the enumeration of certain species of property liable to taxation does not exempt other species not enumerated. The exemption of unpatented mines does not extend to their products.—Hope Mining Co. v. Kennon, 3 Mont. 35.

13. A mortgage on real estate is only personal property, and under the Revenue Law of Montana can only be assessed in the county where found. The record of such mortgage in the recorder's office of a county, being only a copy of the original, is not taxable personal property.—Gallatin v. Beattie, 3 Mont. 173.

13. Mortgages as collateral security are deemed to have no situs except that of the domicile of the owner, and when owned by nonresidents of the state are not "property in the state subject to taxation," within the meaning of Laws 1891, p. 73, § 1.—Holland v. Silver Bow, 15 Mont. 460; 39 Pac. 575.

14. Const., art. 12, § 3, provides that all mines and mining claims, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, and that the independent value of the surface used for other purposes, and machinery and surface improvements, and appurtenances, "and the annual net proceeds of all mines and mining claims, shall be taxed as provided by law." Pol. Code, § 3672, reiterates the foregoing section of the constitution, and provides, also, that such net proceeds are to be taxed "as other personal property." Sec. 3760, in detail, requires every person engaged in mining to make out a statement of the gross yield of the above named "metal or mineral," etc.; and these and the following sections provide for the assessment of the net proceeds of mines and the manner of collecting the tax. *Held*, that the annual net proceeds of mining claims acquired under the laws of the United States relative to the acquisition of coal lands are taxable.—Montana C. & C. Co. v. Livingston, 21 Mont. 59; 52 Pac. 780.

15. A tax can not be lawfully levied against a person for property which he does not own.—Western Ranches Co. v. Custer, 28 Mont. 278; 72 Pac. 659.

16. A mining claim was within the limits of a city, and, while it had never been made an addition to the city, the owners had made a plat, and sold lots and blocks from the claim for townsite purposes, describing the portions sold by metes and bounds. The owners of the claim claimed that a portion thereof was reserved for mining purposes, and not taxable for any purpose other than mining; and it appeared that a shaft had once been sunk on such reserve, but that it had been abandoned, and that the lot on which the shaft was sunk had been sold. *Held*, that the so-called reserve was taxable for purposes other than mining, under Const., art 12, § 3, and Pol. Cod., § 3672.—Murray v. Hinds, 30 Mont. 466; 76 Pac. 1039.

B. CORPORATIONS AND CORPORATE STOCK AND PROPERTY, 17-18.

17. Civ. Code, § 681, was not repealed by implication by Laws 1897, p. 76, which is a general license law relating to insurance companies, both domestic and foreign, and applying to all classes and kinds of insurance; the fee therein provided for being required to be paid prior to the transaction of any business, and being a fixed sum, varying in amount only at the will of the company as to the amount of premiums it asks permission to collect, and not being diminished by reason of losses paid or expenses incurred.—Northwest M. L. I. Co. v. Lewis and Clark, 28 Mont. 484; 72 Pac. 982.

18. Civ. Code, §§ 650-681, apply to a foreign mutual life insurance company.—Id.

C. PUBLIC PROPERTY AND INSTITUTIONS, 19.

19. State lands after sale, but before the price is fully paid, are subject to taxation as the property of the purchaser, notwithstanding Const., art. 12, § 2, exempting the property of the state from taxation, and that the state retains the legal title as security for the deferred payments, since the purchaser is the owner, for the purpose of taxation, after he has entered into possession, paid a portion of the price, and contracted to pay the balance, as required by Pol. Code, § 3480 et seq.—Courtney v. Missoula, 21 Mont. 591; 55 Pac. 359.

D. EXEMPTIONS, 20-25.

20. Congress has power to exempt from taxation the right of way through the public lands, of a railroad corporation chartered by it, the corporation being, in a sense, an instrumentality of the government.—Northern Pacific v. Carland, 5 Mont. 146; 3 Pac. 134.

21. The collection of a tax on exempt property by an insolvent county will be enjoined.—Id.

22. Under the act of congress granting a "right of way" to the Northern Pacific and exempting from taxation, the road-bed, rails, etc., are also exempt.—Id.

23. Under such act the buildings necessary for the operation of the road are also exempt, since, the easement being real estate, what is attached thereto is a part thereof.—Id.

24. Const., art. 12, § 2, and Laws 1891, p. 73, § 2, passed in pursuance thereof, which exempt from taxation the property of the state and federal governments, and "such other property as may be used exclusively" for certain societies, "and institutions of purely charitable character," do not exempt purely public charitable institutions, as such, from the payment of taxes, but only such of their property as is used exclusively for charitable purposes; and a mere intention of such an institution to use its property for charitable purposes at some time in the future is not sufficient to entitle it to exemption.—Montana Cath. Miss. v. Lewis and Clark, 13 Mont. 559; 35 Pac. 2.

25. Civ. Code, § 681, provides for the taxation of insurance companies on the excess of premiums received over losses and ordinary expenses incurred within the state, and further provides that insurance companies are subject to no other taxation under the laws of the state, except taxes on real estate and fees imposed by law. *Held*, that such further provision is violative of Const., art. 12, § 1, pro-

viding that the legislature shall prescribe such regulations as shall secure a just valuation of all property, since under such provision an insurance company may be the owner of personal property situated within the state and which can not be taxed, because it can not be classified under the head of excess premiums. —Northwestern M. L. I. Co. v. Lewis and Clark, 28 Mont. 484; 72 Pac. 982.

IV. PLACE OF TAXATION, 26.

26. By treaty of Aug. 22, 1881, the Crow Indians ceded to the United States a strip of their land 400 feet wide, along and parallel with the southern bank of the Yellowstone river, and used by the Northern Pacific for a right of way. This strip was subsequently granted by the United States to the railroad company, and formed a part of Custer county, as originally created by act Feb. 2, 1865. Subsequently, by act Feb. 26, 1883, the northwestern part of Custer county was set apart as Yellowstone county, the southern boundary of which is the center of the channel of the Yellowstone river; thus leaving the railroad company's right of way within the limits of Custer county. *Held*, that act Mar. 5, 1885, which attached such right of way to Yellowstone county "for judicial purposes," did not confer on that county the right to tax, as that is an executive, and not a judicial, power.—Yellowstone v. Northern Pacific, 10 Mont. 414; 25 Pac. 1058.

V. LEVY AND ASSESSMENT, 27-60.

A. LEVY AND APPORTIONMENT, 27.
B. ASSESSORS AND PROCEEDINGS FOR ASSESSMENT, 28-33.
C. MODE OF ASSESSMENT, 34-39.
D. ASSESSMENT ROLLS OR BOOKS, 40-44.
E. EQUALIZATION OF ASSESSMENT, 45-46.
F. REVIEW, CORRECTION, OR SETTING ASIDE OF ASSESSMENT, 47-60.

A. LEVY AND APPORTIONMENT, 27.

27. Under Laws 1891, p. 96, § 60, providing that the county commissioners must meet in each year to examine the assessment book and equalize the valuation of taxable property within their county, such board is responsible for the correctness of the assessment book, and can not plead, as a defense to an application for mandamus to compel them to make a levy, that it can not ascertain from such assessment book the taxable property within the county, or the names of persons having such property.—State v. Yellowstone, 12 Mont. 503; 31 Pac. 78.

B. ASSESSORS AND PROCEEDINGS FOR ASSESSMENT, 28-33.

28. In order that the county assessor may have jurisdiction to assess property for taxation he must follow the statute.—Northern Pacific v. Carland, 5 Mont. 146; 3 Pac. 134.

29. A county assessor can not charge fees and percentage upon property not liable for taxation.—Berry v. Commissioners, 6 Mont. 121; 9 Pac. 899.

30. An assessment for taxes is completed when the persons and property to be taxed have been listed and the amounts to be collected have been estimated.—State v. Johnson, 16 Mont. 570; 41 Pac. 706.

31. Comp. Stat., p. 1149, § 1790, directing the levy of a poor tax, making it the duty of assessors to collect the same, and providing that the assessor shall be liable on his official bond for the non-performance of his duties in relation to such tax, was not repealed by amendatory and repealing acts before the territory became a state.—Meagher v. Gardner, 18 Mont. 110; 44 Pac. 407.

32. It is the rule in regard to special taxes that the various steps provided by law to be taken in laying them must be observed, and the record of the proceedings must show that the provisions of the law have been complied with. —Hilburn v. Railroad Co., 23 Mont. 229; 58 Pac. 551, 811.

33. In providing, by Pol. Code, § 3698, as amended by Laws 1897, p. 195, for the creation of a board of appraisers in certain counties, the legislature was acting within its authority, under Const., art. 12, § 15, art. 16, §§ 5, 6, and art. 12, § 16, and in clothing such board with authority to fix the value on real property in the first instance no provision of the constitution was contravened, and hence a taxpayer had no right to have his property taxed on the valuation made by the assessor.—Missouri River Power Co. v. Steele, 32 Mont. 433; 80 Pac. 1093.

C. MODE OF ASSESSMENT, 34-39.

34. The failure of the assessor to make a requisition upon the clerk or secretary of a railroad company for a list of the company's property, before listing and assessing the same, renders the tax invalid.—Northern Pacific v. Carland, 5 Mont. 146; 3 Pac. 134.

35. A formal demand by the assessor on the taxpayer for a list is not necessary, when it appears that an effort to make a demand was made, and the taxpayer evaded furnishing the list.—McMillan v. Carter, 6 Mont. 215; 9 Pac. 906.

36. The failure of the assessor to enter on the assessment roll the reason why an assessment was made by himself, will not invalidate an assessment, when the taxpayer failed to furnish a list of his property.—Id.

37. Laws 1891, p. 75, § 6, provides that stockholders of banks must be assessed on the value of their shares, and that the officers of the bank shall furnish the assessor a verified statement showing the amount and number of shares, and the amount of its surplus or reserve fund, and investments in real estate. *Held*, that a printed assessment list, such as is required by law to be made out and returned to the assessor, endorsed on the back, "Assessment list of property subject to taxation, owned, claimed or in possession or control of," a certain bank, containing a list of the real estate and improvements thereon, capital stock, surplus, undivided profits, with the amounts and value of such property, and a deduction of one-third of its value claimed by such cashier, is not the statement required.—First Nat'l Bank v. Bailey, 15 Mont. 301; 39 Pac. 83.

38. Laws 1891, p. 75, § 5, requires the assessor to assess property "at its full cash value." *Held*, where a bank returned a list of its property as of a certain value, and claimed an unauthorized reduction of one-third of its alleged value, the return of the whole amount by the assessor is not an increase of the assessment.—First Nat'l Bank v. Bailey, 16 Mont. 135; 40 Pac. 175.

39. Under Laws 1891, p. 123, § 171, providing that the assessor may require a person to make a verified statement showing the number of his employes subject to taxation, a demand in writing signed by the assessor in his official capacity, requiring a compliance with said statute, and served upon a member of a partnership, was sufficient, and it was not necessary that said assessor should personally

swear as to the one upon whom demand was made.—State v. Owsley, 17 Mont. 94; 42 Pac. 105.

D. ASSESSMENT ROLLS OR BOOKS, 40-44.

40. Under a statute requiring real and personal property to be listed for taxation separately, the listing of the same "en masse" renders the tax invalid.—Northern Pacific v. Carland, 5 Mont. 146; 3 Pac. 134.

41. The omission of the dollar mark from an assessment roll does not vitiate the assessment where the position of the figures, or some other fact, indicates the meaning of the numerals.—Ward v. Gallatin, 12 Mont. 23; 29 Pac. 658.

42. Pol. Code, §§ 3700, 3707, are mandatory, and a misnomer of the owner of personal property assessed as the property of a particular person vitiates the assessment and renders a sale thereunder void; § 3916, not applying to personal property.—Birney v. Warren, 28 Mont. 64; 72 Pac. 293.

43. The failure of the county clerk to make and file a duplicate assessment roll does not affect the validity of the taxes assessed.—Conklin v. Cullen, 29 Mont. 38; 74 Pac. 72.

44. Pol. Code, § 4867, makes it the duty of the county clerk to make a duplicate assessment book for each city in the county; and § 4869 provides that the county clerk must deliver such duplicate book to each city treasurer after having attached thereto an affidavit similar to the one set out in Pol. Code, § 3845. This section requires the county clerk to state that he has made certain additions, calculations and extensions in the book, which are, under § 4869, to be done by the city treasurer. *Held*, that the word "similar," in § 4869, does not require the county clerk to make an affidavit identical with the one required by § 3845, but merely requires an affidavit covering all the facts showing that the clerk has done his duty in making the copy required by § 4867 et seq. —State v. Weston, 29 Mont. 125; 74 Pac. 415.

E. EQUALIZATION OF ASSESSMENTS, 45-46.

45. The state board of equalization was empowered by Const., art. 12, § 15, to "adjust and equalize" the valuation of the taxable property among the several counties of the state." Sec. 9 limits the rate of taxation to be imposed for state purposes. *Held*, that the state board of equalization was without power to increase proportionately the valuation of the property in the several counties of the state, and thereby increase the aggregate of the total.—State v. State Board, 18 Mont. 473; 46 Pac. 266.

46. The state board of equalization was empowered by Const., art. 12, § 15, to "adjust and equalize the valuation of taxable property among the several counties of the state," which limits the rate of taxation to be imposed for such purposes. *Held*, that the state board of equalization was without power to increase proportionately the valuation of the property in the several counties of the state, and thereby increase the total.—State v. Fortune, 24 Mont. 154; 60 Pac. 1086.

F. REVIEW, CORRECTION, OR SETTING ASIDE OF ASSESSMENT, 47-60.

47. Laws 1893, p. 64, amending Laws 1891, p. 95, §§ 58, 59, and providing a new method for appointing appraisers, does not abridge the power conferred by Laws 1891, p. 96, § 61, on the board of equalization to increase the valuation of property assessed for taxes.—State v. Ellis, 15 Mont. 224; 38 Pac. 1079.

48. On certiorari this court can not inquire into an abuse of discretion by the board of equalization in increasing, without sufficient evidence, a valuation of property assessed for taxes.—Id.

49. Where bank stock is erroneously assessed to the bank instead of to the stockholders, the board of equalization may correct the assessment.—First Nat'l Bank v. Bailey, 15 Mont. 290; 39 Pac. 83.

50. Irregularities of a board of equalization in placing a value on a taxpayer's property, instead of requiring the assessor to do so, was waived by the taxpayer, who, with notice thereof, and in response to the notice, appeared before the board to request it to strike the assessment because the property was not subject to taxation, no objection being made to the irregularity, nor to the valuation adopted.—Cosier v. McMillan, 22 Mont. 484; 56 Pac. 965.

51. Since there is no statute allowing an appeal from the action of the county assessor and board of county commissioners, sitting as a board of equalization, in preparing the assessment roll, under Pol. Code, § 3700 et seq., providing for valuing property for the purpose of taxation in counties where the assessed valuation is less than $8,000,000, courts will not interfere with the action of these officers, where it does not appear that the assessor did not act fairly and honestly, or that the board of equalization did not give plaintiff a fair hearing, and where the only ground on which relief is sought is that the valuation of plaintiff's property was fixed at $1+,250, where its actual value was admittedly only $9,700.—Danforth v. Livingston, 23 Mont. 558; 59 Pac. 916.

52. An increase in an assessment by the assessor or in obedience to a void order of the board of equalization can not be justified under Pol. Code, §§ 3701, 4014, under which the assessor may assess at any time property which has escaped taxation.—Western Ranches v. Custer, 28 Mont. 278; 72 Pac. 659.

53. Under Pol. Code, § 3789, the ten days notice therein prescribed is jurisdictional, and in its absence the board's action in increasing an assessment is void.—Id.

54. Failure to give a taxpayer the ten days notice of a proposed increase in his assessment, required by Pol. Code, § 3789, is not waived by his subsequently appearing and securing a reduction of the increased assessment.—Id.

55. A notice of a proposed increase in an assessment, mailed August 8, is void, the functions of the board as a board of equalization expiring on the second Monday in August, which was the tenth of the month.—Pol. Code, §§ 3780, 3789.—Matador L. & C. Co. v. Custer, 28 Mont. 286; 72 Pac. 662.

56. Failure of the board of equalization to give a taxpayer the 10 days notice of an increase in his assessment, as required by Pol. Code, § 3789, is not waived by his voluntarily appearing before the board after a raise has been made and seeking a reduction of the assessment.—M. O. P. Co. v. Maher, 32 Mont. 480; 81 Pac. 13.

57. Whether an attempted change in an assessment without notice be considered as an increase in the assessed valuation under Pol. Code, § 3781, or as a collection which the board ordered the assessor to make, under § 3789, is immaterial, as in either event previous notice to the taxpayer is jurisdictional.—Id.

58. An entry on the minutes of the board of equalization made on July 29, after reciting errors in the returns made to the assessor, directed him to make the proper correction in the assessment, etc., and the pleadings admitted that the board made the entry with respect to

the assessment in the amount stated in the entry. *Held*, that no other changes or records being shown, a contention that final action was not taken in the matter until after the taxpayer's appearance on August 7 and 10 was without merit.—Id.

59. Where the minutes of the board of equalization showed that it met July 20, and that a raise in an assessment was made July 29, and before any appearance on the taxpayer's part, it appeared that the 10 days notice, required by Pol. Code, § 3781, could not have been given, and the board was without jurisdiction in the matter.—Id.

60. As the board of equalization, acting on assessments of property, is a special tribunal of limited and inferior powers, the facts showing its jurisdiction to act in any given instance must appear affirmatively from the record of its proceedings.—Id.

VI. LIEN AND PRIORITY, 61-63.

61. Laws 1887, p. 83, § 2, provides that the levy of a tax on personal property constituted a lien thereon that could be discharged only by payment of the tax. In 1891 a comprehensive act was passed covering the subject of the levy and collection of taxes, without declaring that the tax levied on personal property should constitute a lien thereon, and without expressly repealing the law of 1887, and providing that "all acts or parts of acts inconsistent with the provisions of this act are hereby repealed." *Held*, that this did not repeal § 2 of the former act.—Barden v. Wells, 14 Mont. 462; 36 Pac. 1076.

62. Land should not be relieved of a lien for taxes because the owner did not know of the assessment, and had no opportunity to discharge the taxes, on account of the property being listed in the name of another.—Cobban v. Hinds, 23 Mont. 338; 59 Pac. 1.

63. Pol. Code, § 3827, provides that every tax has the effect of a judgment against the person, and every lien the force and effect of an execution duly levied against all personal property. Sec. 3828 provides that every personal property tax is a lien upon the owner's realty from noon on the first Monday in March, etc. Sec. 3829 authorizes certain real property liens for real estate taxes. *Held*, that no tax lien attached to assessed personalty, the owner of which owned no realty; and hence the sale for taxes of such personalty in the hands of an innocent purchaser should be enjoined.—Walsh v. Croft, 27 Mont. 407; 71 Pac. 409.

VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID, 64-66.

64. Under Pol. Code, § 3782, which provides that no reduction must be made in the valuation of property for taxation unless the party affected thereby, or his agent, files with the board of equalization a verified written application therefor, showing the facts upon which it is claimed such reduction should be made, the filing of such verified application to the board is a condition precedent to the maintenance of an action by a taxpayer to recover taxes paid on property alleged to have been erroneously assessed to him, which must be pleaded.—Barrett v. Shannon, 19 Mont. 397; 48 Pac. 746.

65. Under Pol. Code, § 5185, providing that if any of the acts enumerated in such Code are inconsistent with any acts passed by the Fourth Legislative Assembly the latter shall control, §§ 4024, 4026, providing a special remedy by suit for the recovery of illegal taxes, being part of the special act of Mar. 18, 1895, will control, in case of conflict, § 4023 authorizing injunction; the latter section having been recommended by the Code Commission.—Western Ranches v. Custer, 28 Mont. 278; 72 Pac. 659.

66. Pol. Code, § 4023, authorizes an injunction to restrain the collection of an illegal or unauthorized tax. Sec. 4024 provides that in all cases "of levy of taxes," etc., deemed unlawful by the property owner, he may, under protest, pay such tax, and thereupon sue to recover it. Sec. 4026 provides that this remedy shall supercede injunction and all other remedies which might be invoked to prevent the collection of taxes alleged to be irregularly "levied or demanded," etc. *Held*, that § 4024, being construed with § 4026, is not restricted to cases in which the levy is assailed as unlawful, but suit thereunder might be brought where an assessment was void, notwithstanding § 4023.—Id.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS AND PERSONAL PROPERTY, 67-76.

67. Where a tax deed alone is presumptive evidence of title in a purchaser, the collection of a void tax will be enjoined, if its illegality does not appear of record.—Northern Pacific v. Carland, 5 Mont. 146; 3 Pac. 134.

68. Where the assessor made an unauthorized assessment of the shares of bank stock to the bank, and the bank did not ask the board of equalization to correct such erroneous assessment, it could not enjoin the collection of the taxes, in the absence of a valid excuse for its failure to apply to such board.—First Nat'l Bank v. Bailey, 15 Mont. 290; 39 Pac. 83.

69. Comp. Stat., p. 69, § 42, subd. 2, as amended by Laws 1893, p. 50, § 1, providing that an action for a liability created by a statute, other than a penalty or forfeiture, shall be commenced within two years, and Code Civ. Proc., § 520, providing that such limitations apply to actions brought in the name of and for the benefit of the state, limited the time within which a personal action to collect a tax can be brought to two years.—Custer v. Story, 26 Mont. 517; 69 Pac. 56.

70. As so applied, the statutes do not conflict with Const., art. 5, § 39, providing that "no obligation or liability of any person, association of corporation held or owned by the state or any municipal corporation therein shall ever be exchanged, transferred, remitted, released, postponed or diminished by the legislative assembly, nor shall such liability be extinguished except by the payment thereof into the proper treasury.—Id.

71. Const., art. 16, § 5, declares that there shall be elected in each county certain officers, among whom shall be a treasurer, who shall be collector of taxes; and art. 3, § 29, declares that the provisions of the constitution are mandatory and prohibitory unless expressly declared otherwise. *Held*, that Pol. Code, § 3940, was, under such sections, unconstitutional and void; the legislature having no power to vest any person other than the treasurer with power to collect taxes.—Mutual Life Ins. Co. v. Martien, 27 Mont. 437; 71 Pac. 470.

72. The rule of caveat emptor applies to sales of property for delinquent taxes.—Birney v. Warren, 28 Mont. 64; 72 Pac. 293.

73. Const., art. 16, § 5, declares that the county treasurer shall be the only collector of taxes. Const., art. 12, § 4, provides that the legislature shall not levy taxes in any city, but may vest in the corporate authorities power to assess and collect taxes. Pol. Code, § 4867, makes it the duty of the county clerk to make a duplicate of the corrected assessment book for each city in the county, containing a copy of

the corrected assessment book as far as the same refers to city property; and § 4868 declares that such duplicate must specify the different funds so that the city treasurer may extend the same and collect taxes. *Held*, that construing the constitutional provisions together, art. 16, § 5, merely makes the county treasurer the collector of taxes unless the legislature should use the discretionary power granted in art. 12, § 4, and hence the statutory provisions were not in conflict with art. 16, § 5.—State v. Weston, 29 Mont. 125; 74 Pac. 415.

74. It is the duty of the clerk to deliver to the city treasurer the duplicate required by § 4867 at the same time the original or duplicate is delivered to the county treasurer, and hence the fact that the county commissioners have, under § 3851, dispensed with the duplicate book, does not prevent the county clerk from furnishing a duplicate for a city, though the original book is to be used by the county treasurer.—Id.

75. Where an increase in an assessment made by the board of equalization was void for failure to give the 10 days notice required by Pol. Code, § 3789, injunction lay to restrain the collection of taxes computed on the raised valuation, under Pol. Code, §§ 4023-4026.—M. O. P. Co. v. Maher, 32 Mont. 480; 81 Pac. 13.

76. Where the board of equalization raised an assessment without giving the 10 days notice required by Pol. Code, § 3789, a decree enjoining the county treasurer from selling the property to pay the taxes computed on the raised valuation, without requiring, as a condition precedent, the payment of the tax admitted by the taxpayer to be due, was erroneous.—Id.

IX. SALE OF LAND FOR NON-PAYMENT OF TAXES, 77-90.

77. A bill praying an injunction against the sale of land for taxes on the ground that part of it is exempt, and that there was an irregular assessment and an overvaluation of the rest, is bad on demurrer where it fails to allege that complainant appeared and made such objections as required by § 22, p. 92, Laws 15th Ex. Session, before the board of equalization.—Northern Pacific v. Patterson, 10 Mont. 90; 24 Pac. 704.

78. Laws 1889, p. 225, § 9, provides that where a taxpayer fails to pay his taxes within a certain time, it shall be the duty of the tax collector to seize any personal property belonging to such taxpayer, and sell the same as provided by law. Laws 1887, p. 93, § 28, provides that where sufficient personal property can not be found to pay the tax, the treasurer may collect such tax by attachment, garnishment or otherwise. Laws 1887, p. 83, § 2, declares that every tax levied under the provisions of the act becomes a lien against any and all property assessed. *Held*, that it was not necessary for a tax collector to seize personal property before proceeding to sell his land for delinquent taxes.—Ward v. Gallatin, 12 Mont. 23; 29 Pac. 658.

79. Equity will not intefere with the sale of land for delinquent taxes on account of certain irregularities in the assessment, where the mistakes could have been rectified by appearance before the county commissioners sitting as a board of equalization.—Id.

80. Where in an action to set aside a tax sale, plaintiffs alleged that their lands were sold for a certain sum claimed to be due for delinquent taxes, and that the amount was excessive, since it included taxes levied on personal property, the complaint is not demurrable on the ground of ambiguity and uncertainty, since the excess can be ascertained by computation.—Id.

81. Where plaintiffs alleged, in an action to set aside a tax sale, that their real estate consists of two distinct parcels, but fail to aver that they so returned the same in their statement to the assessor, they can not be heard to complain that the land was improperly listed as one tract.—Id.

82. A sale of separate lots together, for a gross amount of taxes thereon, is invalid.—Casey v. Wright, 14 Mont. 315; 36 Pac. 191.

83. Under Laws 1889, p. 219, § 4, which makes it the duty of a taxpayer to furnish the assessor a list of his property, and § 5, requiring the assessor to value each lot separately, and Laws 1887, p. 82, § 22, which provides that any person aggrieved by any assessment may apply to the board of equalization for the correction thereof, equity will not enjoin the sale of separate lots assessed in gross, for the collection of taxes thereon, where the complainant does not show that he attempted to have the irregularity corrected by application to the board, or some excuse for not doing so.—Deloughrey v. Hinds, 23 Mont. 260; 58 Pac. 709.

84. Under Laws 1889, p. 219, §§ 4, 5, where the complaint, in an action to enjoin a sale for taxes of one of several lots assessed in gross, alleges that complainant is the owner of the lot, but fails to show whether or not he owned all of them at the time the assessment was made, and does not attack the assessment on any ground other than that such assessment is in gross, it will be presumed that he was either the owner of the several lots when the assesment was made, or that he purchased the lot since assessment. In the former case he is not entitled to relief, as it is his duty to pay taxes on all the lots; and in the latter he can not complain, as he took subject to the burdens.—Id.

85. Under Pol. Code, §§ 4023-4026, which prohibit the restraining of the sale of property for non-payment of any tax, except where the tax is illegal or not authorized by law, or where the property is exempt from taxation, the listing of lands to the wrong person is no ground for restraining the tax sale; since under §§ 3700, 3916, 4014, it is but an irregularity or informality, which, of itself, does not render the tax "illegal or unauthorized."—Cobban v. Hinds, 23 Mont. 338; 59 Pac. 1.

86. Under Laws 1889, p. 219, §§ 4, 5, and Laws 1887, p. 82, § 22, equity will not enjoin the sale of separate lots assessed in gross, for the collection of taxes thereon, where complainant does not show that he attempted to have the irregularity corrected by application to the board, or some excuse for not doing so.—Id.

87. The fact that a county treasurer intends to violate Pol. Code, §§ 3922, 3923, by exposing for sale for the delinquent taxes for 1898 part of lands purchased by the county at the tax sales of 1897, and yet unredeemed, does not entitle the owner of the equity of redemption to an injunction; since § 4026 provides that the remedy before the board of equalization shall supercede the remedy of injunction and all other remedies which might be invoked to prevent the collection of taxes alleged to be irregularly levied or demanded, except in unusual cases, where the remedy thereby provided is inadequate.—Id.

88. The fact that the notice under which a tax sale was threatened was published but three weeks, whereas the statute requires four weeks, does not render the taxes "illegal or unauthorized by law," within Pol. Code, §§ 4023, 4026, so as to authorize the enjoining of the collection of such tax.—Id.

89. A contract between a county and a newspaper for the county printing, made pur-

suant to the statutes, is a direction to the county treasurer from the board of county commissioners, within Pol. Code, § 3874, to publish the delinquent tax list in such newspaper.—Conklin v. Cullen, 29 Mont. 38; 74 Pac. 72.

90. The notice of sale published with a delinquent tax list was published Dec. 30, 1895, and Jan. 6 and 13, 1896. The sale took place Jan. 27, 1896. *Held*, that the publication was for a sufficient time, under Pol. Code, §§ 3874, 3877.—Id.

X. REDEMPTION FROM TAX SALE. 91.

91. An owner of land which has been sold for taxes was not entitled to relief from the tax deed merely because subsequent to the sale he requested the county treasurer to give him a statement of the taxes due on the premises, but without saying anything with reference to redeeming the amount from any sale, and the treasurer failed to inform him of the tax sale.—Conklin v. Cullen, 29 Mont. 38; 74 Pac. 72.

XI. TAX TITLES. 92-94.

92. The complaint in an action to set aside a tax deed as a cloud alleged that the assessment made on the three lots in controversy for taxes of 1888 was invalid, because the lots were assessed in gross; that the taxes were not paid, and the three lots, with eight others in different blocks, were sold to defendant in gross for the total taxes of 1888; and that the gross assessment and gross sale were void. *Held*, that the complaint was demurrable for failure to allege injustice or injury to plaintiff from the invalid assessment, or payment, or offer to pay the taxes properly chargeable.—Casey v. Wright, 14 Mont. 315; 36 Pac. 191.

93. Judgment in favor of plaintiff, cancelling a tax deed, but failing to require payment to defendant of the amount admitted by plaintiff in his complaint to be due, and so found by the court, should be corrected, in this respect.—Foster v. Bender, 28 Mont. 526; 73 Pac. 121.

94. One who pleads in a suit to obtain relief from a tax deed, a tender of the amount paid by a purchaser for his tax deed, can not contest the validity of the tax for the non-payment of which the premises were sold.—Conklin v. Cullen, 29 Mont. 38; 74 Pac. 72.

XII. INHERITANCE TAX. 95-98.

95. An inheritance tax which applies to estates which have been probated before its passage, but are to be distributed after it takes effect, is not unconstitutional as to such estates, as, though the heirs take a vested right at the death of their ancestor, yet that right is subject to the control of the courts for distribution, is dependent upon the laws for its protection, and is subject to the taxing power of the state.—Gelsthorpe v. Furnell, 20 Mont. 299; 51 Pac. 267.

96. Laws 1897, p. 83, providing that all property which shall pass by will, or by the intestate laws of the state, from any person who may die possessed of the same, shall be subject to a tax, etc., is not a tax upon property, but a tax upon the right to receive inheritances.—Id.

97. The right to receive property by inheritance being distinct and separate from the property itself, and the right of testamentary disposition being purely statutory, the legislature has the right to impose any reasonable restriction or duty upon the privilege.—Id.

98. Laws 1897, p. 83, § 1, provides that all property within the state passing by will, other than to a decedent's father, mother, husband, wife, etc., shall be subject to a tax of $5 on every $100 of its market value; that when the beneficial interest of any personal property passes to any father, mother, husband, wife, etc., the rate of taxation shall be $1 on every $100 of its market value; and that in all other cases the rate shall be $5 on every $100 of the market value of all property, provided that estate of less than $500 valuation shall not be subject to the tax. *Held*, that real estate devised by testator to his widow is not subject to the tax.—Hinds v. Wilcox, 22 Mont. 4; 55 Pac. 355.

TELEPHONES.

1. Under Code Civ. Proc., § 3145, in an action by the state to recover the license tax imposed by Pol. Code, § 4071, as amended by Act Mar. 6, 1897, on a telephone company doing business within the state, in which it was pleaded that many of its telephones attempted to be taxed were exclusively used in interstate business and were therefore exempt from taxation, the burden was on defendant to establish the number of telephones so used, and that they were the same instruments attempted to be taxed.—State v. Telephone Co., 27 Mont. 394; 71 Pac. 311.

2. Civ. Code, § 1000, authorizing telephone companies to construct lines along any of the public roads, being passed in pursuance of Const., art. 15, § 14, providing that any corporation organized for the purpose shall have the right to construct telephone lines within this state, and that the legislature shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section, is not modified by laws relating to the government of cities.—State v. Mayor, 30 Mont. 338; 76 Pac. 758.

3. Laws 1893, p. 113, Pol. Code, § 4800, and Laws 1897, p. 203, grant to cities the right to prevent the use or obstruction of streets by telephone poles. Civ. Code, § 1000, authorizes telephone companies to construct lines in any of the public roads. Pol. Code, § 4703, provides that every city organized under the act has such powers as are incident to municipal corporations, not inconsistent with the laws of the state. *Held*, that the above acts granting powers to cities are subject to, and do not amend § 1000.—Id.

4. Civ. Code, § 1000, authorizing telephone companies to construct lines along any of the public roads, applies as well to foreign corporations which have complied with Civ. Code, § 1030 et seq., and Laws 1901, p. 150, prescribing the conditions on which foreign corporations may do business in the state, as to domestic corporations.—Id.

5. Pol. Code, § 2600, and Laws 1903, p. 66, amending Pol. Code, § 2600-2604, provide that all streets are public highways. *Held*, that Civ. Code, § 1000, authorizing telephone companies to construct lines along any of the public roads by the erection of necessary fixtures, authorizes their construction along the streets of a city.—Id.

TENANCY IN COMMON.

I. Adverse Possession, 1.

II. Enjoyment and Use of Property, 2-7.

III. Rents and Profits, 8-11.

IV. Remedies and Actions Between Co-tenants, 12-19.

V. Action by Co-tenant Against Third Person, 20.

I. ADVERSE POSSESSION, 1.

1. The possession of one tenant in common is the possession of all, and the relation of partners being made out between the parties holding an interest in mining ground, possession by one partner is possession by another sufficient to protect the latter from the operation of the statute of limitations as to mining claims.—Southmayd v. Southmayd, 4 Mont. 100; 5 Pac. 318.

II. ENJOYMENT AND USE OF PROPERTY, 2-7.

2. Where a tract of land is owned in ascertained proportions by two persons, but the particular part of the land owned by each is not defined by application to the subject matter, a suit for an accounting is not the proper method of determining the damage to the interest of one of the parties by the other cutting timber on the land.—United States v. Northern Pacific, 6 Mont. 351; 12 Pac. 769.

3. The appropriators of the waters of a stream, who use such waters through a ditch owned by them together for a common purpose, are tenants in common of such water right, and upon the abandonment of such water right for use for mining purposes, one tenant may turn the water into its original channel and recapture and use the same water for other and lawful purposes.—Meagher v. Hardenbrook, 11 Mont. 385; 28 Pac. 451.

4. Where the showing made by plaintiff for a preliminary injunction tended to show that defendant, as lessee of the owners of an interest in certain mining claims, in which plaintiff owns the larger interest, was working such claims without the consent and against the wishes of plaintiff, and not dividing the proceeds in good faith, such showing is sufficient to justify the granting of the injunction in the discretion of the trial court, on the ground that the acts of defendant constituted an exercise of exclusive ownership by one tenant in common, under Code Civ. Proc., § 592.—Red Mountain C. M. Co. v. Esler, 18 Mont. 174; 44 Pac. 523.

5. In an action by tenants in common to restrain a co-tenant from exercising exclusive ownership over a certain mine in which they were respectively interested, the alleged fact that defendant's work enhanced the value of the property by developing it was immaterial.—Harrigan v. Lynch, 21 Mont. 36; 52 Pac. 642.

6. Evidence that defendant operated as his own a certain mine, in which plaintiffs were interested as co-tenants, without their consent, appropriating the proceeds without accounting therefor, supported a finding that he was exercising exclusive ownership over such property.—Id.

7. To constitute a tenancy in common in a water right, there must be a right to unity of user of the water, and, if such right is destroyed, the common tenancy ceases to exist.—Norman v. Corbley, 32 Mont. 195; 79 Pac. 1059.

III. RENTS AND PROFITS, 8-11.

8. Under Code Civ. Proc., § 592, an action for the reasonable value of the use and occupation of a city lot is maintainable by one co-tenant against another as to the net profits resulting from such occupation, whether they be the result of rents received from third persons holding under one co-tenant, or from profitable use by the co-tenant himself.—Ayotte v. Nadeau, 32 Mont. 498; 81 Pac. 145.

9. Laws 1899, p. 134, amending Code Civ. Proc., § 592, in the form of limitations and provisos affecting the substantial rights of the parties touching common property, has no retroactive force, and is applicable to a co-tenancy created prior to its passage.—Id.

10. The statute of Anne (4 & 5 Anne, c. 16), providing that where one co-tenant receives more than his share of the rents and profits of their common property he is liable to account to the other therefor, is not in force in Montana.—Id.

11. The common law rule that where one co-tenant occupies the common property and takes the whole porperty the other has no cause of action against him until the acts of the occupant amount to an ouster, or unless the occupancy was under an agreement by which the occupant became bailiff for the other as to his share, is not in force in Montana.—Id.

IV. REMEDIES AND ACTIONS BETWEEN CO-TENANTS, 12-19.

12. Under Code Civ. Proc., § 592, owners of certain interests in a lode caim were entitled to an injunction to restrain a co-owner, who was prosecuting development work without their consent, and declared his intention to continue such work, from so operating such mine.—Harrigan v. Lynch, 21 Mont. 36; 52 Pac. 642.

13. Code Civ. Proc., § 592, giving a right of action in favor of a party aggrieved by an assumption of exclusive ownership over any property held by tenants in common, enables a tenant in common of a mining claim to enjoin his co-tenants from maintaining such a tramway over the claim for his individual benefit as would preclude the erection of works on the part of the claim over which the tramway runs.—Butte & B. C. M. Co. v. M. O. P. Co., 21 Mont. 539; 55 Pac. 112.

14. Code Civ. Proc., § 592, as amended by Laws 1899, p. 134, provides that, if any person shall exercise acts of exclusive ownership over, or injure property held in joint tenancy or tenancy in common, the party aggrieved shall have his action for the injury as if such tenancy did not exist, with the further proviso that a co-tenant or joint tenant shall not thereby be prevented from entering the common property at a point not actually occupied by his co-tenants, and extracting ore, subject to an accounting for the profits to the other tenants. *Held*, that the act applied to co-tenants whose estates were in existence either before or after the passage of the act.—Butte & B. C. M. Co. v. M. O. P. Co., 25 Mont. 41; 63 Pac. 825.

15. Under Act Feb. 8, 1865 (Bann. Stat. p. 454), substantially re-enacted by Code Civ. Proc., § 592, which converts joint tenancies into tenancies in common, and tenancies in common into estates with rights and privileges incident to several ownership, protecting such rights by giving the actions of trespass and trover, it is an unauthorized taking away and lessening in value of the property for one co-tenant to mine and remove ore from the common property without the consent of the other, and injunction will properly issue to restrain violation of the rights given by the act.—Id.

16. Laws 1899, p. 134, amending Code Civ. Proc., § 592, by allowing a co-tenant to take ore from mines held in common or joint tenancy if he should account to his co-tenants for the profits therefrom, deprive one class of rights created by the original act, and confer new rights on another class; and hence a co-tenant whose estate was created after the adoption of the act embodied in § 592, and before the amendment thereto became operative, was entitled to restrain by injunction the commission by his co-tenant of any of the acts denounced

in the original statute, but allowed by the amendment, the amendment being only prospective in its operation.—Id.

17. In an action by a tenant in common against his co-tenant for rents alleged to be due to the plaintiff under a contract for the erection of a building at defendant's expense, and an equal division of rents after defendant was reimbursed by receipts of rent therefrom to the extent of one-half the cost, the burden was on plaintiff to show that defendant had been reimbursed for one-half the cost of construction by the plaintiff's share of the accrued rents.—Id.

18. In an action at law by one co-tenant against another for rents collected and retained by defendant for the use of building on their common property, the interests of the parties in the building itself can not be adjudicated.—Id.

19. A complaint by a tenant in common against his co-tenant alleged the making of a contract between plaintiff and defendant whereby defendant was to erect a building on their property at his own expense, and that when the rents received by defendant were equal to one-half the cost of the building, the rents were to be equally divided between them, and that the rents received by defendant therefrom were in excess of one-half the cost of the building, but that defendant refused to account to plaintiff for his share. *Held*, that the complaint stated a cause of action for rents due under the contract, in view of Code Civ. Proc., § 592.—Id.

V. ACTION BY CO-TENANT AGAINST THIRD PERSON. 20.

20. A tenant in common has exclusive possession, and may treat the common property as his against all the world, except his co-tenants.—Hopkins v. Noyes, 4 Mont. 550; 2 Pac. 280.

TENDER.

1. Where a telephone company terminates a lease of a customer on the alleged ground of a default in the payment of rent, and afterwards refuses a payment thereof on the ground of such termination, it is not necessary that such tender should be kept good by a deposit in court to authorize the lessee to recover for wrongful removal of the instrument.—Ashley v. Telephone Co., 25 Mont. 286; 64 Pac. 765.

TERRITORIES.

1. A territory can not be sued without its consent and compelled to perform its contracts.—Langford v. King, 1 Mont. 33.

2. Congress, by various acts, has recognized the authority of the legislative assembly to enact laws regulating the extent of mining claims which can be located, and the manner of working and developing the same, and appropriating the minerals therein contained, but the power to control and dispose of such land has been conferred on congress by the Constitution, and can not be delegated to the assembly.—Territory v. Lee, 2 Mont. 124.

3. Act Jan. 12, 1872, Cod. Stat., p. 593, c. 82, providing "for the forfeiture to the territory of placer mines held by aliens," interferes with the primary disposal of the public domain within the territory, and hence is void, being inconsistent with Org. Act, § 6, forbidding territorial laws interfering with such disposal.—Id.

4. Under Org. Act, § 7, authorizing the governor by and with the consent of the legislative council to appoint all officers not otherwise provided for, the legislature has the power to abolish the office of territorial auditor after once creating it.—Territory v. Rodgers, 1 Mont. 252.

5. The territory has no essential attributes of sovereignty, and is a province, over which congress exercises supreme control. The laws of the legislative assembly can be repealed by congress and the territorial courts have no jurisdiction in cases in which the amount in controversy exceeds $1,000.—Territory v. Lee, 2 Mont. 124.

6. Under Org. Act, § 9, power is conferred on the legislature to define the jurisdiction of the courts of the territory, subject to the limitations specified therein. (See 2 Otto 358.)—Chumasero v. Potts, 2 Mont. 242.

7. By Org. Act, § 9, providing that the supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction, and that this jurisdiction shall be as limited by law, the legislative assembly is expressly authorized to define the jurisdiction of the territorial courts, subject to the limitations specified therein.—Id.

8. Organic Act having entrusted the legislature with the entire system of municipal law, it may, in the execution of such trust, impose what duties it sees proper on the federal officers within the territory not inconsistent with their official duties, and such imposition is not the creation of a territorial office.—Id.

9. The territory, having the right to make contracts and sue thereon, has the right, in a civil action, to bring an appeal to review any judgment by which it is aggrieved.—Territory v. Hildebrand, 2 Mont. 426.

10. The territory is a corporation, and is entitled to maintain suits in its own name, as any other party.—Id.

11. A citizen can not sue the territory in the absence of an enabling statute.—Fisk v. Cuthbert, 2 Mont. 593.

12. The Montana law of 1872, providing for the formation of corporations for carrying on any branch of business "designed to aid in the industrial or productive interests of the country, and the development thereof," is not in conflict with U. S. R. S., § 1889, which provides that territorial legislatures shall not grant private charters, but may permit persons "to associate themselves together as bodies corporate for mining, manufacturing or other industrial pursuits;" and a mercantile corporation may be incorporated under such law.—Carver Merc. Co. v. Hulme, 7 Mont. 566; 19 Pac. 213.

13. Under U. S. R. S., § 1851, providing that "the legislative power of every territory shall extend to all subjects of rightful legislation not inconsistent with the Constitution and laws of the United States," there is no limitation on the authority of a territory to pass laws restricting and regulating "the sale of articles deemed injurious to the health or morals of the community."—Territory v. Guyott, 9 Mont. 46; 22 Pac. 134.

14. Act Cong., May 26, 1864, creating the territory of Montana, and defining its boundaries, excluded therefrom territory which, by Indian treaties, was not to be included within the jurisdiction of any state or territory. Afterwards a treaty was made with the Crow Indians, by which a reservation was set apart to them. *Held*, that, as the treaty was silent on the question of the inclusion of the reservation within the boundaries of Montana, the Crow reservation became a part of the territory, and subject to the control of the territorial legislature, so far as the division of the territory into counties is concerned.—Yellowstone v. Northern Pacific, 10 Mont. 414; 25 Pac. 1058.

TIME.

1. In cases arising under a statute or under a notice given in accordance with a statute, where the last day on which a required act can be performed falls on Sunday, the act may well be done on the following day.—Schnepel v. Mellen, 3 Mont. 118.

2. Where an order extends the time for doing any act in court practice "to" a specified day, the day specified is part of the time within which the act may be done.—Penn. P. M. Co. v. Schreiner, 14 Mont. 121; 35 Pac. 878.

3. Where an order extends the time for filing a statement on motion for new trial "to" a specified day, the day specified is part of the time within which the statement may be filed.—Id.

TORTS.

1. Where a nuisance arises from the individual acts of different mining companies, which have discharged deleterious and poisonous matter into the waters of a creek, and the injury is in no sense a joint one, each company is liable to the person injured for the damages caused by its wrongful acts, and not for that caused by the acts of the others, regardless of the difficulty of determining what part of the damage is occasioned by the acts of each.—Watson v. Smelting Co., 31 Mont. 513; 79 Pac. 14.

TRESPASS.

1. Actual force is not necessary to constitute a trespass upon land.—Febes v. Tiernan, 1 Mont. 179.

2. The law implies force in an unlawful entry on the lands of another, and no evidence of such force is required.—Id.

3. Actual force not being necessary to constitute a trespass on land, it need not be alleged.—Id.

4. To maintain an action for trespass for the wrongful taking of goods, plaintiff must have had actual or constructive possession at the time of the alleged wrongful taking.—Wetzel v. Powers, 5 Mont. 214; 2 Pac. 338.

5. Goods in the hands of a common carrier, sent by the consignor to the consignee are in the constructive possession of the consignee, and he alone can maintain trespass for any wrongful taking of the same from the carrier.—Id.

6. In an action for "wilfully and maliciously driving sheep on the lands of plaintiff to consume and destroy the grass," it is proper to charge that "if defendant's sheep strayed on the uninclosed lands of plaintiff, or were driven thereon for pasturage, and not for the purpose of maliciously injuring the lands, plaintiff could not recover.—Fant v. Lyman, 9 Mont. 61; 22 Pac. 120.

6a. To recover treble damages under Comp. Stat., p. 159, § 363, plaintiff must prove that the cutting of timber on his land, and its conversion by defendant, were wilful, wanton and malicious.—McDonald v. Wood Co., 14 Mont. 88; 35 Pac. 668.

7. Where plaintiff in trespass had sold his land to a townsite company, which had regularly platted it as part of a townsite, but remained in possession by permission of his grantee, such possession is sufficient to maintain the action against a naked trespasser who enters without claim or color of title.—Sell v. Graves, 16 Mont. 342; 40 Pac. 788.

8. A verdict for plaintiff in a suit to recover damages for trespass on land, and for cutting hay thereon, will be set aside where plaintiff's own witness testified that he arranged with her on behalf of defendant to cut hay on one side of a line drawn through the field, and the testimony of plaintiff herself did not positively show that such arrangement was not made.—Meyers v. Savery, 19 Mont. 329; 48 Pac. 390.

9. Where, in an action to recover for permanent injury to land occasioned by a trespass, a witness is questioned as to the value of adjoining land, and a map is used, and the land inquired about pointed out to the jury, the receipt of such testimony is not error, on the ground that the jury did not understand the situation.—Sweeney v. Montana Central, 25 Mont. 543; 65 Pac. 912.

TRESPASS TO TRY TITLE.

1. A complaint in the nature of trespass to try title to a mining claim, which avers ownership, right of possession, and the fact of possession, and entry by defendant without the consent of plaintiff, his mining thereon, and threat to continue to mine, and damages done by reason of defendant's acts, states a good cause of action.—McKay v. McDougal, 19 Mont. 488; 48 Pac. 988.

TRIAL.

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I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS, 1-4.

1. Issues of law should be disposed of before issues of fact are tried; but this right is waived by a party who goes to trial upon the facts, without insisting upon a demurrer, which has been filed in the action.—Marden v. Wheelock, 1 Mont. 49.

2. District court rule 31, which requires the clerk to notify attorneys interested in a case, and not present at the setting thereof, of such setting, applies to attorneys residing at the county seat as well as those residing elsewhere. —Collier v. Fitzpatrick, 22 Mont. 553; 57 Pac. 181.

3. The mere fact that the defense set up by one of several defendants in an action to revive a judgment—i. e., that the judgment as to him was void for want of jurisdiction over his person—was different from that set up by the other defendants, did not entitle such defendant to a separate trial as a matter of right.—Haupt v. Simington, 27 Mont. 480; 71 Pac. 672.

4. Error can not be predicated on the overruling of plaintiff's objection to immediately proceed to trial on the ground that he was not ready for trial, there being no application for continuance, and no showing why he could not try the case then as well as any time.—Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

II. COURSE AND CONDUCT OF TRIAL IN GENERAL, 5.

5. Code Civ. Proc., § 1081, provides that when, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, it may order them to be conducted there. *Held*, that the view is within the trial court's discretion.—Maloney v. King, 30 Mont. 158; 76 Pac. 4.

III. RECEPTION OF EVIDENCE, 6-39.

A. INTRODUCTION, OFFER, AND ADMISSION OF EVIDENCE IN GENERAL, 6-12.

B. ORDER OF PROOF, REBUTTAL, AND REOPENING CASE, 13-22.

C. OBJECTIONS, MOTIONS TO STRIKE OUT, AND EXCEPTIONS, 23-39.

A. INTRODUCTION, OFFER, AND ADMISSION OF EVIDENCE IN GENERAL, 6-12.

6. It is for the trial court to say whether counsel may be permitted to argue a question as to whether evidence shall or shall not be admitted.—Territory v. Corbett, 3 Mont. 51.

7. An offer of depositions "for the purpose of proving that the property in controversy is not the property of plaintiff, and that she was not in possession thereof," is properly excluded on the ground of vagueness, where the portions of the depositions which it is desired to introduce are not designated.—Palmer v. McMaster, 10 Mont. 390; 25 Pac. 1056.

8. In trover for wood, plaintiff alleged title in himself, and a conversion by defendant. Defendants set up a counterclaim, in which they alleged that the title originally had been in a third person, for whom plaintiff had done the cutting; that such third person had sold the wood to defendants; and that they had furnished supplies to plaintiff while engaged in the cutting. Plaintiff's replication consisted of a general denial. *Held*, that on the trial plaintiff could not admit the truth of the facts averred in the counterclaim, and introduce evidence in avoidance, as the issue raised by his general denial was the existence of the facts averred in the counterclaim.—Swenson v. McCormick, 10 Mont. 473; 26 Pac. 198.

9. In an action for cutting timber on, and damage to, land upon which paintiff had made a homestead filing, for the purpose of clearing the same for cultivation, plaintiff having been fully compensated in the verdict for the value of the timber taken, was not entitled to damages for defendant's failure to remove the tree tops from the land.—Nelson v. Big Blackfoot M. Co., 17 Mont. 553; 44 Pac. 81.

10. Where, on asking a question, counsel, in response to a query by the court, stated the purpose of the testimony sought to be brought out, he was precluded from thereafter claiming a different purpose.—Bullard v. Smith, 28 Mont. 387; 72 Pac. 761.

11. Where evidence is offered as a whole, and part of it is incompetent, the exclusion of all of it is not error.—Farleigh v. Kelley, 28 Mont. 421; 72 Pac. 756.

12. An offer of proof is not sufficient, without having the witness present and calling him, or asking leave to call him, or without affirmatively showing that the offer is made in good faith, and with the means of doing or trying to do what is desired.—Schilling v. Curran, 30 Mont. 370; 76 Pac. 998.

B. ORDER OF PROOF, REBUTTAL, AND REOPENING CASE, 13-22.

13. It is purely within the discretion of the court to direct the order of proof.
Griswold v. Boley, 1 Mont. 545.
Campbell v. Rankin, 2 Mont. 363.

14. It is not reversible error to admit evidence in rebuttal which should have been given in chief, when an opportunity was given by the court to produce testimony in contradiction. (See 111 U. S. 389.)—Stafford v. Hornbuckle, 3 Mont. 485.

15. Where, in an action to recover for contract work, the issue is both as to the authority of an agent to accept contract work, and also as to the fact of acceptance by him, no objection can be raised on the ground that the acceptance was allowed to be proven before the proof of the authority to accept. (See 141 U. S. 222.) —Starr v. Gregory C. M. Co., 6 Mont. 485; 13 Pac. 195.

17. Evidence brought out on a proper cross examination is part of the evidence given in chief for the party calling the witness.—Wilson v. Harris, 21 Mont. 374; 54 Pac. 46.

18. On the issue whether a sale of property was fraudulent as to creditors of the vendor, plaintiff having introduced evidence that there was no continued change of possession after the sale, for the purpose of showing constructive fraud, it was competent for defendant to show in rebuttal that a third person had possession of the property after the sale. —Finch v. Kent, 24 Mont. 268; 61 Pac. 653.

19. The admission of evidence in chief for the purpose of disproving an affirmative defense contained in defendant's answer, which would have been proper in rebuttal, was not error.—Tague v. John Caplice Co., 28 Mont. 51; 72 Pac. 297.

20. It was not error to exclude evidence in chief for plaintiff, which though relevant to the issue made by the answer, was not necessary to establish the case as alleged in the complaint. —Lisker v. O'Rourke, 28 Mont. 129; 72 Pac. 416, 755.

21. In an action by the owners of a mining claim for removal of ore from within its boundaries, the issue was the location of the point

at which a certain vein departed from a sideline of defendants' location. Defendants, after plaintiffs showed the taking of ore from within their boundaries, introduced evidence that the vein departed at the point as claimed by them, whereupon plaintiffs in rebuttal introduced evidence that it departed at the place claimed by them as shown by the fact that the vein was exposed in the cellar of a certain building. *Held*, that it was error under Code Civ. Proc., § 1080, as amended by Laws 1901, p. 160, not to permit defendants to show in rebuttal that the vein located in the cellar was along a course or strike which would bring it out at a point other than claimed by plaintiffs. —Maloney v. King, 30 Mont. 158; 76 Pac. 4.

22. Where counsel for defendant had, in his case in chief, introduced evidence bearing on the connection of plaintiff with the fraudulent acts of a debtor, it was his duty to have completed his showing in that regard before he closed his case, and it was proper to refuse to allow him to re-open it for the purpose of introducing further evidence on that subject.—Schilling v. Curran, 30 Mont. 370; 76 Pac. 998.

C. OBJECTIONS, MOTIONS TO STRIKE OUT, AND EXCEPTIONS, 23-39.

23. The testimony of a witness will not be stricken out, because he testifies as to the best of his knowledge, information and belief, and not positively.—Fitscher v. Thomas, 9 Mont. 52; 22 Pac. 450.

24. It is error for the court to strike out or withdraw from the consideration of the jury evidence that is competent under the pleadings. —Hammond v. Foster, 4 Mont. 421; 1 Pac. 757.

25. An objection to the admission of a written instrument must point out the particular in which such instrument is objectionable.—Herman v. Jeffries, 4 Mont. 513; 1 Pac. 11.

26. An objection must state the point and the reason therefor, and this can not be irrelevancy in the district court and incompetency in the supreme court.—Story v. Black, 5 Mont. 26; 1 Pac. 1.

27. Exceptions to the introduction of evidence must state the particular points upon which such exceptions are based.—Tucker v. Jones, 8 Mont. 225; 19 Pac. 571.

28. An objection to evidence as incompetent is not explicit enough to avail the party on appeal.—Helena v. Albertose, 8 Mont. 499; 20 Pac. 817.

29. An answer, which is responsive to a question insisted upon by a party against objection, will not be stricken out because unfavorable to him.—Hogan v. Shuart, 11 Mont. 498; 28 Pac. 969.

30. An objection to a hypothetical question, that it does not state the evidence on material matters and assumes conditions not existing, should point out wherein it is defective.— Prosser v. Montana Central, 17 Mont. 372; 43 Pac. 81.

31. Objections to evidence are propery overruled unless they state the ground on which they are made.—Maddox v. Teague, 18 Mont. 512; 46 Pac. 535.

32. Incompetent testimony should not necessarily be stricken out merely because it was not responsive to the question.—Harrington v. Mining Co., 19 Mont. 411; 48 Pac. 758.

33. The right to object to the validity of the tender of a deed, on the ground that there was no evidence that it was executed by the successor of defendant, or that the signatures therein were genuine, or that the officers of the successor were authorized to execute it, is waived by objecting on the ground that the deed tendered was executed by the successor, when it shoud have been the deed of defendant.—O'Keefe v. Dyer, 20 Mont. 477; 52 Pac. 296.

34. Where evidence offered by defendant is admissible against one plaintiff, but not against another, the latter can not complain of the refusal of the court to strike out such evidence. —Murray v. Montana L. & M. Co., 25 Mont. 14; 63 Pac. 719.

35. Where plaintiff brings ejectment to recover a mining claim, and defendant offers evidence of a superior claim, and that plaintiff wrongfully obtained the patent therefor, and holds the property in trust for defendant, it is not error to refuse to strike out such evidence if insufficient, but the proper method is to move to direct a verdict.—Id.

36. In a suit to foreclose a mortgage, it was proper to refuse to strike out the testimony of plaintiff at the close thereof on the ground that her testimony was incompetent, immaterial and irrelevant, in that she had failed to produce, or account for the non-production of, the note on which the action was based; plaintiff's testimony being not only as to a search for the note, but as to circumstances tending to support her allegation that the note had not been paid; and as the testimony for plaintiff was not all in, the court had no knowledge but that further evidence might be introduced, showing a search.—Withers v. Kemper, 25 Mont. 432; 65 Pac. 422.

37. A party who permits incompetent testimony to go in without objection waives his right to object, and can not move to strike it out.—Yoder v. Reynolds, 28 Mont. 183; 72 Pac. 417.

38. The mere fact that an objection made to an offer to prove is not good does not prevent the court from exercising its discretion and refusing to allow the offered proof.—Schilling v. Curran, 30 Mont. 370; 76 Pac. 998.

39. An objection to a series of documents as a whole is not well taken if some of the documents are admissible.—Thornton v. Bretherton, 32 Mont. 80; 80 Pac. 10.

IV. TAKING CASE OR QUESTION FROM JURY, 40-60.

40. It is error for the court to refuse to submit an issue to the jury on the ground that it is an admitted fact, if there is no solemn admission of it.—Taylor v. Stewart, 1 Mont. 316.

41. Where essential allegations in a declaration are not proved, a nonsuit ought to be granted.—Herbert v. King, 1 Mont. 475.

42. A judgment of nonsuit may be entered when the plaintiff fails to establish by the proof one of his causes of action. (Ob dict.) —Gans v. Woolfolk, 2 Mont. 458.

43. In an action for personal injuries while in defendant's employ, a direction of verdict for defendant at the close of the evidence, on the ground that plaintiff's evidence showed him guilty of contributory negligence, and that his fellow servants had not been guilty of any negligence, is a "nonsuit," within the meaning of Comp. Stat., p. 118, § 242, requiring judgment of nonsuit to be entered when, on the trial, plaintiff fails to prove a sufficient case for the jury.—McKay v. Montana Union, 13 Mont. 15; 31 Pac. 999.

44. A direction to the jury, in a civil case, to find for defendant, is in effect a non-suit.
McKay v. Montana Union, 13 Mont. 15; 31 Pac. 999.
Creek v. McManus, 13 Mont. 152; 32 Pac. 675.

45. On a motion for nonsuit, that which the evidence tends to prove will be considered as proved.
State v. Benton, 13 Mont. 306; 34 Pac. 301.
Soyer v. Water Co., 15 Mont. 1; 37 Pac. 808.
McCabe v. Montana Central, 30 Mont. 323; 76 Pac. 701.
Cameron v. Kenyon, 22 Mont. 312; 56 Pac. 358.

46. In an action for rent, when there is evidence to support defendant's contention that he is merely a tenant from month to month, a peremptory direction to find for plaintiff is erroneous.—Kline v. Hanke, 14 Mont. 361; 36 Pac. 454.

47. A motion for nonsuit must specify wherein the evidence is insufficient.—Jacobs v. Union Merc. Co., 17 Mont. 61; 42 Pac. 109.

48. Where, in an action at law on a contract, in which the parties are entitled to a jury as a matter of right, both at common law and under Code Civ. Proc., § 250, the jury disagree and are discharged, it is error for the court, over objection of plaintiff, to make a finding of the facts and the law, and enter judgment accordingly, since § 269 provides that in case of mistrial the action may be again tried, immediately or at a future time, as the court may direct.—Murray v. Hauser, 21 Mont. 120; 53 Pac. 99.

49. When the evidence is undisputed upon a question of fact, it is error to refuse an instruction to that effect, and substitute an instruction leaving the jury to determine it.—Sweeney v. Darcy, 21 Mont. 188; 53 Pac. 540.

50. The truth of plaintiff's evidence is to be assumed, and it is to be regarded in the most favorable light on a motion to direct a verdict for defendant.
Freeman v. Coal Co., 25 Mont. 194; 64 Pac. 347.
Cummings v. Reduction Co., 26 Mont. 434; 68 Pac. 852.

51. Where, in a suit on an alleged contract, plaintiff alone testifies in support of his case, and his evidence, though uncontradicted, is confusing, it is error to direct a verdict for him, as the jury should determine the weight of his testimony.—Whalen v. Harrison, 26 Mont. 316; 67 Pac. 934.

52. Where plaintiff's own evidence shows that he ought not to recover, a non-suit should be granted.—Cummings v. Reduction Co., 26 Mont. 434; 68 Pac. 852.

53. In an action to recover for work and labor on a mining claim belonging to defendants, defendants denied all the allegations of the complaint, and alleged that they did at certain times have some interest in the claim. On trial there was a failure of proof that the work was done at the request of defendants, or that any of them ever agreed to pay for it. Code Civ. Proc., § 720, was in force at the time, and provided that all new matter set up in an answer, not constituting a counterclaim, is deemed denied without a reply. *Held*, that as there was a failure to prove any premise, and defendants' allegation that they at times owned the claim must be considered as denied, a motion for nonsuit was properly granted.—Briggs v. Collins, 27 Mont. 405; 71 Pac. 307.

54. No case should be taken from the jury unless it appears as a matter of law that no recovery can be had on any view which can reasonably be drawn from the facts which the evidence tends to establish.—Cain v. Mining Co., 27 Mont. 529; 71 Pac. 1004.

55. Where there was no evidence whatever on an issue raised by the pleadings, it was proper to withdraw such issue from the jury.—Tague v. John Caplice Co., 28 Mont. 51; 72 Pac. 297.

56. Under Code Civ. Proc., § 1104, providing that a verdict may be directed when a case presents "only" questions of law, a verdict should not be otherwise directed.—Michener v. Fransham, 29 Mont. 240; 74 Pac. 448.

57. Under Code Civ. Proc., § 1104, providing that the judge may direct a verdict where the case presents only questions of law, a verdict can not be directed for defendant where substantial evidence is introduced prior to the motion for direction which in any way tends to support plaintiff's contentions, the weight of such evidence being a question for the jury.—Ball v. Gussenhoven, 29 Mont. 321; 74 Pac. 871.

58. A nonsuit should not be granted unless the conclusion from the facts necessarily follows, as a matter of law, that no recovery could be had under any view which could reasonably be drawn from the facts which the evidence tends to establish.—Nord v. Mining Co., 30 Mont. 48; 75 Pac. 681.

59. No case should be withdrawn from the jury unless the conclusion necessarily follows from the facts as a matter of law that no recovery could be had on any view which could reasonably be drawn from the facts which the evidence tends to establish.—McCabe v. Montana Central, 30 Mont. 323; 76 Pac. 701.

60. Defendant, if satisfied that the evidence introduced by plaintiff is not sufficient to warrant a recovery, may move for nonsuit, which raises a question of law, admitting the truth of the evidence, but questioning its sufficiency, or, proceeding upon the theory that the jury will not believe plaintiff's testimony, may have the case submitted to the jury upon plaintiff's evidence alone, in which case the question submitted is one of fact, with the burden of proof on plaintiff to establish by a preponderance of the evidence the allegations of his complaint.—Brophy v. Provision Co., 31 Mont. 279; 78 Pac. 493.

V. INSTRUCTIONS TO JURY, 61-112.

A. Province of Court and Jury in General, 61-70.
B. Necessity and Subject-Matter, 71.
C. Form, Requisites, and Sufficiency, 72-83.
D. Applicability of Pleading and Evidence, 84-88.
E. Requests and Prayers, 89-97.
F. Objections and Exceptions, 98-109.
G. Construction and Operation, 110-112.

A. PROVINCE OF COURT AND JURY IN GENERAL, 61-70.

61. In an action for forcible entry and detainer of land, an instruction that "there has been considerable evidence introduced in the way of letters and certificates, applications to file, and other evidence that would ordinarily tend to show right of possession or such title as a man could acquire to unsurveyed land, but the question of right of possession and title is not in the case," is not objectionable as commenting on the weight of the evidence.—Brand v. Servoss, 11 Mont. 86; 27 Pac. 407.

62. Instructions to the jury are not objectionable on the ground that they assume the existence of certain facts, where such facts are not controverted.—Hogan v. Shuart, 11 Mont. 498; 28 Pac. 969.

63. An instruction beginning with the words, "plaintiffs having the burden of proof, they

must establish the material allegations of their complaint by a preponderance of evidence." was not objectionable as assuming that a right of recovery had been established. (See 171 U. S. 92.)—Fitzgerald v. Clark, 17 Mont. 100; 42 Pac. 273.

64. An instruction that, if the jury believe that certain witnesses have sworn falsely on the trial in any particular, they may disregard their entire evidence, except in so far as it has been corroborated by other creditable evidence, is erroneous as invading the province of the jury.—Wastl v. Montana Union, 17 Mont. 213; 42 Pac. 772.

65. An instruction that as a general rule the statements of a witness as to verbal admissions of a party should be received with caution, as that kind of evidence is subject to much imperfection and mistake, is erroneous, as a comment on the weight of evidence.

Wastl v. Montana Union, 17 Mont. 213; 42 Pac. 772.

Knowles v. Nixon, 17 Mont. 473; 43 Pac. 628.

66. An instruction which authorizes a jury to disregard the entire uncorroborated testimony of a witness, in cases where it is "probable" that he has deiberately and intentionally testified falsely as to some material matter, is bad, as authorizing the jury to judge of the effect of the evidence arbitrarily.—Cameron v. Wentworth, 23 Mont. 70; 57 Pac. 648.

67. Nor would the instruction be improved by the use of the word "palpable," as the power of the jury would thereby be circumscribed by limiting their right to discard the testimony of a witness to those instances only where it is palpable that the witness has testified falsely, and is not corroborated by other witnesses.—Id.

68. In an action against alleged copartners on an account stated, etc., where the answer of one of the defendants denied the existence of any partnership, and also denied that plaintiff ever sold any goods to any copartnership of which said defendant was a member, and the evidence was in irreconcilable conflict on both issues, an instruction that in such cases as the one at bar, where an action is brought by a third person against a firm, less strictness of proof is required to show that a certain person was a copartner than is required in an action by one partner against another, was error for assuming the existence both of a partnership and of a partnership liability.—Lawrence v. Westlake, 28 Mont. 503; 73 Pac. 119.

69. Under Code Civ. Proc., § 1080, as amended by Laws 1897, p. 241 and § 3390, it is error for the court in its charge to assume as proven a fact which is in issue.—Gallick v. Bordeaux, 31 Mont. 328; 78 Pac. 583.

70. In an action against a constable for the wrongful seizure of property under the execution the question whether the justice had jurisdiction of the parties and of the subject matter, whether the judgment was wrongfully made, and whether the execution was in due form, were questions of law, and instructions that those things must appear in order to make out the defense of justification under the writ were erroneous in submitting legal questions to the jury.—Id.

B. NECESSITY AND SUBJECT-MATTER, 71.

71. The mere fact that, in an action against a railroad, the witnesses for defendant are mostly its employees, does not warrant an instruction authorizing the jury, if they believe that any witness testified under fear of losing employment, or with a desire of pleasing his employer, to consider such fact in determining the weight to be given his evidence.—Wastl v. Montana Union, 17 Mont. 213; 42 Pac. 772.

C. FORM, REQUISITES, AND SUFFICIENCY, 72-83.

72. It is not error for a judge of the district court to give oral instructions.—Marden v. Wheelock, 1 Mont. 49.

73. The court will not give an instruction that is correct, if it will mislead the jury.—Boucher v. Mulverhill, 1 Mont. 306.

74. Instructions given by the court upon matters not embraced in the issue are calculated to mislead the jury and are erroneous, and the judgment will be reversed.—Kinna v. Horn, 1 Mont. 329.

75. In an action to recover for services the court was requested to instruct the jury as follows. "If from the testimony, you believe that plaintiff rendered services for defendant, as averred in plaintiff's complaint, and that defendant has not paid plaintiff therefor, then it is your duty to find for plaintiff in the amount found due under the testimony." *Held*, that the refusal to give such instruction was not error.—Perkins v. Davis, 2 Mont. 474.

76. It is error to give to the jury conflicting instructions based upon different views of the law applicable to the case, without such instructions being harmonized by the judge.—Kelley v. Cable Co., 7 Mont. 70; 14 Pac. 633.

77. A judgment will be reversed when instructions have been given by the trial court, which are inconsistent and contradictory on a material point.—Flick v. Mining Co., 8 Mont. 298; 20 Pac. 807.

78. On an issue as to whether defendant had done $100 worth of work on a mining claim, an instruction is not prejudicial to him which states that there is no dispute as to $75 worth of work, but as to the remaining $25 the fact is disputed, and the evidence is conflicting, where plaintiff had admitted an item of $3.50 besides the $75.—Mattingly v. Lewishon, 13 Mont. 508; 35 Pac. 111.

79. An agreement of dissolution of partnership was made between plaintiff and defendant. Plaintiff, in his replication to defendant's counterclaim, alleged that after the partnership was dissolved he employed defendant as a herder at $40 per month. *Held*, that an instruction that plaintiff in his replication alleged that under the agreement of dissolution defendant was to receive $40 per month was erroneous.—Nelson v. Spears, 16 Mont. 351; 40 Pac. 786.

80. Where the jury have been instructed that any contributory negligence on plaintiff's part will defeat the action, it is not necessary to incorporate a similar instruction as a limitation to a general charge on negligence.—Cannon v. Lewis, 18 Mont. 402; 45 Pac. 572.

81. An instruction to the effect that, in determining questions of fact, the jury should be governed solely by the evidence introduced, and that they have no right to indulge in conjectures or speculations not supported by the evidence, should be given when requested.—Ramsey v. Burns, 27 Mont. 154; 69 Pac. 711.

82. Under Code Civ. Proc., § 3390, it was error to charge that, in actions against a firm by a third person, less strictness of proof was required to show partnership than is required in an action brought by one partner against another, preponderance of the evidence being required in both cases.—Lawrence v. Westlake, 28 Mont. 503; 73 Pac. 119.

83. An instruction setting forth a clear and concise statement of the nature of the case and the issues to be determined is not objectionable.—Paxton v. Woodward, 31 Mont. 195; 78 Pac. 215.

D. APPLICABILITY OF PLEADING AND EVIDENCE, 84-88.

84. Where the answer contained no new matter constituting a counterclaim or entitling the defendants to affirmative relief, no replication was necessary, and it was error for the district court to give an instruction that plaintiffs admitted in their pleading a matter not required under the Civil Code to be denied by replication.—Caruthers v. Pemberton, 1 Mont. 111.

85. Instructions that contain abstract propositions of law, but which are inapplicable to the facts shown by the evidence, are erroneous.—Territory v. Manton, 7 Mont. 162; 14 Pac. 637.

86. In an action for the price of lumber sold it appeared that plaintiffs had been shipping lumber to one B for the erection of a certain building; that defendants were bondsmen of B in the contract for such building; that plaintiffs becoming uneasy as to B's credit arranged to ship the lumber direct to defendants; that plaintiffs sought to hold defendants as purchasers, without imputing to defendants any intent to defraud B's creditors. The court instructed that, if the lumber was shipped to defendants for the purpose of delaying the creditors of B "then defendants will not be allowed to prove those facts in defense, and the transaction as between plaintiffs and defendants is good and valid." *Held*, that the instruction was error, as there was no allegation or evidence of fraud in the case.—Purtle v. Casey, 11 Mont. 229; 28 Pac. 305.

87. In an action for breach of warranty as to the age of sheep sold, instructions that the jury should consider all the circumstances of the case, including the purchaser's reasons for relying on the warranty, and his statement that he was ignorant as to the means of determining the age of sheep, while improper, because the purchaser's reasons and knowledge were not involved in the controversy, are rendered harmless by a finding of the jury that the seller's statements amounted to a warranty.—Hogan v. Shuart, 11 Mont. 498; 28 Pac. 969.

88. The giving of an instruction having no foundation in the evidence is error.—Bullard v. Smith, 28 Mont. 387; 72 Pac. 761.

E. REQUESTS OR PRAYERS, 89-97.

89. It is error for the court to refuse to submit an issue to the jury on the ground that it is an admitted fact, if there has not been a solemn admission of the fact.—Taylor v. Stewart, 1 Mont. 316.

90. Where the court in instructing upon the respective claims of the plaintiff and defendant was not requested to state in further detail the defendant's claim, defendant can not, by merely excepting to the charge, make it the foundation for an assignment of error that it is indefinite or incomplete.—Hamilton v. Railway Co., 17 Mont. 334; 42 Pac. 860; 43 Pac. 713.

91. Under Code Civ. Proc., § 1080, subd. 7, repuiring a party desiring special instructions to reduce them to writing, and to request the court to so instruct, alleged errors in omitting to charge on certain points will not be considered in the absence of such a request.—Helena & L. S. & R. Co. v. Lynch, 25 Mont. 497; 65 Pac. 919.

92. Where requested instructions are sufficiently covered by the general charge, it is not error to refuse them.—Largey v. Mantle, 26 Mont. 264; 67 Pac. 114.

93. A requested instruction, though technically stating the law, being expressed in language which will probably be misunderstood by the jury, and requiring more than verbal change to make it clear, may be refused.—Ramsey v. Burns, 27 Mont. 154; 69 Pac. 711.

94. Where the instructions given incorporate the substance of those requested, it is not error to refuse to adopt them.—Paxton v. Woodward, 31 Mont. 195; 78 Pac. 215.

95. Instructions covering a feature of the case proprely covered by other instructions given may be refused.—Gallick v. Bordeaux, 31 Mont. 328; 78 Pac. 583.

96. The fact that instructions requested by the parties bore the names of their respective attorneys is not reversible error.—Thornton v. Bretherton, 32 Mont. 80; 80 Pac. 10.

97. Where the instructions of the court fairly covered the case, and are correct, the judgment will not be reversed because all the phases of the case are not covered by them, where no additional instructions covering the omitted point are requested.—Gillies v. Mining Co., 32 Mont. 320; 80 Pac. 370.

F. OBJECTIONS AND EXCEPTIONS, 98-109.

98. This court will not consider an objection that oral instructions were given to the jury, contrary to the statute, if no exception was properly taken at the time.—Davis v. Germaine, 1 Mont. 210.

99. Parties can not except to the reasons given by the court for its rulings.—Taylor v. Stewart, 1 Mont. 316.

100. A general exception to the charge, or portions thereof, is of no avail, unless the same is entirely erroneous.—Simonton v. Kelly, 1 Mont. 363.

101. A party can except to the opinion of the court in giving or refusing instructions only at the time when they are given or refused, and objections not taken then will not be considered on appeal.—Griswold v. Boley, 1 Mont. 545.

102. On motion for a new trial a specification of error that "the court erred in instructing the jury for the plaintiff, as they were instructed by the court at the time" is insufficient as being too general.—Id.

103. Unless exceptions are made at the time of the trial, in order that the judge may have an opportunity, before the jury retires, to correct any error he may have fallen into in the hurry and perplexity of the trial, they will not be considered on appeal.—McKinstry v. Clark, 4 Mont. 370; 1 Pac. 759.

104. Exceptions must point out the specific portions of the instructions excepted to, and the instructions must be referred to by number.—Id.

105. A general exception to the entire charge of the court can not be considered.—Id.

106. An agreement between counsel that certain instructions granted or refused shall be deemed excepted to, without complying with the statute as to saving exceptions, is of no consequence whatever.—Herman v. Jeffries, 4 Mont. 513; 1 Pac. 11.

107. A general objection to each and all of the instructions given that they are not law, or are misleading to the jury, is not sufficient on appeal.—Gum v. Murray, 6 Mont. 10; 9 Pac. 447.

108. A party objecting to instructions must designate, either by number or by some other certain method, each of the instructions to which he objects.—Woods v. Berry, 7 Mont. 195; 14 Pac. 758.

109. Under Code Civ. Proc., § 1080, as amended by Laws 1901, p. 160, it is not neces-

sary to take an exception to the reasons given by the court for the refusal of an instruction. —Chessman v. Hale, 31 Mont. 577; 79 Pac. 254.

G. CONSTRUCTION AND OPERATION, 110-112.

110. Where the court, in its charge, inadvertently gave an erroneous description of the land in controversy, which land was described in the answer, such error is harmless, when the jury, in their findings, would necessarily refer to the land as described in said answer.—Neill v. Jordan, 15 Mont. 47; 38 Pac. 223.

111. In an action for the death of an employee by the explosion of a boiler, an instruction that defendant "is required to supply its employees with safe and suitable machinery" is not erroneous, when qualified by subsequent instructions that defendant is not liable if the explosion was caused by a "latent" defect, which defendant could not discover by using "ordinary care," and that "in this case, if defendant furnished such a boiler as a reasonably prudent man would furnish, then plaintiff can not recover."—Johnston v. Mining Co., 16 Mont. 164; 40 Pac. 298.

112. In an action for injury to a passenger by being thrown from a street car in a collision, error in particularizing the testimony of a witness that plaintiff stated after the accident that, if she had not been standing up in the car, she would not have been hurt, and calling attention to its credibility, was harmless, where the charge elsewhere told the jury to determine whether plaintiff so stated "from all the evidence," and other charges instructed that if plaintiff was standing in the car at the time of collision, and was not exercising ordinary care in so standing, and such action contributed to her injury, she could not recover.—Hamilton v. Railway Co., 17 Mont. 334; 42 Pac. 860; 43 Pac. 713.

VI. CUSTODY, CONDUCT AND DELIBERATIONS OF JURY, 113-119.

113. An act providing that the verdict of three-fourths of the jurors shall have the same effect as if agreed upon by the whole of the jurors, is unconstitutional and void in actions at common law, in which the amount in controversy exceeds $20. (See 11 Wall. 610.)—Kleinschmidt v. Dunphy, 1 Mont. 118.

114. The jury must believe from the testimony, legally produced before them in open court, and from that alone; and any instruction of the court that permits private belief or private knowledge of a juryman to sway his findings or his judgment, is wrong and beyond remedy.—Territory v. Whitcomb, 1 Mont. 359.

115. It is cause for granting a new trial if important instructions given by the court were not sent in to the jury, with others, though the omission was not intentional.—Hammond v. Foster, 4 Mont. 421; 1 Pac. 757.

116. Comp. Stat., p. 127, § 267, provides that if the jury, after retiring for deliberation, disagree as to any part of the evidence, they may require the officer to conduct them into court, where the information shall be given them, in the presence of, or after notice to, the parties or counsel. *Held*, that the court may read the testimony from the stenographer's notes, which as the stenographer is a sworn officer, are presumed to be correct.—Freezer v. Sweeney, 8 Mont. 508; 21 Pac. 20.

117. It is proper for a jury, who have viewed the property which is the subject of litigation, to take into consideration the result of their observations in connection with the evidence in deliberating upon the verdict.—Ormund v. Mining Co., 11 Mont. 303; 28 Pac. 289.

118. In replevin of property taken under execution, the court disregarded all evidence offered to show justification by the sheriff under the execution, because there was no evidence of any legal judgment, but permitted the jury to take with them and consider the summons, account and execution in the case in making up their verdict. *Held*, error.—Sweeney v. Darcy, 21 Mont. 188; 53 Pac. 540.

119. Under Code Civ. Proc., § 1083, it was not error, in an action against a railroad company for killing cattle on its track, to refuse to allow the jury to take with them a map of the place where the accident occurred, which was not admitted in evidence, but only used by witnesses while testifying in explaining their testimony.—Carman v. Montana Central, 32 Mont. 137; 79 Pac. 690.

VII. VERDICT, 120-138.

A. GENERAL VERDICT, 120-131.
B. SPECIAL INTERROGATORIES AND FINDINGS, 132-138.

A. GENERAL VERDICT, 120-131.

120. In an action to recover damages for the diversion of water and to obtain decree of title and perpetual injunction, the verdict of the jury that plaintiff is entitled to the water, is a finding on the material issue, and entitles him to a judgment for costs and the relief sought.—Harris v. Shontz, 1 Mont. 212.

121. A court may correct the form of a verdict, but not the substance.—Frohner v Rodgers, 2 Mont. 179.

122. After a verdict is rendered and recorded and the jury discharged the province of the jury is exhausted, and the verdict can not then be changed in substance, though the court has power to amend it as to informalities.—In re Thompson, 9 Mont. 381; 23 Pac. 933.

123. Where an answer, admitting plaintiff's claim, sets up a counterclaim for a greater amount, and asks judgment for the difference, a verdict for the full amount of the counterclaim, on which judgment is entered for such difference, is not erroneous.—Hogan v. Shuart, 11 Mont. 498; 28 Pac. 969.

124. A verdict simply "in favor of plaintiff," without stating the amount awarded him, is sufficient, where the complaint claims a named amount, and the answer does not deny the indebtedness, or the amount thereof, but merely denies that the debt is yet due.—Josephi v. Clothing Co., 13 Mont. 195; 33 Pac. 1

125. Comp. Stat., p. 127, § 271, providing that the verdict, if informal or insufficient, may be corrected by the jury under the advice of the court, or the jury may be again sent out, does not authorize the court to refuse to receive a verdict for plaintiff for $50, on the ground that, under the evidence, if plaintiff recover any verdict, it must be for $100.—Morris v. Burke, 15 Mont. 214; 38 Pac. 1065.

126. In an action to recover on an account stated, the court charged that "an account stated is a document or writing which exhibits the state of account between parties, and the balance owing from one to the other, * * * and should be something more than a mere memorandum; it should show on its face that it was intended to be a final settlement up to date; and this should be expressed with clearness and certainty." There was evidence that the parties sat at a table and talked over their several claims, and that plaintiff's clerk took down the

amounts, and figured out the balance, which he showed the parties, and that they assented thereto, but no written statement, other than such memorandum, was made, and a disagreement followed. *Held*, that a finding that there was an account stated was contrary to law, as given by the court.—King v. Lincoln, 26 Mont. 157; 66 Pac. 836.

127. A jury is bound by the law given by the court, whether correct or not.—Id.

128. That a verdict is contrary to instructions which were inapplicable is not ground for reversal.—Babcock v. Maxwell, 29 Mont. 31; 74 Pac. 64.

129. Where instructions warranted finding for defendant, but were inconsistent and conflicting with other instructions, the court abused its discretion in granting a new trial on the ground that the verdict was against the law because contrary to the instructions, since the verdict while opposed to some of the instructions, was warranted by others.—Cotter v. Smelting Co., 31 Mont. 129; 77 Pac. 509

130. Where the evidence in the record clearly shows that the jury disregarded the instructions of the trial court, the verdict will be set aside, without determining the propriety of the instructions.—McAllister v. Coal Co., 31 Mont. 359; 78 Pac. 595.

131. Special findings acquiesced in by the required two-thirds of a jury may not be attacked by affidavits of dissenting jurors that, in their opinion, the conclusion of the majority was reached by giving a wrong construction or too much weight to a part of the evidence.—Spencer v. Spencer, 31 Mont. 631; 79 Pac. 320.

B. SPECIAL INTERROGATORIES AND FINDINGS, 132-138.

132. A general verdict should not be set aside unless the special finding clearly controverts it, and is undoubtedly inconsistent with it.—Febes v. Tiernan, 1 Mont. 179.

133. Where the general verdict finds all the issues joined which were raised by the pleadings, and one of the special findings of the jury is not supported by the evidence, but is upon an immaterial point, the other special findings and the general verdict will not be overturned. (20 Wall. 648.)—Toombs v. Hornbuckle, 1 Mont. 286.

134. A finding by the jury that a party has performed services for one year, under a contract requiring him to superintend mines in this territory, will be set aside if the evidence shows that he left the territory before the year expired.—Isaacs v. McAndrew, 1 Mont. 427.

135. In an action on a fire insurance policy with a clause, "$1,800 total concurrent insurance permited," plaintiff aleged that defendant, knowing that prior insurance to the amount of $1,800 existed on the property, and was about to expire, agreed that the same should be renewed. There was a general verdict for plaintiff, accompanied by a special finding that defendant did not agree to an increase of the insurance to the aggregate amount of $3,600, and that defendant did not consent to the renewal of the old policy. *Held*, that a judgment setting aside the general verdict and rendering judgment for defendant on the special finding was proper.—Neimick v. American Ins. Co., 16 Mont. 318; 40 Pac. 597.

136. On a suit to determine the right to 200 inches of water from a stream, it appeared that plaintiff and defendant claimed the same as appurtenant to land bought from the same grantor. Special findings were rendered that plaintiff's deed of the land, with the water appurtenant, was executed and recorded long prior to defendant's; that, when plaintiff bought, the water was actually conducted on the land, and he never ceased to use the same; that 160 inches were necessary for plaintiff's use. *Held*, that it was error to set aside the general verdict, adopt the special findings, and enter judgment for defendant on them, as they warranted a judgment for plaintiff.—Kimpton v. Mining Co., 16 Mont. 379; 41 Pac. 137.

137. Where, in an action on a note by a bank as assignee, it appears that limitations are a good defense if, as defendant claims, the price of stock sold to a member of the assignor bank was paid and credited on the note on Aug. 30, 1883, as agreed, instead of Dec. 21, 1883, as endorsed on the note, a general verdict for plaintiff is not inconsistent with special findings that the vendee purchased the stock of defendant in August, 1883, and that the credit on the note should have been made in that month, but that plaintiff did not receive the money until Dec. 21, 1883.—First Nat'l Bank v. Pardee, 16 Mont. 390; 41 Pac. 77.

138. There is no error in refusing a requested instruction that the jury might render a general verdict or a special verdict, where the party requesting it does not ask the court to submit any special findings.—Prosser v. Montana Central, 17 Mont. 372; 43 Pac. 81.

VIII. TRIAL BY COURT, 139-153.

A. HEARING AND DETERMINATION OF CAUSE, 139-142.

B. FINDINGS OF FACT AND CONCLUSIONS OF LAW, 143-153.

A. HEARING AND DETERMINATION OF CAUSE, 139-142.

139. An application for an injunction was made to the district court of Meagher county, the cause was tried in that court, and the court submitted certain questions to the jury, which questions the jury answered and their answers were filed with the papers in the case. Afterwards the case was, by consent, removed to Lewis and Clarke county and was there heard upon motion for a judgment and decree, and the cause was finally submitted to the court upon the pleadings, evidence and proceedings in the case. Upon such submission the court rendered judgment, disregarding the special findings of the jury. *Held*, that an objection that the case was tried as an action at law when it should have been tried as a suit in equity was not well taken. (See 20 Wall. 670.)—Gallagher v. Basey, 1 Mont. 457.

140. Actions at law, where a legal remedy is demanded, must be tried as at law, and the judgment based upon the verdict of the jury or the findings of the court sitting in the capacity of a jury.—Woolman v. Garringer, 1 Mont. 535.

141. Suits in equity, where equitable relief is prayed, or where an equitable defense is set up to a claim at law, must be tried as in a court of chancery, and the decree emanate from the judge sitting as a chancellor.—Id.

142. A proceeding to foreclose a mechanic's lien being equitable, the court may set aside the findings of the jury, and render judgment notwithstanding the same.—O'Rourke v. Butte Lodge, 19 Mont. 541; 48 Pac. 1106.

B. FINDINGS OF FACT AND CONCLUSIONS OF LAW, 143-153.

143. The opinion of the chancellor in an equitable action is not a finding of facts.—Thorp v. Freed, 1 Mont. 651.

144. In an action to restrain the diversion of water from a creek, the court found that

plaintiffs were entitled to the use of the water therein, but did not find specifically how much. It also found that defendant was entitled to use so much of the water as flowed in the north channel of the creek. The plaintiffs requested the court to find the number of inches of water to which they were entitled. *Held*, that to avoid a multiplicity of suits and in order to finally determine the rights of the parties, the finding should have been made, especially as Comp. Stat., p. 130, § 280, provides that no judgment shall be reversed for want of a finding of facts at the instance of any party who shall not have requested such finding.—Estill v. Irvine, 10 Mont. 509; 26 Pac. 1005.

145. A court need not make separate findings of damages and benefits, where there is no evidence of benefits in any sum whatever.—Gallatin Canal Co. v. Lay, 10 Mont. 528; 26 Pac. 1001.

146. Where, in an action by a grantor to have a deed declared a mortgage, the jury finds that it was intended as a mortgage, and such finding is not attacked, a subsequent finding by the court, on an accounting between the parties, that the grantee believed it was a deed, and under such belief made improvements while in possession, must be set aside as inconsistent with the admitted facts.—Bateman v. Raymond, 15 Mont. 439; 39 Pac. 520.

147. In an action tried by the court, a finding of fact stated in the pleadings of one party, and not denied by the other, is not required, since the fact amitted by the pleadings will be treated as found by the court in accordance with such admissions.—State v. Telephone Co., 27 Mont. 394; 71 Pac. 311.

148. Under Code Civ. Proc., § 1117, a conclusion of law contradictory of the agreed statement is sufficient to vitiate the judgment.—Birney v. Warren, 28 Mont. 64; 72 Pac. 293.

149. It was error for the court, on discovering an obvious mistake in favor of plaintiff in a conclusion of law, which it had overlooked, to amend the same with plaintiff's consent.—Miller v. Marheson, 28 Mont. 132; 72 Pac. 414.

150. Under Code Civ. Proc., § 1114, providing that no judgment shall be reversed for want of findings at the instance of any party who, at the close of the evidence and arguments, shall not have requested findings in writing, requests for findings made after the filing of the findings and conclusions are presented too late, and the want of such findings can not be made the ground of reversal.—Schilling v. Curran, 30 Mont. 370; 76 Pac. 998.

151. Where the court stated that it would make findings of fact, defendant was relieved from making any request for findings, and the submission of written findings had the effect of requesting findings in writing on the material facts involved.—Quinlan v. Calvert, 31 Mont. 115; 77 Pac. 428.

152. Under Code Civ. Proc., § 1112, where affirmative matter is set out in the answer, a finding that all the material allegations of the complaint are true, and directing that judgment be entered for plaintiff is insufficient.—Id.

153. Under the express provisions of Code Civ. Proc., § 1114, no judgment is reversible for want of findings at the instance of a party who, at the close of the evidence and argument, shall not have requested findings in writing, and caused the request to be entered on the minutes.—Bordeaux v. Bordeaux, 32 Mont. 159; 80 Pac. 6.

IX. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS, 154-158.

154. The error of the trial court in not permitting proper cross examination is not cured by the failure of the party cross examining to make the witness his own witness.—Territory v. Rehberg, 6 Mont. 467; 13 Pac. 132.

155. Where a defendant fails to stand on an adverse ruling on a motion for non-suit, but introduces evidence which supplies the defects in plaintiff's case, such evidence inures to plaintiff's benefit, and cures the defect, so that it can not be urged as a ground for new trial.—Power v. Stocking, 26 Mont. 478; 68 Pac. 857.

156. A motion for non-suit is not waived by the moving party putting in evidence after the motion has been overruled, but he assumes the risk of supplying any deficiency in the other party's case by the testimony of his own witnesses.—Cain v. Mining Co., 27 Mont. 529; 71 Pac. 1004.

157. Where plaintiffs, in an action to recover damages for the diversion of water adjacent to their mining claim, offered to show, by the person who obtained the patent from the government for the claim, that he described in his application, as one of the improvements entitling him to a patent, a ditch, which was the same as that in which the water involved in the action was located, to which objection was made and sustained, whereupon plaintiffs offered a certified copy of the application for the patent, they thereby waived any error in the exclusion of the testimony.—Leggat v. Carroll, 30 Mont. 384; 76 Pac. 805.

158. An exception to the refusal to give an instruction is not waived by proceeding with the trial after such refusal.—Chessman v. Hale, 31 Mont. 577; 79 Pac. 254.

TROVER AND CONVERSION.

I. Acts Constituting Conversion and Liability Therefor, 1-2.

II. Actions, 3-27.
- A. Right of action and defenses, 3-6.
- B. Jurisdiction, parties, preliminary proceedings, and pleading, 7-13.
- C. Evidence, 14-23.
- D. Damages, 24-25.
- E. Trial, 26-27.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR, 1-2.

1. In an action for conversion, it appeared that plaintiff was lessee for five years of certain heifers, the product of which was to be divided between him and the owner; that plaintiff wrote the owner that she must either take $11 per head, or come and get the cattle, as there was no feed on their range; that the owner seasonably accepted the offer, and waited three weeks for plaintiff to close the sale; that he did nothing; and that her husband, as her agent, took the cattle. *Held*, that there was no conversion.—Powers v. Klenzie, 15 Mont. 177; 38 Pac. 833.

2. It is not necessary to a conversion that there should be a nominal taking of the thing in question by the defendant; if he exercises a dominion over the thing in exclusion or in defiance of plaintiff's right, that is, in law, a conversion, be it for one or another person's use.—Tuttle v. Hardenberg, 15 Mont. 219; 38 Pac. 1070.

II. ACTIONS, 3-27.

A. RIGHT OF ACTION AND DEFENSES, 3-6.

B. JURISDICTION, PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING, 7-13.

C. EVIDENCE, 14-23.

D. DAMAGES, 24-25.

E. TRIAL, 26-27.

A. RIGHT OF ACTION AND DEFENSES, 3-6.

3. A written order by the owner of personal property, authorizing plaintiff to dispose of it, and collect the proceeds, does not transfer the title to plaintiff, and does not enable him to maintain trover against a third person, who converted the same to his own use.—Swenson v. Kleinschmidt, 10 Mont. 473; 26 Pac. 198.

4. In an action for conversion, where the taking is wrongful, a demand before the commencement of the action is not necessary.—Reynolds v. Fitzpatrick, 23 Mont. 52; 57 Pac. 452.

5. In an action for conversion, proof of title or right of possession of the property in a third person is a good defense.—Reynolds v. Fitzpatrick, 28 Mont. 170; 72 Pac. 510.

6. Plaintiffs allege that, being the owners of certain capital stock in defendant company, they deposited it with the company to be sold by defendant and the proceeds used in paying its debts, in consideration of an agreement that plaintiffs should hold certain offices of defendant until its business should be in successful operation; that defendant violated its agreement and ejected plaintiffs from the offices, and had sold and issued the stock to others, and refused and failed to deliver it to plaintiffs, or to pay plaintiffs the value thereof, though requested to do so. *Held*, that the complaint did not state a cause of action in conversion, as it did not show a general or special ownership in the property and a right to immediate possession at the time of the original taking by defendant.—Glass v. Mining Co., 31 Mont. 21; 77 Pac. 302.

B. JURISDICTION, PARTIES, PRELIMINARY PROCEEDINGS, AND PLEADING, 7-13.

7. In conversion, where the complaint fails to state the county in which the wrongful taking occurred, defendant, if a resident of another county, may have a change of venue, under Comp. Stat., p. 72, § 59, providing that the action shall be tried in the county where defendant resides, and that actions for torts shall be tried in the county where the tort was committed.—Yore v. Murphy, 10 Mont. 304; 25 Pac. 1039.

8. A complaint in an action for conversion which avers that "on the 8th day of May the plaintiff was, and is now," the owner of the property described, and that defendant converted the property "on or about the 12th of May," is fatally defective in not alleging with certainty ownership at the time of the conversion, and will not support a judgment by default.—Sawyer v. Robertson, 11 Mont. 416; 28 Pac. 456.

9. In conversion, where damages only are recoverable, it is sufficient to allege plaintiff's ownership and possession on the date the property was converted, as distinguished from on the date of the commencement of the action.—Babcock v. Caldwell, 22 Mont. 460; 56 Pac. 1081.

10. In an action for the unlawful taking and detention of property, a denial of a wrongful or unlawful taking or withholding is an admission that defendant did take or withhold the property.—Proctor v. Irvin, 22 Mont. 547; 57 Pac. 183.

11. A complaint in an action for conversion, which avers that plaintiff is the owner of the property described, states its value, and the acts of defendant which deprived him thereof, and asks damages, is sufficient, and need not aver that defendant did any wrong.—Reynolds v. Fitzpatrick, 23 Mont. 52; 57 Pac. 452.

12. In an action for conversion, an allegation that defendants converted and disposed of the property to their own use is an allegation of fact sufficient, in the absence of a special demurrer, to sustain a judgment for plaintiff.—Stevens v. Curran, 28 Mont. 366; 72 Pac. 753.

13. Under Civ. Code, § 4333, the injured party must elect which measure of damages he will claim, and can not claim damages according to both standards fixed in such section in the same case.—Thornton v. Bretherton, 32 Mont. 80; 80 Pac. 10.

C. EVIDENCE, 14-23.

14. Where plaintiff, in an action for conversion, has proved his ownership and present right of possession, they are presumed to continue until he is shown to have parted with them.—Laubenheimer v. Bach, 19 Mont. 177; 47 Pac. 803.

15. Where, in an action for conversion, defendant denies plaintiff's ownership, and introduces evidence that he purchased the property from another with plaintiff's knowledge, and without objection by him, and that plaintiff had admitted having sold the property to defendant's vendor, it was error to exclude evidence offered by plaintiff in rebuttal of such testimony.—Id.

16. Where defendant admitted the taking of plaintiff's cattle, and the detention of them until they were retaken by the sheriff, evidence for defendant as to who had possession when the sheriff took them is immaterial.—Proctor v. Irvin, 22 Mont. 547; 57 Pac. 183.

17. In an action for damages for the taking and detention of plaintiff's cattle, which plaintiff claimed were injured by being driven 25 miles and close herded for several days, evidence by defendant that they were in good condition at the end of the first five miles of the drive is immaterial.—Id.

18. Where defendant admitted the taking and detention of plaintiff's cattle, where it was proved that the cattle were driven 25 miles, and plaintiff testified that they were in much worse condition after the drive, and that on that account there were not as many calves that year as usual, evidence as to the increase of cattle that year, as compared with former years, is admissible.—Id.

19. In an action for damages for the wrongful taking and detention of plaintiff's cattle, where it was proved that the cattle were driven 25 miles, and plaintiff testified that they were in much worse condition after the drive, and that on that account there were not as many calves that year as usual, evidence as to the increase of cattle that year, as compared with former years, is admissible.—Id.

20. Where plaintiff sought to recover damages for conversion of a stock of goods, apparently in the exclusive possession of his agent, and an instruction was given that the burden of proof was on plaintiff to show his ownership, a further instruction that the burden was on defendants to show that, at the time of levy and sale constituting the alleged conversion, the property was owned by the agent, was erroneous, as conflicting with the previous

instruction, and incorrectly stating the law.—Kipp v. Silverman, 25 Mont. 296; 64 Pac. 884.

21. An instruction, in an action for damages for conversion of a stock of goods, that "the burden is on plaintiff to show that at the times alleged he was the owner of, and entitled to the possession of, the goods, and at said time defendant sheriff wrongfully and unlawfully levied on and sold said goods, to plaintiff's damage; the burden is also on plaintiff to show that the goods were of any greater value than $1,000, as admitted by the answer, and that he has expended any sum necessarily in endeavoring to recover said property or the value thereof."—correctly stated the law on the issues of the ownership of the property and its value.—Id.

22. Where plaintiff alleges a wrongful seizure of his goods in his agent's possession on an execution against his agent as owner thereof, letters of plaintiff ordering goods to be shipped and billed to the agent, with duplicate bills to himself, are not admissible in evidence, since they show no title in plaintiff.—Id.

23. Where plaintiff alleged a wrongful seizure of his goods in his agent's possession, and the answer, denying his ownership, showed the agent's exclusive possession, management and control thereof, a contract of agency between plaintiff and the agent was properly admitted to rebut the presumption of the plaintiff's ownership.—Id.

D. DAMAGES, 24-25.

24. Interest will not be allowed on money recovered for the conversion of property except from the time of the judgment, unless there has been a vexatious delay in the payment of the money.—Black v. Black, 5 Mont. 15; 2 Pac. 317.

25. A complaint alleged that defendant wrongfully carried away and converted certain property, to plaintiff's damage in a given sum, and alleged also that that sum was the value of the property, and demanded judgment for such sum, with interest from the date of conversion. Comp. Stat., p. 991, §§ 1236, 1237, fixed the rate of interest, and specified certain cases in which it may be collected in the absence of agreement for it, which cases do not include the one in question. *Held*, that the interest was unauthorized from the day of the conversion, but could be recovered only from the date of the judgment for damages.—Palmer v. Murray, 8 Mont. 312; 21 Pac. 126.

E. TRIAL, 26-27.

26. In an action for conversion of property, where plaintiff's ownership and possession are in issue, it is error to instruct that the "only question" is the value of the property, although plaintiff's testimony as to her ownership is undisputed.—Palmer v. McMaster, 10 Mont. 390; 25 Pac. 1056.

27. In a suit for the conversion of personalty, and also damages for trespass on realty possessed by plaintiff as a tenant, it is error to instruct that the burden is on plaintiff to show his right to the possession of "the property in controversy," since the leasehold is not in controversy.—Yoder v. Reynolds, 28 Mont. 183; 72 Pac. 417.

TRUSTS.

I. Creation, Existence, and Validity, 1-13.
A. Express trusts, 1-4.
B. Resulting trusts, 5-8.
C. Constructive trusts, 9-13.
II. Appointment of Trustee, 14.
III. Management and Disposal of Trust Property, 15.
IV. Accounting, 16.
V. Establishment and Enforcement of Trust, 17-21.

I. CREATION, EXISTENCE, AND VALIDITY, 1-13.

A. Express Trusts, 1-4.
B. Resulting Trusts, 5-8.
C. Constructive Trusts, 9-13.

A. EXPRESS TRUSTS, 1-4.

1. Plaintiff, under a parol contract with defendant, procured a lease and deed in escrow to certain property, and became entitled for his services to $1,000. After completing the negotiation he drew up the following paper: "Whereas (setting out the lease and deed), I, to whom the lease and deed were made, in consideration, etc., that (defendant) will pay the sum mentioned, so that I shall have a right to above deed, and that he will, at the same time, pay me (in addition to such sum) $1,000, I will execute and deliver," etc. *Held*, that the paper could not be construed as a declaration in trust.—Huntoon v. Lloyd, 7 Mont. 365; 16 Pac. 573.

2. Plaintiffs agreed to sell a mine, and the deeds were placed in escrow in a bank until payment of the balance of the purchase price. The purchaser sold the mine under a contract providing that a certain amount should be deposited with such bank to pay plaintiffs the balance of the purchase price and other charges against the mine, and such amount and a copy of the contract were forwarded to the bank, and the cashier's attention was called thereto. *Held*, that such deposit did not create a voluntary trust in favor of plaintiffs as beneficiaries, under Civ. Code, § 2951, defining a voluntary trust as an obligation arising out of personal confidence reposed in and voluntarily accepted by one for the benefit of another, and § 2956, declaring that a voluntary trust is created as to the trustor and beneficiary by any words or acts of the trustor intending with reasonable certainty an intention of the trustor to create a trust.—McDonald v. Bank, 25 Mont. 456; 65 Pac. 896.

3. An express trust in land can only be created by a conveyance in writing, which is accepted by the grantee, showing the purpose for which the grantee holds the property.—Chowen v. Phelps, 26 Mont. 524; 69 Pac. 54.

4. Under Comp. Stat., p. 651, § 217, providing that no trust or power concerning lands shall be created or declared, unless by act of law or by deed of conveyance in writing subscribed by the party creating or declaring the same, and § 219, providing that contracts for the sale of lands shall be void unless some note or memorandum expressing the consideration be made in writing and subscribed by the party to whom the sale is to be made, where a trust in land was declared on behalf of the members of a syndicate by the grantee of the land to secure the payment of the price to the grantor, such grantee, in signing the declaration, acted as the agent of the parties to the syndicate, and they were bound by the declaration, although they did not sign it.—Goodell v. Sanford, 31 Mont. 163; 77 Pac. 522.

B. RESULTING TRUSTS, 5-8.

5. The statute of frauds is inapplicable in the case of a resulting trust.—Lynch v. Herrig, 32 Mont. 267; 80 Pac. 240.

6. To raise a resulting trust on the transfer of real estate to one person when the consideration is paid by or for another, the payment must be made at the time or before the legal title passes to the party to be charged.—Id.

7. To establish a resulting trust where land sought to be charged therewith is purchased under an executory contract, the legal title only passing on payment of the price, it is sufficient if an aliquot part of the entire price is paid by the person claiming the existence of the trust at any time before the legal title passes.—Id.

8. Defendant agreed to take a contract for the purchase of land, and that, if plaintiff should pay one-half the price, defendant would see that there should be conveyed to plaintiff a certain part of the land. There was no writing between them. Plaintiff, relying on the agreement, made two payments on the contract, and tendered a third, and also half of all the taxes on the land, and defendant thereafter refused to recognize plaintiff's rights. *Held*, that inasmuch as, if defendant should be allowed to obtain a deed from the vendor for the entire tract, and he should then sell the land to an innocent purchaser, or should sell or assign the contract of purchase to a third person, a bona fide holder, without recognizing plaintiff's rights, plaintiff would be defrauded, a resulting trust arose in favor of plaintiff against defendant, which equity has jurisdiction to enforce.—Id.

C. CONSTRUCTIVE TRUSTS, 9-13.

9. Plaintiff, the owner of an undivided interest in a mining claim, conveyed by a void deed to its co-tenants, who, on the supposition that the deed was valid, obtained a patent, and subsequently conveyed to defendant, who took with notice. *Held*, that plaintiff's co-tenants, when they obtained the patent, became constructive trustees of plaintiff's undivided interest, and their grantee with notice occupies no better position.—Butte Hardware Co. v. Cobban, 13 Mont. 351; 34 Pac. 24.

10. If the owners of a part interest in a mining claim procure a patent in their name without the knowledge of their co-owner, they become trustees for him.—Brundy v. Mayfield, 15 Mont. 201; 38 Pac. 1067.

11. A mortgagee transferred a mortgage note as collateral security. The mortgagors afterwards agreed to deed the mortgaged land to the mortgagee on his surrender of the note. Thereupon the pledgee, at the solicitation of the mortgagee, surrendered the note to the latter for delivery to the mortgagors, on the verbal condition that the pledgee's lien should be continued as security, and that immediately upon the mortgagee's obtaining the legal title he would either raise the money to pay the pledgee his debt by mortgaging the land, or give him a mortgage thereon to secure it. The mortgagee surrendered the note to the mortgagors, released the mortgage, and received a deed to the land. *Held*, that when the mortgagee received back the note from the pledgee he assumed a fiduciary relation towards the latter, so that on the conveyance to the mortgagee, and his subsequent repudiation of the verbal agreement, a constructive trust arose in favor of the transferee to the extent of his debt.—Lewis v. Lindley, 19 Mont. 422; 48 Pac. 765.

12. An oral agreement by a purchaser at a judicial sale to take the deed in his own name and convey to another can not be taken out of the statute of frauds and enforced against the purchaser as a trustee ex malificio, to prevent the perpetration of a fraud, when neither party had any interest in the property, and no money was advanced to the purchaser, or anything done toward carrying the agreement into effect.—Largey v. Leggat, 30 Mont. 148; 75 Pac. 950.

13. Where a receiver of a corporation sold certain of its property, and thereafter the order appointing the receiver and authorizing a sale was reversed on appeal, the purchasers held the property and the proceeds of their sale thereof as involuntary trustees for the corporation, and the receiver held the purchase price as an involuntary trustee for the purchasers, under Civ. Code, §§ 2958, 2959.—Lutey v. Clark, 31 Mont. 45; 77 Pac. 305; 84 Pac. 73.

II. APPOINTMENT OF TRUSTEE, 14.

14. On the death of a trustee for benefit of creditors, pending an action by him in equity to enforce the trust, the court has jurisdiction to appoint on its own motion a new trustee, and substitute him as plaintiff.—Tuttle v. Bank, 19 Mont. 11; 47 Pac. 203.

III. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY, 15.

15. Though a trustee retains trust funds in his hands directed by the court to be loaned to banks, the cestui que trust can not complain where he pays a larger amount of interest than the banks would have done.—In re Ricker's Estate, 14 Mont. 153; 35 Pac. 960.

IV. ACCOUNTING, 16.

16. Where a trustee uses trust funds to the extent of half the price of land purchased for himself, but afterwards accounts for the fund so used, with compound interest, the land is not impressed with a resulting trust in favor of the cestui que trust.—In re Ricker's Estate, 14 Mont. 153; 35 Pac. 960.

V. ESTABLISHMENT AND ENFORCEMENT OF TRUST, 17-21.

17. The complaint alleged that plaintiff and defendant lived together as man and wife; that their relations were intimate and confidential; that defendant had great influence over plaintiff; that in consequence of these relations plaintiff, in buying certain property, had it conveyed to defendant, that he might hold it in trust for her. *Held*, that the allegations would not support a decree that the property was held by defendant in trust for plaintiff.—Muller v. Buyck, 12 Mont. 354; 30 Pac. 386.

18. A complaint in an action to enforce an express trust in land must allege a conveyance in writing, accepted by the grantee, which shows the purpose for which the grantee holds the property.—Chowen v. Phelps, 26 Mont. 524; 69 Pac. 54.

19. Pleadings alleging that a trust relation was created between parties in question by virtue of written agreements do not support conclusions of law declaring a party to be a trustee ex malificio.—Largey v. Leggat, 30 Mont. 148; 75 Pac. 950.

20. Under Comp. Stat., p. 99, § 172, providing that an action on any contract or liability founded upon an instrument in writing shall be commenced within eight years, an action to enforce a liability evidenced by a declaration of trust, in which a complaint was filed within eight years after a certain payment under the declaration became due, was commenced in time.—Goodell v. Sanford, 31 Mont. 163; 77 Pac. 522.

21. Where an executory contract for the purchase of real estate has not been performed

by the payment of the price, a purchaser who has paid portions of the price, and allowed the contract for the purchase of the land to be taken in the name of a co-purchaser, has but an equitable interest in the contract, and can not enforce a resulting trust in the land until the title has passed from the vendor after the payment of the entire price.—Lynch v. Herrig, 32 Mont. 267; 80 Pac. 240.

USURY.

1. Though an antecedent agreement to pay interest on interest to become due is void, parties may substitute a new note for an old one which is due, and incorporate in the new one accrued interest remaining unpaid; and hence a guarantor of a note and renewals will not be required to pay interest on the accrued interest unpaid at the time of the renewal and made a part of its principal.—Stanford v. Coram, 26 Mont. 285; 67 Pac. 1065.

2. A contract guarantying the payment of notes, not calling for compound interest, which provides that the holder may renew the notes without the consent or knowledge of the guarantors, though contemplating that upon the renewal of the notes the accrued interest, if not paid, shall either become a part of the principal or an independent obligation drawing interest, is not void as an antecedent agreement for the payment of compound interest.—Id.

VENDOR AND PURCHASER.

I. Requisites and Validity of Contract, 1-7.
II. Modification or Rescission of Contract, 8-11.
III. Performance of Contract, 12.
IV. Rights and Liabilities of Parties, 13-25.
V. Remedies, 26-28.

I. REQUISITES AND VALIDITY OF CONTRACT, 1-7.

1. Defendant agreed in writing to give plaintiff the option to purchase his land within a given time at a named price, a consideration for such option being stated. The purchase was not completed, and at the end of the time defendant made, on the agreement, and signed, a memorandum extending the option for ten days, but there was no new consideration. *Held*, that the new option was void, but, when plaintiff accepts within the time named, and tenders the price, there is a complete contract of sale.—Ide v. Leiser, 10 Mont. 5; 24 Pac. 695.

2. Plaintiff conveyed land to one C, who executed notes secured by mortgage for the purchase money. C then executed a trust deed, which recited that he, as party of the first part, and two others, parties of the second part, had purchased the land, specifying the interest of each, and declared that for their mutual benefit and convenience they had agreed that the conveyance should be made to C. *Held*, that such trust deed did not render the parties of the second part therein personally liable for the purchase-money notes.—Pendleton v. Cowling, 11 Mont. 38; 27 Pac. 386.

3. In an action to compel the reconveyance of land, procured by fraud, and for an inadequate price, evidence as to the saleable value of the land at the time of trial, two years after the conveyance to defendant, is inadmissible.—Leggatt v. Leggatt, 13 Mont. 190; 33 Pac. 5.

4. Evidence as to the value of land several years before it was conveyed, and that it had not since depreciated, is, in effect, as to the value of the land at the time of the transaction, and is admissible.—Id.

5. In an action to compel a reconveyance of land, procured by plaintiff's attorney by fraud, there was no error in admitting evidence that he could have realized more by selling the land in separate lots than by selling it as a whole, it being conceded that he paid an inadequate price for it.—Id.

6. A conveyance by plaintiff to her brother-in-law, J, through her brother-in-law, R, who was appointed her attorney in fact at the suggestion of J, will be set aside for fraud and collusion, they having, with full knowledge, grossly misrepresented to her the value of the land and the state of its title, she being ignorant of the facts and trusting them, and the sale being for a small fraction only of the value of the land.—Leggatt v. Leggatt, 14 Mont. 104; 35 Pac. 724.

7. In the ordinary contract of purchase and sale there is an implication that the conveyance to be made thereunder will transfer the title to the property; but, in the absence of any special agreement, it is incumbent upon the vendee to examine the title for himself, and to point out any objections he may have to the title tendered him by the vendor.—Goodell v. Sanford, 31 Mont. 163; 77 Pac. 522.

II. MODIFICATION OR RESCISSION OF CONTRACT, 8-11.

8. The mere fact that an appurtenant to the land covered by a contract of sale, which was not the chief inducement of the purchase, was, without the vendor's fault, destroyed by fire, will not entitle the vendee to a rescission of the contract.—Bautz v. Kuhworth, 1 Mont. 133.

9. Where a person acquired land of which his grantor claimed to be the equitable owner by reason of a parol contract with the holder of the legal title, but which contract was repudiated by the other party thereto, the fact that the grantee, with full knowledge of the facts, took possession of the land, and made valuable improvements thereon, can add no weight to his claim to the land.—Boulder V. D. M. & M. Co. v. Farnham, 12 Mont. 1; 29 Pac. 277.

10. Defendant gave plaintiff an exclusive option on certain mining property and placed him in possession. An installment becoming due, plaintiff expressed dissatisfaction, and requested an extension of 30 days on the installment, which was refused, and demand made for adherence to the contract. Defendant insisted on the contract, and indicated no intention of abandoning it. After telegraphic communications relating to the transaction, defendant demanded the deeds which had been placed in escrow, and received from plaintiff possession of the properties, terminating the contract. Plaintiff claimed a return of installments previously paid, on the ground that defendant had abandoned the contract, which contained no provision relative to the retention of installments, and of which time was of the essence. *Held*, that plaintiff was not entitled to a return of the installments, as it did not affirmatively appear, from the contract of sale or in the agreement to rescind, that the purchaser was to have payments made refunded.—Clark v. Mining Co., 28 Mont. 468; 72 Pac. 978.

11. In an action to rescind a sale of real estate for fraud, an allegation that plaintiff relied on the representations made constituted a sufficient averment that he believed them to be true.—Spencer v. Hersam, 31 Mont. 120; 77 Pac. 418.

III. PERFORMANCE OF CONTRACT, 12.

12. Where defendant, who had given his bond to plaintiff to quitclaim certain mining property, tendered a deed of the successor of all his rights, which purported to grant, bargain and sell, as well as quitclaim the property to plaintiff, the tender was sufficient, under the bond, where it was not shown that plaintiff could suffer any damage by the change, or that he would not thereby obtain the full title.—O'Keefe v. Dyer, 20 Mont. 477; 52 Pac. 296.

IV. RIGHTS AND LIABILITIES OF PARTIES, 13-25.

13. A purchaser who acquires his title by a quitclaim deed can not be regarded as a bona fide purchaser without notice, but takes only such title as the grantor can lawfully convey.—McAdow v. Black, 6 Mont. 661; 13 Pac. 377.

14. Where a tenant in common has conveyed an undivided interest in a mining claim to his co-tenants, and they have obtained a patent, and afterwards conveyed to a third person, who was not a bona fide purchaser, the latter's position is not superior to that of his grantors, and where they admit that they held the undivided interest in trust for their co-tenant the trust will be declared, and a conveyance to him decreed.—Butte Hardware Co. v. Cobban, 13 Mont. 351; 34 Pac. 24.

15. That grantors of lot 16, block 57, had given a mortgage on lot 16, block 67, which was recorded, is not notice to the grantee of the former lot that they had intended it to be a mortgage on such lot.—Baker v. Bartlett, 18 Mont. 446; 45 Pac. 1084.

16. Where, prior to the location of a quartz mining claim, the surface was occupied by different persons, who agreed that one should locate for all, and that after patent issued conveyances should be made vesting in each full title to the surface occupied by him, and the person securing the patent executed deeds to each of the occupants for an undivided interest in the mine, but not referring to any surface interest as distinguished from the interest in the whole claim, the continued occupation of the separate portions of the surface, with the payment of taxes and the making of improvements thereon, was not inconsistent with the record title, and gave no notice to subsequent purchasers that the occupant claimed any certain divided interest.—Mullins v. Hardware Co., 25 Mont. 525; 65 Pac. 1004.

17. Where a grantee of a mine, with notice of an outstanding equity, conveys to one without notice, and for a valuable consideration, such purchaser is protected.—Id.

18. If the burden was on subsequent purchasers to show that they purchased interests in a mining claim for a valuable consideration, and without notice of the occupants' equitable title to certain surface rights, such burden was discharged by the introduction of the deeds under which the purchasers held, setting forth a valuable consideration.—Id.

19. Plaintiff, at the time she took a deed for the undivided one-half interest of S in a lot, is not shown to have had actual notice of an oral partition by S and O, his co-tenant, by the fact that she thereafter paid the taxes on the part S had occupied, and when O forbade her from sweeping her dirt onto the part occupied by him she said that O's deed was not fixed right, and that she could do what she felt like till there was a division.—Hurley v. O'Neill, 26 Mont. 269; 67 Pac. 626.

20. Plaintiff, purchasing the undivided half interest of S in a lot, as shown by the record, has not constructive notice of an oral partition of the lot by S and O, his co-tenant, from the fact that O had for years paid the taxes on a certain half of the lot.—Id.

21. A purchaser of real estate is not chargeable with notice of a trust agreement affecting the land, between his vendor and a person to whom the land had been conveyed by the person selling to the vendor, made after the conveyance to the latter.—Chowen v. Phelps, 26 Mont. 524; 69 Pac. 54.

22. A purchaser of real estate is not chargeable with record notice of a conveyance by the person from whom his vendor had acquired title by a quitclaim deed executed after the execution of the latter deed.—Id.

23. Payment of taxes by the grantee in an unrecorded deed is not notice to a subsequent purchaser.—Sheldon v. Powell, 31 Mont. 249; 78 Pac. 491.

24. After conveyance to plaintiff by a deed which was not recorded, the grantor applied to defendant for a loan on the land, stating that it was fenced, and a part of it plowed. Defendant examined the title, and went to the land, finding more plowed than had been represented, and that the fence also enclosed other land which belonged to plaintiff. *Held*, that defendant was guilty of no fraud in taking a conveyance of the land as security for the loan.—Id.

25. Under Civ. Code, §§ 1640, 1641, providing for the recording of deeds, and making them constructive notice to subsequent purchasers, and § 4667, declaring that every person who has actual notice sufficient to put him on inquiry has constructive notice of the fact itself, if by inquiry he might have learned such fact, a certificate of acknowledgment of a mortgage by husband and wife is not rendered insufficient to charge a subsequent purchaser with notice by reason of the fact that, in the statement that the parties "severally acknowledge ..he.. executed the same," the blanks before and after the word "he" were not filled so as to make the word "they."—Trerise v. Bottego, 32 Mont. 244; 79 Pac. 1057.

V. REMEDIES, 26-28.

26. In an action on a note given for the price of land, title to which the vendor had agreed to perfect by continuing to prosecute a suit against an adverse claimant, an allegation by the maker that such suit was corruptly and fraudulently dismissed, without stating the facts constituting the fraud, is insufficient to show a defense.—First Nat'l Bank v. How, 1 Mont. 604.

27. Defendant contradicted that he and his wife would convey to plaintiff for a certain sum land belonging to his wife. Plaintiff entered on the land, and made improvements, though nothing was said in the contract as to possession, and neither defendant nor his wife consented to his entry. Afterward the wife refused to convey. *Held*, that plaintiff had no right to the possesion, and hence is not entitled to recover the value of his improvements as damages for breach of the contract.—Cartin v. Hammond, 10 Mont. 1; 24 Pac. 627.

28. Defendant contracted to give plaintiff a deed to certain property. A deed with covenants was given, but the secretary of the interior, on appeal from proceedings in the land department, decided that defendant had no title. *Held*, that plaintiff need not wait to be ousted, and then sue on the covenants in the deed, but might sue to recover the purchase money for breach of the contract. (See 164 U. S. 383.) —Colburn v. Northern Pacific, 13 Mont. 476; 34 Pac. 1017.

VENUE.

I. Nature or Subject of Action, 1-3.
II. Change of Venue or Place of Trial, 4-21.
A. In general, 4-10.
B. Grounds, 11-17.
C. Proceedings, 18-21.

I. NATURE OR SUBJECT OF ACTION, 1-3.

1. An action on an account is not within the provisions of Code Civ. Proc., § 613, that "actions upon contracts may be tried in the county in which the contract was to be performed," and must be brought in the county in which defendant resides, unless he is found in the county of plaintiff's residence.—McDonnell v. Collins, 19 Mont. 379; 48 Pac. 549.

2. Where two of three causes of action alleged in a complaint were such that defendant was clearly entitled to a change of venue to the county where he resided, plaintiff was not entitled to abridge such right by joining in the complaint a third cause of action which might properly be triable in the county where the suit was brought.—Bond v. Hurd, 31 Mont. 314; 78 Pac. 579.

3. Where two of the three causes of action alleged in a complaint were actions on an open account for medical services rendered in B county, and not on express contracts to render such services, plaintiff was not entitled to sue thereon in B county, under Code Civ. Proc., § 613.—Id.

II. CHANGE OF VENUE OR PLACE OF TRIAL, 4-21.

A. In General, 4-10.
B. Grounds, 11-17.
C. Proceedings, 18-21.

A. IN GENERAL, 4-10.

4. Act Dec. 6, 1867, which provides that upon the filing of an affidavit in a cause to the effect that a fair trial can not be had by reason of bias or prejudice on the part of the judge, the cause shall be removed to the court of another county, is not liable to the objection that it divests the district courts of the common law jurisdiction conferred upon them by the organic act of the territory.—Godbe v. McCormick, 1 Mont. 105.

5. The power of courts to grant change of venue is limited to the exercise of a judicial discretion, on good cause shown, which must consist of facts beyond the mere opinions and conclusions of the party making the affidavit. (See 131 U. S. 22.)—Kennon v. Gilmer, 5 Mont. 257; 5 Pac. 847.

6. Where defendant in conversion is entitled to a change of venue because the complaint fails to state the county in which the wrongful taking occurred, he can not be deprived of that right by the joinder of another cause of action, sounding in tort, in which the county in which the wrongful act was committed is properly stated. Yore v. Murphy, 10 Mont. 304; 25 Pac. 1039.

7. Comp. Stat., p. 72, § 59, provides that an action shall be tried in the county in which defendant resides at the commencement of the action, or where plaintiff resides and defendant may be found. Actions on contract may be tried in the county in which the contract was to be performed, subject to the power of the court to change the place of trial as provided in the act. Sec. 62 provides that the court may for good cause change the place of trial when the county designated in the complaint is not the proper county, when the convenience of witnesses and the ends of justice would be promoted by the change. *Held*, that where the complaint, in an execution for goods sold, merely alleged that plaintiffs were doing business in the county where the action was brought, and made no mention of where the contract was to be performed, and a motion for a change of venue was made before answer on an affidavit that defendant was a resident of another county, the change should have been granted, though there were counter-affidavits as to where the contract was to be performed, and plaintiff made affidavit that it would be for the convenience of witnesses to have the action tried in the county where it was commenced, as a motion for change on account of convenience can not be made until after answer, and the fact that the contract was to be performed in the county where the action was brought could not be shown, if not shown by the pleadings when defendant appeared.—Wallace v. Owsley, 11 Mont. 219; 27 Pac. 790.

8. Under Code Civ. Proc., § 615, as amended by 2d Ex. Sess. 8th Leg., is mandatory, and the district court must change the venue in the cases prescribed, but only after a motion has been filed, and a showing made as required by the clause of the section invoked. The court can not act of its own motion.—State v. District Court, 30 Mont. 188; 75 Pac. 1109.

9. Under Const., art. 8, §§ 1, 11, which, as shown by the original draft of the Constitution finally adopted, read, "The judicial power of the state shall be vested in * * * district courts," etc., and that "the district courts shall have original jurisdiction," etc., the district courts are distinct entities, and a transfer of a cause from one district to another amounts to a change of venue.—State v. Clancy, 30 Mont. 103; 76 Pac. 10.

10. Where at the time suit was brought in B county, where plaintiff resided, on a cause of action included within Code Civ. Proc., § 613, defendant was a bona fide resident of V County, in which he served, defendant was entitled to a change of venue to V county as a matter of right.—Bond v. Hurd, 31 Mont. 314; 78 Pac. 579.

B. GROUNDS, 11-17.

11. Comp. Stat., p. 72, § 59, provides that actions on contract may be tried in the county in which the contract was to be performed, and actions for torts in the county where the tort was committed, subject, however, to the power of the court to change the place of trial, as provided in the act. *Held*, that where an employee brought suit in Jefferson county for personal injuries received while upon a railroad therein, a change of venue will not be granted, although such railroad is owned by a smelting company whose principal place of business is in another county.—Oels v. Reduction Co., 10 Mont. 524; 26 Pac. 1000.

12. Comp. Stat., p. 298, § 110, providing for the transfer of proceedings in matters of probate to another court when the judge is "disqualified to act from any cause," relates only to the statutory disqualifications existing at the passage of that act, and does not include the ground of the judge's prejudice.—In re Davis' Estate, 11 Mont. 1; 27 Pac. 342.

13. Comp. Stat., p. 72, § 62, relating to change of venue "when there is reason to believe that an impartial trial can not be had," does not include the ground of the bias or prejudice of the court.—Id.

14. Under Comp. Stat., p. 72, § 62, which provides that "the court may, on good cause

shown, change the place of trial in the following cases: * * * fourth, when from any cause the judge is disqualified from acting in the action; provided, that the court shall not change the place of the trial for disqualification of the district judge in any case where the judge of another district will appear and try the action,"—a district judge, disqualified to hear a case, will not be ordered by mandate to grant a motion for change of venue where he announces that, on a certain day and hour, a judge of another district would be in attendance to hear the motion and set the case for trial.—Granite M. M. Co. v. Durfee, 11 Mont. 222; 27 Pac. 919.

15. Const., art. 8, § 11, provides that actions concerning land shall be "commenced" in the county in which the land is situated. Comp. Stat., p. 71, § 56, provides that such actions shall be "tried" in the county where the land is situated. *Held*, that where an action was commenced in a county in which the land was then situated, and subsequently, and before defendant's appearance, a new county was formed out of that part in which the land was, defendant was entitled to a change of venue to the new county, if he applied therefor at the time he appeared.—Bookwalter v. Conrad, 15 Mont. 464; 39 Pac. 573.

16. Comp. Stat., p. 649, § 209, providing that no action pending at the time any statutory provision shall be repealed shall be affected by such repeal, does not affect the right of defendant to a change of venue in an action concerning land, where the action was commenced in the county wherein the land was then situated, but, by a subsequent act creating a new county, the land was made part of the new county.—Id.

17. Under Code Civ. Proc., p. 615, subd. 4, the ground for change of venue must be one of the facts enumerated in § 180, as disqualifying a judge to sit in an action.—Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

C. PROCEEDINGS, 18-21.

18. The conditions and circumstances that render an impartial trial impossible must come to the knowledge of the court as facts, and not as the opinions and conclusions of witnesses. The "good cause shown," required by the statute, must be a statement of facts upon which the court is to determine whether a sufficient case is made out. (See 131 U. S. 22.)—Kennon v. Gilmer, 5 Mont. 257; 5 Pac. 847.

19. On a motion for change of venue in a probate proceeding, on the ground that an impartial trial can not be had, the affidvaits in support of the motion were by two non-residents of the county, and referred to newspaper clippings, and to statements made by several persons that the people of the county were prejudiced in the matter. Only one of these persons was named, but it was stated that they all refused to make affidavit to their statement. No excuse was given for not compelling them to appear in court and substantiate their statements. Eleven residents of the county made affidavit that there was no prejudice, and it appeared that the newspaper clippings were comments upon actions of the court in the appointment of an administrator, and were published without any authority from the party whose cause they favored. *Held*, that it was not an abuse of discretion to refuse a change of venue.—In re Davis' Estate, 11 Mont. 1; 27 Pac. 342.

20. Code Civ. Proc., § 615, as amended by Acts 2d Ex. Sess. 1903, p. 9, provides that a court or judge must, "on motion," change the place of trial for disqualifiction of the judge; and § 180, as amended, declares that a district judge may be disqualified by the filing of an affidavit provided for, whereupon his authority ceases, except to arrange his calendar, invite in another judge, or change the place of trial in case the judge invited fails to come within 30 days. *Held*, that notice of an application for a change of venue was not required to be given to defendant who had answered.—State v. District Court, 32 Mont. 595; 81 Pac. 351.

21. Under Code Civ. Pro., § 180, as amended by Acts 2d Ex. Sess. 1903, p. 9, where a judge, on being disqualified, changed the venue to another county, a judge of a different department of the same court had no jurisdiction to hear a motion to annul such order changing the place of trial.—Id.

WAREHOUSEMEN.

1. Civ. Code, § 393, providing that a corporation may be formed for the transaction of any commercial business, authorizes a corporation for warehousing goods for shipment.—Orient Ins. Co. v. Northern Pacific, 31 Mont. 502; 78 Pac. 1036.

WATERS AND WATER COURSES.

I. Appropriation of Rights in Public Lands, 1-50.
- A. In general, 1-3.
- B. Proceedings to effect appropriation, 4-8.
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I. APPROPRIATION OF RIGHTS IN PUBLIC LANDS, 1-50.

A. In General, 1-3.
B. Proceedings to Effect Appropriation, 4-8.
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D. Rights as Against Subsequent Grants, 10.
E. Nature and Extent of Rights Acquired, 11-19.
F. Change in Place, Manner, or Purpose of Diversion or Use of Water, 20-23.
G. Abandonment, Loss, or Forfeiture of Rights, 24-33.
H. Proceedings to Determine, Establish, and Protect Rights, 34-45.
I. Injunction, 46-50.

A. IN GENERAL, 1-3.

1. Where a person rents land and uses a portion of the water on it, and it does not appear what portion was used, it can not be inferred that he intended to make it or any portion of it appurtenant to the land.—Hays v. Buzard, 31 Mont. 74; 77 Pac. 423.

2. Prior to Mar. 12, 1885 no notice of the location or record of the appropriation of a water right was required. The act of that date (Comp. Stat., p. 996, § 1258) requiring persons who had theretofore acquired water rights to file a written declaration with the recorder, by its terms protected prior appropriators. *Held*, that the recording by previous appropriators of a notice in accordance with the act did not of itself constitute an appropriation, nor affect, as between the appropriators, their respective rights to the water, but merely constitute notice to the world of their claims under their appropriations.—Norman v. Corbley, 32 Mont. 195; 79 Pac. 1059.

3. Plaintiff's predecessors in interest appropriated waters for irrigation in 1866. Defendant made a subsequent appropriation in 1871 or 1874. In 1874 the parties, by oral agreement, and during that season only, used the water alternately. During one season in the early 80's there was a scarcity of water, and they used the same half and half. In 1885 plaintiff and defendant filed a joint notice of their appropriations, which stated that the appropriation of each amounted to 200 inches. Plaintiff in no manner waived or abandoned at any time his prior appropriation. *Held*, that none of the things specified constituted a conveyance by plaintiff to defendant of any interest in the former's prior appropriation, and there was no tenancy in common between them.—Id.

B. PROCEEDINGS TO EFFECT APPROPRIATION, 4-8.

4. An intention to appropriate water, to be effectual as against other parties, must be carried into actual execution with all reasonable diligence, by some known and tangible means and at some designated point.—Columbia Min. Co. v. Holter, 1 Mont. 296.

5. A declaration of a claim to water, unaccompanied by acts of possession, is wholly inoperative as against those who shall legally proceed to acquire a right to the same.—Id.

6. A notice of the appropriation of water should be liberally construed; and though a notice is ambiguous in describing two branches of a stream from which the water is taken without designating the amount taken from each, its admission in evidence can not be held error where the means of the appropriation and the quantity, purpose and date of the diversion are otherwise sufficiently shown.—Floyd v. Mining C., 11 Mont. 435; 28 Pac. 450.

7. Where 180 acres of a ranch comprising 320 acres were capable of being covered with water by means of the owner's ditches, the mere fact that that owner had only 45 acres under cultivation did not show him guilty of lack of diligence in the application of the waters to useful purposes.—Arnold v. Passevant, 19 Mont. 575; 49 Pac. 400.

8. Comp. Stat., p. 992, § 74, relating to water rights, requires a notice of location to be posted at the point of diversion, and the appropriator to file with the county clerk a notice of appropriation. Sec. 1257 provides that a failure to comply with the provisions of the chapter deprives the appropriator of the right to the water, as against a subsequent claimant who complies therewith, but by complying with the provisions of the act the right to the use of the water shall relate back to the date of posting the notice. *Held*, that the only effect of the statute is to give the appropriator complying therewith the benefit of the doctrine of "relation back," and priority according to the date of posting notice, and a water right may be acquired, without complying with the statute, which is good against all subsequent appropriators, by the actual diversion and appropriation of the water of a stream for a beneficial use.—Murray v. Tingley, 20 Mont. 260; 50 Pac. 723.

C. SUCCESSIVE APPROPRIATIONS AND PRIORITIES THEREOF, 9.

9. Comp. Stat., p. 996, § 1258, provides that persons who have heretofore acquired rights to use the water in any stream for irrigation shall, within six months after the publication of this act, file, in the office of the recorder of the county in which the water right is situated, a declaration in writing, stating the number of inches claimed, the purpose and place of intended use, the means of diversion, the date of appropriation, and the name of the appropriator: "provided, that a failure to comply with the requirements of this section may in no wise work a forfeiture of such heretofore acquired rights, nor prevent any such claimant from establishing such rights in the courts." *Held*, that where plaintiff actually appropriated the water in 1880 for irrigating his land, and has continuously used it for that purpose, his right is superior to that of defendant, whose appropriation was made in 1889, though plaintiff did not record his notice of appropriation until 1891.—Salazar v. Smart, 12 Mont. 395; 30 Pac. 676.

D. RIGHTS AS AGAINST SUBSEQUENT GRANTS, 10.

10. Where lands have been withdrawn from the public domain by entry, if a ditch and its uses were a burden thereon by grant from the government at the time of the entry, such burden can not be added to in favor of a third person under 14 Stat. 251, giving citizens the privilege of running a ditch over unoccupied government lands.—Campbell v. Flannery, 32 Mont. 119; 79 Pac. 702; 80 Pac. 240.

E. NATURE AND EXTENT OF RIGHTS ACQUIRED, 11-19.

11. In an action for damages for the diversion of water claimed by plaintiffs under a

prior appropriation for mining purposes, the measure of plaintiffs' right would be the amount of water the said ditch would convey, from the stream from which the appropriation was made, without running over its banks, and not the number of inches it might convey to the place be used, some miles distant.—Caruthers v. Pemberton, 1 Mont. 111.

12. Law and equity give the first locator of land and claimant of water a sufficient quantity to irrigate his land.—Thorp v. Woolman, 1 Mont. 168.

13. By appropriation, a man acquires only the right of possession and user, qualified by the right of others to its use, in such manner as shall not materially diminish or deteriorate it, at the place of appropriation, in quantity or quality.—Columbia Min. Co. v. Holter, 1 Mont. 296.

14. Plaintiff was entitled under a judgment to 35 inches of water at the head of his ditch, and to make good this amount of water defendant was required by the decree to allow 125 inches to flow past the head of his ditch. *Held*, that by the decree plaintiff was entitled to the full amount of 125 inches of water at the head of defendant's ditch, and that if by any means he could save it from waste or sinking, he was entitled to the benefits thereof. (See 111 U. S. 389.)—Stafford v. Hornbuckle, 3 Mont. 485.

15. In an action for damages for diverting waters claimed by virtue of prior appropriation and use for purposes of irrigation, an instruction that the extent of the appropriation is determined by the capacity of plaintiff's "headgate and ditches, and the quantity of water required" by him, to be measured as the statutes (Comp. Stat., p. 997, § 1262) provide, is not erroneous in making the test the headgate, instead of what the ditch will carry.—Carron v. Wood, 10 Mont. 500; 26 Pac. 388.

16. The claim of a prior appropriator of water is not cut down by the claim of a subsequent appropriator to an amount sufficient to irrigate the land which the former actually had under cultivation at the time of the latter's appropriation, but he is entited to so much of the water originally appropriated as was necessary to irrigate such lands as he then had which were availabe for the production of crops.—Kleinschmidt v. Greiser, 14 Mont. 484; 37 Pac. 5.

17. Where one appropriates all the water of a stream to irrigate his land, and another landowner subsequently makes an appropriation of part of the water for the same purposes, the owner making the first appropriation can not, after using sufficient water for his purposes, deprive the other owner of water from the stream by selling the same to supply the inhabitants of a city.—Creek v. Bozeman, 15 Mont. 121; 38 Pac. 459.

18. Where a settler constructed a ditch of sufficient capacity to irrigate his entire tract of irrigable lands, but conveyed the water to only a small portion thereof, it was an appropriation to the extent of the capacity of the ditch, entitling the owner to construct and maintain ditches to other portions of his land, provided the total amount of water taken did not exceed the capacity of his original ditch.—McDonald v. Lannen, 19 Mont. 78; 47 Pac. 648.

19. A diversion of water for domestic purposes, and incidentally permitting the excess to flow upon the appropriator's land, and distribute itself over several acres of hay land, which rendered the land more valuable for raising hay, but with no intention of using it for irrigating the land to raise a crop or otherwise apply it to a useful purpose, does not give the appropriator a valid right to such excess, since under Civ. Code, §§ 1880, 1881, the appropriation must be for a useful or beneficial purpose, in considering which question the intention in making the appropriation is an important factor.—York v. Steward, 21 Mont. 515; 55 Pac. 29.

F. CHANGE IN PLACE, MANNER, OR PURPOSE OF DIVERSION OR USE OF WATER, 20-23.

20. Defendant appropriated the water of a creek at a certain point in 1865, and plaintiff appropriated water from the same creek, above defendant, in 1867, for the use of a mill, and returned the water into the creek, so that defendant had the benefit of it. *Held*, that defendant had no right to change his point of diversion of the water in 1869, and appropriate it above plaintiff's mill, and thereby deprive plaintiff of the use of the water.—Columbia Min. Co. v. Holter, 1 Mont. 296.

21. The prior appropriator of water for mining purposes at a certain point can extend his ditch and use the water, to the extent of his appropriation, at any other point, for the same or a different purpose.—Woolman v. Garringer, 1 Mont. 535.

22. Where, at the time a lower appropriator's right attached, upper appropriators were returning the water appropriated by them, to the stream, above the point of diversion by the lower appropriator, the upper appropriator had no right to change the place of use of the water so as to prevent its return, after use, to the stream.—Gassert v. Noyes, 18 Mont. 216; 44 Pac. 959.

23. A lawful appropriation of water for a specified purpose gives the owner the right to change the use of his appropriation so long as it does not injure subsequent appropriators in their acquired rights.—York v. Steward, 21 Mont. 515; 55 Pac. 29.

G. ABANDONMENT, LOSS, OR FORFEITURE OF RIGHTS, 24-33.

24. Where the testimony shows that plaintiffs commenced work on their ditch, expended $23,000 in its construction, when their money failed, and then suspended work, but afterwards sold the same for $4,000 to parties who completed the ditch and put it in operation, there was no abandonment of the ditch within the meaning of the law, for when the work was suspended there was no intention to abandon. (See 20 Wall. 507.)—Atchison v. Peterson, 1 Mont. 561.

25. A prior appropriator of water is estopped from claiming the water after the right has been abandoned by him and appropriated by another.—Barkley v. Tieleke, 2 Mont. 59.

26. Though the attempted conveyance of a water ditch which does not pursue the form required for a transfer of real estate as required by Code Stat., p. 396, § 3, Id., p. 402, § 34, is not sufficient to transfer the property, it will nevertheless amount to an abandonment of the right acquired by the appropriation.—Id.

27. Where parties are not the prior appropriators of water, their interests can not be destroyed or forfeited by the omission to make a record of a verbal agreement to permit a certain use of such water.—Fabian v. Collins, 3 Mont. 215.

28. Although one who has appropriated water for irrigating purposes abandons it, yet, if no newcomer enters upon the land, and uses the right during his absence, he may, on his return, resume his rights, and avoid the effect of

abandonment.—Tucker v. Jones, 8 Mont. 225; 19 Pac. 571.

29. Where the jury finds that an appropriator of water for placer mining did not use the water during five specified years, but find that he did use it during an intervening year, and the testimony shows that during some of those years there was not water enough to work the mines, the evidence is not sufficient to establish an abandonment of the right.—McCauley v. McKieg, 8 Mont. 389; 21 Pac. 22.

30. The abandonment by the appropriator of a water right of a ditch through which he formerly diverted the water does not constitute an abandonment of the water right, or any part thereof, where he actually used the water appropriated, but from time to time diverted the same through different ditches.—Kleinschmidt v. Greiser, 14 Mont. 484; 37 Pac. 5.

31. Evidence of non-user of a water ditch and right to appropriate water for three years did not show an abandonment, where the owners testified that they did not intend to abandon their right, and it appeared that one of them, during the non-user, purchased the other's interest.—Gassert v. Noyes, 18 Mont. 216; 44 Pac. 959.

32. In a compromise settlement as to water rights between two mining companies, it was agreed that defendant had the prior right to 15 inches, that it should take the water through plaintiff's ditch, and that it should also have the use of a further amount of water, which was over and above the water necessary for plaintiff's mill. Plaintiff closed its mill in 1883, and from that time to 1893 used no water; defendant, as it might under the contract, using all of the water conveyed into the ditch. While plaintiff's mill was shut down a man was employed to drain all the pipes and oil the machinery, and during the whole period of nonuse someone had charge of the property; a watchman being on the premises and caring for them most of the time. The water was not used simply because the machinery of the mill was not in motion. *Held*, that there was no intention to abandon the mill, and hence none to abandon the appurtenant water right.—Smith v. Hope Min. Co., 18 Mont. 432; 45 Pac. 632.

33. A transfer by parol of a settler's right of entry of lands carries with it a water right appurtenant thereto, entitling the transferee to the benefits of the priority of the appropriation.—McDonald v. Lannen, 19 Mont. 78; 47 Pac. 648.

H. PROCEEDINGS TO DETERMINE, ESTABLISH, AND PROTECT RIGHTS, 34-45.

34. In an action by an appropriator of water to recover damages against another appropriator for the diversion thereof, and asking for a decree of title, a verdict that plaintiff was entitled to the water, was a finding of the material issue, and entitled him to the relief sought.—Harris v. Shontz, 1 Mont. 212.

35. Where plaintiff, who claimed by virtue of a prior appropriation of water, sues for the wrongful diversion thereof, it is no defense that defendants have not diverted the water continuously, and in fact may have used it for only a short time.—Carron v. Wood, 10 Mont. 500; 26 Pac. 388.

36. The court instructed the jury that in determining the amount of water plaintiff was entitled to they should find the same in inches, measured in the manner provided by law for the measurement of water; and set out the law in detail in the charge. *Held*, that there was no error in striking out of the charge, before giving it, a clause that, in order to find the amount of water plaintiff was entitled to, the evidence and the jury's finding must conform to the measurement provided by law, and, if the evidence did not, it was only speculative and uncertain, since such clause was mere repetition, and was on the weight of the evidence.—Id.

37. In an action to establish a water right, a written declaration of the amount of water appropriated by the respective parties, which was duly verified, and filed for record, may be received in evidence to prove their intention as to the amount of water each was to have under the appropriation, though the statute did not require such declarations to be filed.—Sweetland v. Olsen, 11 Mont. 27; 27 Pac. 339.

38. In an action for diverting water claimed by plaintiff for irrigation, defendant claimed that, in order for him to exercise his water right, which was prior to plaintiff's, it was necessary to raise his gate occasionally to flush out the impurities accumulated there; that this could not be done without opening plaintiff's gate at the same time. Plaintiff conceded to defendant the right of flushing, but alleged that defendant took away his gate altogether and so deprived plaintiff of the water which would otherwise have been thrown into his ditch. *Held*, that an instruction that an appropriator of water from a stream had no right to any surplus above the amount of his appropriation, nor any right to prevent the same from flowing into the ditch of any one below who was lawfully entitled thereto, was not erroneous as impliedly informing the jury that defendant was not entitled to slum their dam at all.—Quigley v. Birdseye, 11 Mont. 439; 28 Pac. 741.

39. A decree determining the rights of prior and subsequent appropriators of water should provide that each appropriator should have the amount to which he is entitled at the point where his ditch taps the creek.—Kleinschmidt v. Greiser, 14 Mont. 484; 37 Pac. 5.

40. Comp. Stat., p. 997, § 1260, which authorizes, in a suit for the protection of water rights, a joinder of all persons as defendants who have diverted the water, and a settlement of the rights of the parties by one decree, and for an apportionment of damages, applies only to equitable actions; and in a legal action by an appropriator for damages for wrongful diversion, where no equitable relief is asked, and no facts are alleged which would authorize the granting of such relief, plaintiff can not join as defendants persons who did not act jointly in diverting the water.—Miles v. Du Bey, 15 Mont. 340; 39 Pac. 313.

41. Evidence that plaintiff had constructed his ditch in April or May, 1871, and that in a statutory declaration of water right filed in 1885 he had claimed his appropriation as made in 1871, was sufficient to justify a finding that his appropriation was made May 15, 1871, and that certain other appropriations antedating plaintiff's were made on or about May 1.—McDonald v. Lannen, 19 Mont. 78; 47 Pac. 648.

42. It is no objection to such finding that the date fixed was arbitrarily selected so long as the priority is not affected.—Id.

43. A finding that a ditch owner is entitled to 150 inches of water is not justified when the only evidence of his right fixes his appropriation as not exceeding 60 inches.—Id.

44. In an action involving the right to the waters of a creek, plaintiffs claimed under a notice of location posted at the point of diversion by one M in 1887, but at the trial they were permitted to amend their complaint so as to set forth that one of them had, on Jun. 1, 1887, in compliance with the statute, made an appropriation of the waters diverted by the ditch

originally commenced by M. *Held*, that such amendment was not a substitution of a new cause of action, under the provisions of Comp. Stat., p. 997, § 1260, that no court may in one decree settle the relative rights of any and all persons who are parties to the litigation.—Murray v. Tingley, 20 Mont. 260; 50 Pac. 723.

45. In an action to quiet title to use the waters of a creek, where the decree awarded plaintiff a prior right to a certain amount of the water which it was found he had appropriated, he can not complain of the indefiniteness of a further provision therein awarding defendant the right to the use of all the remaining waters of the creek to an amount "necessary" to the use of his manufactory.—York v. Steward, 21 Mont. 515; 55 Pac. 29.

I. INJUNCTION, 46-50.

46. In an action by an appropriator for a perpetual injunction against the diversion of water, a verdict that plaintiff was entitled to the water was a finding on the material issue, and entitled him to the relief sought.—Harris v. Shontz, 1 Mont. 212.

47. On an application for an injunction to restrain defendants from using the water of a stream for mining purposes, the evidence showed that the head of plaintiffs' ditch was 15 miles below defendants' mining ground; that plaintiffs, who were the first appropriators of the water, were compelled, on account of the working of the ground, to construct and maintain a sand reservoir, and use the water ten minutes daily to clean it, and employed, during that time, one man, who was also employed on the ditch for other purposes. *Held*, that the injuries complained of did not justify the granting of an injunction. (See 20 Wall. 507.)—Atchison v. Peterson, 1 Mont. 561.

48. The referee appointed by the court reported that F was the owner and entitled to the use of the water described in the complaint; that C wrongfully diverted the same and threatened to continue such diversion. *Held*, that F was entitled to an injunction pending suit.—Fabian v. Collins, 2 Mont. 510.

49. In an action to restrain the diversion of water from a creek, the court found that plaintiffs were entitled to the use of the water therein, but did not find specifically how much. It also found that defendant was entitled to use so much of the water as flowed in the north channel of the creek. The plaintiffs requested the court to find the number of inches of water to which they were entitled. *Held*, that to avoid a multiplicity of suits and in order to finally determine the rights of the parties, the finding should have been made, especially as Comp. Stat., p. 130, § 280, provides that no judgment shall be reversed for want of a finding of facts at the instance of any party who shall not have requested such finding.—Estill v. Irvine, 10 Mont. 509; 26 Pac. 1005.

50. A complaint to restrain defendant from using the water of a stream, to which plaintiff claimed a prior right by appropriation, alleged that plaintiff owned and occupied certain lands which required irrigation in order to grow agricultural crops; that, prior to the acts of defendant complained of, plaintiff appropriated 200 inches of the water, "and used and employed the same on the said lands for agricultural purposes ever since, from year to year, uninterruptedly, down to and until the time of the wrongs and grievances" complained of, "all of which plaintiff needed and required for agricultural uses on said lands." *Held*, that the complaint sufficiently alleged the purpose for which plaintiff appropriated the water, and the amount necessary.—Salazar v. Smart, 12 Mont. 395; 30 Pac. 676.

II. NATURAL WATER COURSES, 51-62.

51. In an action in which both parties claim the prior right to the use of water for mining purposes, equity affords the appropriate remedy.—Barkley v. Tieleke, 2 Mont. 59.

52. In an action to enjoin defendant from diverting the waters of a creek, the answer affirmatively alleged that the creek was not a running stream during the irrigation season, and that none of the waters flowing into it at defendant's ranch could, in the course of its natural flow, reach plaintiff's ranch, and stated that three miles below defendant's ranch the stream sank into the ground and was lost to sight, and from that point to a point one mile below plaintiff's ranch, a distance of 15 miles, at places, the channel was entirely dry. *Held*, that the answer stated a good defense.—Raymond v. Wimsette, 12 Mont. 551; 31 Pac. 537.

53. A riparian owner who has appropriated the waters of a stream for irrigation purposes can not enjoin the diversion of waters from the stream by the owner of land 15 miles above him, which water can not reach plaintiff's land because of the drying up of the stream between his land and defendant's, on the ground that the volume of water diverted might, in the event of unusual flow of water, cause some to flow in the stream to plaintiff's land.—Id.

54. Defendant in an action for diverting water contended that the reason that the water did not flow in plaintiff's ditch was due to improper construction. Findings were made that plaintiff and defendant had agreed to construct their ditches on a 12-inch grade, and that plaintiff's ditch was not on a 12-inch grade, and that one point in plaintiff's ditch was as high as the bottom of the main ditch, where plaintiff's ditch connected therewith, but that plaintiff's ditch was sufficient to irrigate his land. The findings did not show the grade of plaintiff's ditch, or that the bottom of the main ditch was not below the agreed grade. The court found that the allegation of the complaint was sustained. *Held*, that the findings were sufficient to support a judgment for plaintiff.—Anderson v. Cook, 25 Mont. 330; 64 Pac. 873; 65 Pac. 113.

55. A complaint in an action to restrain defendant from diverting waters to the use of which plaintiffs were entitled alleged the dates and amounts of the appropriations made by the predecessors in interest of plaintiffs, the actual and continuous use of the waters, and the usual matters in complaints of like character. *Held*, not demurrable for failing to deraign plaintiffs' respective titles.—Beach v. Water Co., 25 Mont. 379; 65 Pac. 111.

56. In an action for trespass and diverting a stream crossing plaintiff's lands, defendant should be permitted to show what it would cost to restore the stream to its former channel, as the measure of damages would be the expense of such restoration and such other damages as could not be avoided.—Sweeny v. Montana Central, 25 Mont. 543; 65 Pac. 912.

57. Plaintiff, suing to protect by injunction his right to use the bed of a creek, which he had reclaimed, for agricultural purposes, alleged that an artificial ditch had been constructed from a river to the creek, down which the water flowed, and from which it was extracted by another ditch, which conducted the water to the south ends of plaintiff's and defendants' ranches; that below this ditch the creek continued along plaintiff's land, but that the artificial ditch and laterals were sufficient to carry all the water out of the creek, so that no water had flowed in the remainder of the creek bed since 1893; that since 1898 plaintiff had reclaimed and cultivated such

remainder; and that recent rains, etc., had caused a great volume of water to flow down the creek and enter the ditch, etc. Held, that as it did not appear that, assuming the creek to be a natural water course, defendants were not upper riparian proprietors, and therefore invested with a right to have the water leave their lands in its accustomed channel, which right it was not alleged they had conveyed to plaintiff, the complaint was insufficient to warrant a temporary injunction.—Campbell v. Flannery, 29 Mont. 246; 74 Pac. 450.

58. The measure of damages for permanent injury to land, resulting from the poisoning of the waters of a stream, is the difference between the value of the land prior to the injury and its value after the injury.—Watson v. Smelting Co., 31 Mont. 513; 79 Pac. 14.

59. In an action for damages caused by the pollution of a stream, a question asked a witness, who produced a sample of water from the stream, as to whether he did not know that the sewerage of a city was dumped into the stream at the place where he procured the sample, should have been allowed on cross examination. —Id.

60. The use of water by an upper riparian proprietor in such a way as to carry sand, gravel and mining debris over the land of a lower proprietor, so as to render it valueless, constitutes a nuisance, both at common law, and under Civ. Code, § 4550, and Code Civ. Proc., § 1300.—Chessman v. Hale, 31 Mont. 577; 79 Pac. 254.

61. An upper riparian proprietor, who has appropriated water, and, in a contract to deliver it to a lower proprietor at a certain place, has reserved to himself the right to use the water for placer mining purposes, acquires no title to the water itself, or any right to pollute the water to any greater extent than is permitted by law; and while he has a right to a reasonable use of the water for the purposes specified, although such use does result in polluting it to some extent, yet he can not cover the lower proprietor's land with mining debris, so as to render it valueless.—Id.

62. Under Const., art. 3, § 15, every citizen is entitled to divert and use the waters of streams so long as he does not infringe the rights of some other citizen who has acquired a prior right by appropriation, on condition that he restore the waters to the channel of the stream on the cessation of his necessity.—Bullerdick v. Hermsmeyer, 32 Mont. 541; 81 Pac. 334.

III. PERCOLATING WATERS, 63.

63. In an action to restrain defendant from using a spring claimed to be one of the sources of a certain creek, the waters of which had been appropriated by defendant, the evidence showed that the spring lay on high ground between two forks of the creek: that, before defendant turned the spring by a ditch, the tendency of the water was toward the west fork; that in freshets the water, perhaps, flowed overground to the west fork; that in the summer the water did not flow on the surface to the west fork or elsewhere, but sank. Whether the water ever reached the west fork was a point on which the evidence was quite conflicting. *Held*, that the finding of the trial court that the spring was not a source of the creek would not be disturbed.—Leonard v. Shatzer, 11 Mont. 422; 28 Pac. 457.

IV. SURFACE WATERS, 64-65.

64. Plaintiff, suing to protect by injunction his right to use the bed of a creek, which he had reclaimed for agricultural purposes, alleged that an artificial ditch had been constructed from the river to the creek, down which the water flowed, and from which it was abstracted by another ditch, which conducted the water to the south ends of plaintiff's and defendant's ranches; that below this ditch the creek continued along plaintiff's land, but the artificial ditch and laterals were sufficient to carry all the water out of the creek, so that no water had flowed into the remainder of it since 1893; that since 1898 plaintiff had reclaimed and cultivated such remainder; and that recent rains had caused a great volume of water to flow down the creek and into the ditch. *Held*, that assuming that the water was surface water, the complaint was insufficient, as a lower proprietor's protection against surface water lies in the erection of dikes and dams, and this it was not alleged plaintiff had done.—Campbell v. Flannery, 29 Mont. 246; 74 Pac. 450.

65. Flood waters of a river, which become severed from the main current, or leave it never to return, and spread out over lower ground, become surface water; but if they form a continuous body with the water flowing in the ordinary channel, or if they depart therefrom presently to return, they are to be regarded as still a part of the stream, subject to the law as to obstruction thereof.—Fordham v. Northern Pacific, 30 Mont. 421; 76 Pac. 1040.

V. APPROPRIATION AND PRESCRIPTION, 66-98.

A. Right of Way, 66.
B. Exclusive Appropriation and Use, 67.
C. Adverse Character of Appropriation or Use, 68-71.
D. Nature and Extent of Rights Acquired in General, 72-80.
E. Abandonment or Forfeiture of Rights, 81-83.
F. Proceedings to Determine, Establish, and Protect Rights, 84-98.

A. RIGHT OF WAY, 66.

66. Under § 9, act of congress Jul. 26, 1866, acknowledging and confirming the right of way for the construction of ditches, etc., over the public domain, for carrying water for many purposes, to those who had vested rights therein, a person has no right to go upon the mining ground of another and construct his ditch through it, without the consent of the owner, unless he shows a necessity therefor, and pays the damages.—Noteware v. Stearns, 1 Mont. 311.

B. EXCLUSIVE APPROPRIATION AND AND USE, 67.

67. No one, by prior appropriation, can obtain exclusive control of an entire stream, or any part thereof, for irrigation purposes, unless the appropriation is for some beneficial purpose, existing or contemplated, and not for mere future speculative profit or advantage.—Toohey v. Campbell, 24 Mont. 13; 60 Pac. 396.

C. ADVERSE CHARACTER OF APPROPRIATION OR USE, 68-71.

68. An allegation in the complaint that plaintiff enjoyed the use of 20 inches of water from a canal for a certain period, when read in connection with other allegations that defendant is and has been proprietor, and has exercised dominion and control over such canal since its construction, does not constitute a plea of ad-

verse possession.—Crawford v. Improvement Co., 15 Mont. 153; 38 Pac. 713.

69. In a compromise settlement as to water rights between two mining companies, it was agreed that defendant had the prior right to 15 inches, that it should take the water through plaintiff's ditch, and that it should also have the use of a further amount of water, which was over and above water necessary for plaintiff's mill. Plaintiff closed its mill in 1883, and from that time to 1893 used no water; defendant, as it might under the contract, using all of the water conveyed into the ditch. Defendant gave no notice, by word or deed, that it claimed otherwise than under the contract. *Held*, that defendant's use was not adverse to plaintiff's right.—Smith v. Mining Co., 18 Mont. 432; 45 Pac. 632.

70. No use of water by a subsequent appropriator can be said to be adverse to the right of a prior appropriator, unless such use deprives the prior appropriator of it when he has actual need of it.—Talbott v. Water Co., 29 Mont. 17; 73 Pac. 1111.

71. Where plaintiff in a suit to determine water rights asserted rights under a deed conveying all the appurtenances, water rights and water ditches, and all the interest of the grantor, evidence showing the exclusive use of the water by defendants for 10 years, during which time neither plaintiff nor his immediate predecessor asserted any right thereto, justified the conclusion that the plaintiff's claim was not well founded.—Hays v. Buzard, 31 Mont. 74; 77 Pac. 423.

D. NATURE AND EXTENT OF RIGHTS ACQUIRED IN GENERAL, 72-80.

72. Plaintiff's prior grantor claimed land under a squatter's privilege, and in June, 1868, made an irrigating ditch to the land, having at that time about 10 acres cultivated. In 1876, having about 25 acres enclosed, he made a timber culture entry embracing the land possessed under the squatter's privilege. *Held*, that while the appropriator was entitled to sufficient water to irrigate his whole claim after the entry in 1876, he could not be allowed more than 50 inches for the appropriation of 1868, since, the timber culture act not having been passed until 1873, he could not have intended, at the time of the appropriation in 1868, a beneficial use of more water than a quantity sufficient for the land thereafter reduced to possession prior to 1876.—Toohey v. Campbell, 24 Mont. 13; 60 Pac. 396.

73. Where the amount of water for irrigation to which a settler was entitled under an appropriation was determined by the extent of beneficial use to which he intended to put it at the time of appropriation, his intent being determined by the extent of the tract actually reduced to cultivation, the intent could not be enlarged by the fact that he had a partner in his undertaking.—Id.

74. As, under Civ. Code, § 1881, every appropriation of water must be for a beneficial or useful purpose, either existing or contemplated, a claimant's intent at the time of appropriation must be determined by his acts, and by surrounding circumstances, its actual and contemplated use, and the purpose thereof.—Id.

75. The right to the use of water, obtained by actual prior appropriation, diversion and application of the water to a beneficial use then present or contemplated, may be owned without regard to the title to lands upon which the water is to be used.—Id.

76. Where one rightfully in possession of non-riparian land under a contract of purchase appropriates water from the public domain, and conducts it by means of a ditch on the public domain to, and continuously uses it on, such land, he acquires title to the water right and ditch; and it does not become appurtenant to the land, in the absence of a conveyance from the appropriator to the owner thereof, but will pass under a mortgage by the proprietor of the land and water right.—Smith v. Denniff, 24 Mont. 20; 60 Pac. 398.

77. Civ. Code, § 1078, recites that a thing is deemed to be appurtenant to the land when it is by right used with the land for its benefit, as in the case of a way or watercourse. Sec. 1882 provides that one entitled to use water for irrigation purposes may divert such water to land other than that for which it was originally appropriated. *Held*, that § 1078 can not be construed to deprive one having merely a possessory right in land, who appropriates water from the public domain for use on such land, of his title to such water and make it appurtenant to the land, the title whereof is in another, since such interpretation would be violative of § 1882.—Id.

78. A water right, when once appropriated, includes and comprehends an easement.—Id.

79. Under Civ. Code, § 1880, there can be no title to the corpus of the water, so that a prior appropriator, who has all the water that his necessities require, can not question the right of another to use the remainder of the water, nor maintain an action against him on account of such use, and the latter can not, so long as the former's enjoyment of all the water that he needs remains unimpaired, acquire a prescriptive right to use any given quantity of the water to the detriment of the former's appropriation.—Norman v. Corbley, 32 Mont. 195; 79 Pac. 1059.

80. Under Civ. Code, § 4605, requiring one to so use his own rights as not to infringe the rights of another, one who has a prior right to the use of the waters of one creek can not let those waters run to waste and use the full amount of his appropriation of the waters of another creek to the detriment of a junior appropriator of the latter creek; but such junior appropriator can not, as of right, compel the prior appropriator to exhaust his rights in the former creek before resorting to the use of the latter creek.—Id.

E. ABANDONMENT OR FORFEITURE OF RIGHTS, 81-83.

81. Mere nonuser of a water right is not an abandonment.—Sloan v. Glancy, 19 Mont. 70; 47 Pac. 334.

82. Where one who has appropriated water from a public domain for use on land, of which he is in possession under a contract with the owners for the purchase thereof, mortgages his water rights, he will not be deemed to have abandoned such water rights, so as to defeat the mortgagee's title.—Smith v. Denniff, 24 Mont. 20; 60 Pac. 398.

83. A joint notice, filed by successive appropriators of water, stated that they have and claim a right to use a given quantity of water on certain described lands, and that they appropriated the water as to one ditch in one year and as to another ditch in another year, does not of itself constitute or show an abandonment of prior appropriations, and the initiation of a new right and appropriation.—Norman v. Corbley, 32 Mont. 195; 79 Pac. 1059.

F. PROCEEDINGS TO DETERMINE, ESTABLISH, AND PROTECT RIGHTS, 84-98.

84. In an action to determine the priority of water rights, findings that a defendant became

entitled to his right by an appropriation at a given date; that plaintiff had obtained a right to a less amount of water by a later appropriation; and that plaintiff had held the amount of such appropriation through adverse possession as against defendant, are inconsistent, and will not support a judgment awarding plaintiff the amount of his later appropriation.—Johnson v. Bielenberg, 14 Mont. 506; 37 Pac. 12.

85. One who asserts that a water right and ditch are appurtenant to certain lands has the burden of proving it, and, if he claims title thereto, he must connect himself with the title of the prior appropriator.—Smith v. Denniff, 24 Mont. 20; 60 Pac. 398.

86. Where one having a right to the possession of land appropriates water from the public domain for use on such land, and subsequently mortgages such right, the fact that the mortgagee has not used the water will not defeat an action by him against the owner of the land, or one in the privity with him, to obtain possession and use of such water right, since, until foreclosure, the mortgagee would have no right to possession.—Id.

87. In an action to enjoin defendants from diverting certain waters claimed by plaintiffs for irrigation purposes, the parties stipulated that no question should be made as to the titles of the respective parties to the lands described in the pleadings, and in connection with which the water claimed by each was to be used. *Held*, that evidence that defendants' premises were located upon an Indian reservation, which they could not lawfully occupy, was admissible. —Phillips v. Coburn, 28 Mont. 45; 72 Pac. 291.

88. Plaintiff, in an action for diversion of water from an irrigation ditch, admitted in her complaint the use of some of the water, and in her reply claimed that defendant was estopped, by proceedings in another suit, to deny that plaintiff had been prevented from using any water during the season in question. The witnesses testified that some of the water was allowed to pass defendant's obstruction at all times, and the court charged that if defendant filed a verified answer in the previous suit, in which the right of plaintiff's landlord to use the irrigation ditch was denied, and admitted having prevented any water flowing through the ditch to the landlord's land during the time in question, defendant was estopped to deny such admission, but that if the water was allowed to run in the ditch during the period in question it was plaintiff's duty to use the water if she needed the same, and if she failed to do so, and her crops were thereby injured, she could not recover damages so sustained. *Held*, that such instructions were inconsistent and contradictory.—Flannery v. Campbell, 30 Mont. 172; 75 Pac. 1109.

89. Where plaintiffs, in an action to recover damages for the diversion of water adjacent to their mining claim, alleged ownership of the right to use the water, the burden of proof is on them to show ownership, on denial of the allegation by defendant.—Leggat v. Carroll, 30 Mont. 384; 76 Pac. 805.

90. Mere proof of ownership of an interest in a placer mining claim is insufficient to show an ownership of the right to use the waters adjacent thereto.—Id.

91. In an action to recover damages for the diversion of water adjacent to plaintiffs' mining claim, testimony tending to show that the claim could not be worked as a placer successfully without sufficient volume of water to enable hydraulic mining to be done on it is immaterial, in the absence of proof of ownership by plaintiffs of the right to use the water. —Id.

92. A person asserting that a water right and a ditch are appurtenant to certain land must prove that they are appurtenances and must connect himself with the title of the prior appropriator.—Hays v. Buzard, 31 Mont. 74; 77 Pac. 423.

93. In an action for damages for using the waters of a certain river, and for an injunction to prevent interference with the alleged rights of plaintiff therein, evidence examined, and *held* to warrant a non-suit for failure of plaintiff to comply with the requirements of Comp. Stat., div. 5, §§ 1250, 1251, 1256, 1257, in making his alleged appropriation, in that he never diverted the water claimed to have been appropriated, or constructed any dam, ditch, flume or work of any kind to convey water to any place for a beneficial purpose, or owned the land described in his notice, or any mine, mill, smelter, ranch or property to which the water right was appurtenant, and on which the water could be utilized.—Miles v. Power Co., 32 Mont. 56; 79 Pac. 549.

94. Until a claimant is himself in a position to use the water of a stream subject to appropriation, the right to the water or water right does not exist in such sense that the mere diversion of the water by another is a ground of action either to recover the water or for damages for the diversion.—Id.

95. A complaint alleged that plaintiff was the prior appropriator and entitled to the prior use of 200 inches of water, and that defendant interfered with plaintiff's right. Defendant answered, denying that plaintiff's prior appropriation consisted of more than 100 inches of water, alleged an appropriation by defendant, and denied that defendant had interfered with plaintiff's rights. *Held*, that a motion for judgment on the pleadings was properly denied.—Norman v. Corbley, 32 Mont. 195; 79 Pac. 1059.

96. In a suit to determine the water rights of the owners of certain land, evidence held insufficient to support a finding that plaintiff had acquired a right to the use of all the waters of the stream by adverse possession since 1888.— Bullerdick v. Hersmeyer, 32 Mont. 541; 81 Pac. 334.

97. A use of the waters of a stream does not become adverse until a superior right is infringed and the owner suffers a deprivation thereof, after which the adverse user may become entitled to the prescriptive right by continuous adverse user for the full period of limitation.—Id.

98. Where the owner of certain land had used water from a main irrigation ditch through a lateral since Sept. 3, 1888, when the right so to do was decreed her by a void probate decree, such use constituted an original appropriation as of that date.—Id.

VI. CONVEYANCES AND CONTRACTS, 99-114.

99. Things in their nature equal, and of like character and grade, can never be appurtenant to each other, so that a water ditch can never become appurtenant to another ditch of like character, and pass as an incident thereto.— Donnell v. Humphreys, 1 Mont. 518.

100. The grant of a water ditch, by general words, includes the excavated channel, the rights to the water by which it is supplied and made available, and another ditch which conveys the water to it.—Id.

101. Under Cod. Stat., p. 396, § 3, and p. 402, § 34, requiring the conveyance of a water ditch to be with the same form and solemnity as the conveyance of any other real estate, a

conveyance by an unsealed and unacknowledged paper writing, is not sufficient to convey the property.—Barkley v. Tieleke, 2 Mont. 59.

102. A conveyance of land, with its "appurtenances," is, by implication, a conveyance of the grantor's interest in a ditch and water right necessary to the use and enjoyment of the land.—Tucker v. Jones, 8 Mont. 225; 19 Pac. 571.

103. A conveyance of land "with all appurtenances," conveys the grantor's water right necessary to its use and enjoyment.—Sweetland v. Olsen, 11 Mont. 27; 27 Pac. 339.

104. The grant of a ditch and water right to an alien is not an abandonment by the owner, but the alien may hold the same until forfeited by office found, against collateral attacks by third persons, other than the state, and, in the absence of such forfeiture, may convey the title. —Quigley v. Birdseye, 11 Mont. 439; 28 Pac. 741.

105. A complaint alleging that defendant owned land on which it had begun to dig an irrigation canal, and that plaintiff bought part of such land when defendant was making sales, "by representing that the right to needed water through said canal * * * inured to purchasers," but which fails to allege that the contract of sale or the deed contained a grant of any interest in the canal or its waters, and which shows that plaintiff went into possession before the canal was completed, and before any water therefrom had been used on his land, fails to show that the canal, or any interest therein, was appurtenant to such land, and hence does not state a cause of action for a stoppage of the flow therein.—Crawford v. Improvement Co., 15 Mont. 153; 38 Pac. 713.

106. Certain persons, who had acquired by appropriation the right to use the water from the lower portion of a stream, entered into a contract whereby they did "give and grant" to certain persons who wished to appropriate water from the upper portion of the stream, their rights, respectively, to the use of the water naturally flowing in the stream, in proportion to the amount of water supplied to this stream from another, by a ditch which was to be constructed by the grantees. *Held*, that the instrument was a valid grant of the usufruct of the water of the stream.—Middle Creek D. Co. v. Henry, 15 Mont. 558; 39 Pac. 1054.

107. A contract transferring water rights acquired under Comp. Stat., p. 992, c. 74, by the appropriation of the waters of a stream for irrigation, is valid and binding, as between the parties, without being acknowledged or recorded.—Id.

108. Comp. Stat., p. 661, § 260, provides that every conveyance of real estate hereafter made which shall not be recorded as provided for in this chapter shall be deemed void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate or any portion thereof where his own conveyance shall be first duly recorded. *Held*, that an appropriator of the usufruct of the water of a stream subsequent to a conveyance thereof by a previous owner is not a purchaser within the provisions of this act.—Id.

109. A settler in possession of government land, for which he has appropriated a water right, may transfer such land and water right by parol assignment, so that the transferee becomes his successor in interest in the water right, even though the transfer was made without consideration.—Wood v. Lowney, 20 Mont. 273; 50 Pac. 794.

110. A diversion and appropriation of water from a creek by means of an irrigating ditch to land in the possession of one who has no title thereto, but is in possession thereof under a land contract, for the purpose of irrigating the land, and its use continuously, constitutes such water right, in the absence of an agreement between him and the owner to the contrary, a mere appurtenance to the land on which it is used, and a purchaser at a foreclosure sale of a mortgage by him of the land and water rights does not acquire any right to appropriate the water.—Smith v. Denniff, 23 Mont. 65; 57 Pac. 557.

111. Evidence examined and *held* to sustain a finding that whatever right decedent had acquired in the waters of certain springs had been abandoned.—Good v. Proctor, 27 Mont. 526; 71 Pac. 1003.

112. A lease of several mining claims "including the right to use the Mammoth ditch and water right, and all water and water rights heretofore used or pertaining with the said leased premises," has no tendency to show that the right to use such water was appurtenant to any particular one of the claims so leased.—Leggat v. Carrol, 30 Mont. 384; 76 Pac. 805.

113. A deed of land, together with all appurtenances, water rights and water ditches, and all interest of the grantor, conveys all rights which were appurtenant, but does not affect a right belonging exclusively to the grantee.—Hays v. Buzard, 31 Mont. 74; 77 Pac. 423.

114. Where parties acquired certain land in separate parcels from the owners of a water right appurtenant to the land, they each became vested with an interest in the water, measured in amount by the requirements of each, whether they were tenants in common or not.—Bullerdick v. Hermsmeyer, 32 Mont. 541; 81 Pac. 334.

VII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE, 115-125.

115. Where the appropriator runs sand, gravel and tailings into the creek and upon the land of a subsequent purchaser, but this is not due to any cause not a necessary incident to the use of the water in placer mining, and no damage results to the owner of the land, equity will not restrain the appropriator from so using his rights.—McCauley v. McKeig, 8 Mont. 389; 21 Pac. 22.

116. Failure of a person living on a stream below a dam, and having knowledge of its dangerous condition, to institute proceedings to have the dam judicially examined and made secure or removed, as authorized by Comp. Stat., 912, c. 56, does not constitute contributory negligence so as to defeat his right to recover for damages resulting from the subsequent breaking of the dam.—Hollenback v. Dingwell, 16 Mont. 335; 40 Pac. 863.

117. The value of the crops, and the expense of maturing, reaping, threshing and moving them to market, are competent facts to be considered in arriving at the measure of damages to crops by the overflow of a stream, caused by negligence in driving logs.—Hopkins v. Copper Co., 16 Mont. 356; 40 Pac. 865.

118. An instruction in an action for damages from the breaking of an irrigating ditch, that it was incumbent on an irrigation company to construct its flumes and ditches in such a reasonable and prudent manner that no damage shall result to the person whose lands are crossed, is erroneous, as making it an insurer. —King v. Ditch Co., 16 Mont. 463; 41 Pac. 431

119. At the time a grant of a right to store and flood water for mining purposes upon any of the lands of a certain described tract was made, an easement to convey water from certain courses to such land existed, within the

purview of the parties thereto. *Held*, that the grant so made excluded from the easement granted any right to lay pipes to conduct water across the tract, except such as existed at or about the time the grant was made.—M. O. P. Co. v. Mining Co., 20 Mont. 533; 52 Pac. 375.

120. A grantee had the right to flood and store water for mining purposes on grantor's land east of a certain embankment of a railroad crossing grantor's land, which embankment grantee used as a dam. Grantor reserved the right from the railroad to exercise mining rights not endangering the roadbed. *Held*, that even though the railroad made no complaint, grantor or his successor might be enjoined at suit of grantee from constructing boxes through the embankment at a point below where grantee's water line might often come, endangering the whole embankment, and not intended to be used for any beneficial purpose.—Id.

121. One who buys land of, and at the same time succeeds to the interest of, a tenant in common in an irrigation ditch, can not recover of his co-tenant for damages to the land from negligent construction or location of the ditch, his predecessor having performed part of the work of construction of the ditch; but he can recover of them any damages from their negligent maintenance thereof, his predecessor having, by agreement between him and them, been relieved from all responsibility for repairs, and they having thereby impliedly obliged themselves to keep up necessary repairs.—Crowder v. McDonnell, 21 Mont. 367; 54 Pac. 43.

122. Though one frames his complaint for damages from failure to make repairs to an irrigating ditch on the theory that defendants were liable for violation of a general duty, still he may recover for breach of the contract; defendants having pleaded a decree and judgment roll, which, while showing that there was no general duty, showed that they were liable by reason of a contract, and plaintiff having made such record part of his case by proof on the trial.—Id.

123. A parol license to lay water mains through land can not ripen into an easement by prescription.—Great Falls W. W. Co. v. Great Northern, 21 Mont. 487; 54 Pac. 963.

124. An owner in common of a water right, who takes water at a main ditch at a point above the outlet of the other owner thereof, is not entitled to withdraw an amount of water in proportion to his ownership of the water right, provided he leaves the proportionate share of the owner in the main ditch, without regard to seepage and evaporation of the remainder before it reaches the other owner, a mile distant.—Anderson v. Cook, 25 Mont. 330; 64 Pac. 873; 65 Pac. 113.

125. Under the common law overflow waters of a stream which still form part of the stream may not be obstructed by a railroad company by a fill along its right of way without openings, so as to injure the property of another.—Fordham v. Northern Pacific, 30 Mont. 421; 76 Pac. 1040.

VIII. PUBLIC WATER SUPPLY, 126-138.

126. The powers conferred by Act Jan. 12, 1865, § 4, "to protect and regulate the irrigation of land in Montana Territory," on commissioners to apportion water, was judicial, and can not be granted by the legislative assembly, under the organic act of the territory.—Thorp v. Woolman, 1 Mont. 168.

127. Parties conducting mining operations on land adjacent to a ditch owned by other parties can acquire no other than a mere privilege or right to the use of the waste water from the mining operations of the owners of the ditch, or, at most, but a secondary or subordinate right to that of the first appropriators, and only such as was liable to be determined by their action at any time, unless the water had been turned back into the original channel after it had been used and answered the purposes of the first appropriators.—Woolman v. Garringer, 1 Mont. 535.

128. Where the defendant has diverted all the water from plaintiff's ditch his possession of such water is not regarded as an adverse possession, but such a case is a proper one in which to seek the equitable relief afforded by an injunction.—Fabian v. Collins, 3 Mont. 215.

129. In a mining gulch, when water has been used upon one mining claim,, it must be discharged therefrom for use by the owners of claims below.—Alder Gulch C. M. Co. v. Hayes, 6 Mont. 31; 9 Pac. 581.

130. A temporary injunction to restrain a trespass was granted on filing a complaint. The affidavits filed in support of a motion to dissolve the injunction showed that defendants owned a placer mining claim in a gulch above plaintiff's land, on which defendant's had a right to dump tailings; that defendants had been engaged in digging a flume on plaintiff's land for 18 months, and had dug it for a distance of 750 feet, at an expense of $1,500, without objection, and with plaintiff's full knowledge, and had but 28 feet further to go to complete the flume when the temporary injunction was granted. The court viewed the premises. *Held*, that it was not an abuse of discretion to dissolve the injunction.—Klein v. Davis; 11 Mont. 155; 27 Pac. 511.

131. A complaint which alleges that plaintiffs own mining claims adjoining and above defendants' land, and that they have a right to dig trenches and construct flumes across defendants' land, and have so constructed trenches and flumes, which defendants are filling and destroying, and will continue to do so unless restrained by order of the court, shows a prima facie case for granting a temporary injunction.—Power v. Klein, 11 Mont. 159; 27 Pac. 513.

132. A water company, required to furnish the inhabitants of a city with water for general use at prices specified in its charter, can not refuse to furnish a tenant of a house with water on tender of payment in advance, because it has adopted a rule that it shall deal only with the owner or his agent of the property to which water is to be supplied.—State v. Water Co., 18 Mont. 199; 44 Pac. 966.

133. Laws 1897, p. 180, § 3532, authorizes the arid land grant commission to enact such rules for its government and the carrying into effect of the act of congress granting arid lands to the state as may seem just, and § 3533 authorizes it to take all steps necessary to comply with the conditions of the act, "to the end that the state may receive the full benefit and advantage accruing through or by the terms of any congressional action." *Held*, that the only limitation imposed on the commission is that its acts must be for the benefit of the state.—State v. Marshall, 20 Mont. 510; 52 Pac. 268.

134. The arid land grant commission selected, for the purpose of reclaiming under the Carey act, a large body of arid land within the limits of the grant to the Northern Pacific, which owned each alternate section. *Held*, that under a resolution of the commission that, where there was more than enough water to irrigate the lands selected, any person might contract with the party selected by the commission to construct the state canal, to extend such canal for conveying to his lands such excess water, the additional expense being borne by such

party, they could contract with the Northern Pacific that that company would contract with the commissioners' contractor to so enlarge the canal of the commission as to furnish enough water to irrigate the whole district, if by the terms of the contract the rights of the state to construct, control and maintain ditches and canals, and a lien on all the property allowed by law, were fully preserved.—Id.

135. The Carey act and the arid land act having been enacted with full knowledge that the state could only acquire title to each alternate section of the arid lands of the state which lie within the limits of the Northern Pacific land grant, it must have been contemplated that the state might reclaim the alternate sections.—Id.

136. Sec. 3536 (arid land act) provides for the issuing of bonds in series, "each series to be used to reclaim the lands of a certain district," each district and its bonds to bear a distinct number. Sec. 3541 provides that such bonds shall be made "a lien upon and charge against all lands embraced in the district for the reclamation of which such bonds are issued, * * * and first lien upon all water rights and improvements and upon the entire plant connected with such district," etc. *Held*, that with reference to the districts where only alternate sections were reclaimed, the commission could issue bonds specifying on their face that the lien thereof should attach only to lands to which the state might acquire title under the Carey act and the canal and water rights appurtenant thereto.—Id.

137. It is further provided in § 3543 that the state treasurer shall keep an account with each district, etc. *Held*, that each locality to be reclaimed should be designated as a district by number, and the bonds should show on their face that they are liens on the property in the district having the number of the district corresponding with the number on the face of the bonds.—Id.

138. A townsite company verbally authorizing a water company to lay its mains by a route different from that which had previously been conveyed, does not thereby convey to the water company a substituted right of way.—Great Falls W. W. Co. v. Great Northern, 21 Mont. 487; 54 Pac. 963.

WEAPONS.

1. An indictment for carrying a concealed weapon upon the person need not contain an averment negativing the exception contained in the statute, providing that the act shall not apply to peace officers in the discharge of their official duties.—Territory v. Burns, 6 Mont. 72; 9 Pac. 432.

WILLS.

I. Contracts to Devise or Bequeath, 1-2.
II. Requisites and Validity, 3-4.
III. Probate, Establishment, and Annulment, 5-29.
IV. Construction, 30-31.
V. Rights and Liabilities of Devisees and Legatees, 32-35.

I. CONTRACTS TO DEVISE OR BEQUEATH, 1-2.

1. Where deceased had promised to leave to one sought to be adopted a child's share of his estate, in return for her companionship, and obedience, the fact that the promisee left his home and remained away for some time, or did not yield to him the obedience the contract demanded, can not be taken advantage of by his heirs at law; he not having rescinded the contract.—Burns v. Smith, 21 Mont. 251; 53 Pac. 742.

2. The mother of a child sought to be adopted testified positively that the contract of adoption, which was lost, contained a provision that the child should have a share of the promisor's estate, as his only child. The one who drew the contract thought there was something not making the child the promisor's heir, and knew that the promisor wanted a contract showing his intention to adopt the promisee. Many witnesses testified that the promisor dearly loved the promisee, spoke of her as his heir and as his adopted daughter, and introduced her as his daughter, and cared for her for years. She was married with his consent, and at his house, and when her child was born he felicitated himself on being a grandfather. *Held*, that a contract providing that the promisor should leave the promisee a child's share of his estate was sufficiently established to authorize a court of equity to decree specific performance thereof.—Id.

II. REQUISITES AND VALIDITY, 3-4.

3. Testator devised to his wife all his personalty, and a certain portion of his realty and mining lands. After the execution of the will he contracted for the sale of certain mining lands, part of the price being paid down and the deed placed in escrow to be delivered on payment of the balance before a certain date; otherwise to be returned to the grantor. After the death of testator the payment was made and the deed delivered. *Held*, that under Comp. Stat., p. 384, §§ 461, 463, which provide that an agreement for the sale of property disposed of by a will previously made does not revoke such disposal, but it passes by the will, subject to a right of specific performance, and that a conveyance or other act, by which testator's interest in the thing previously disposed of by his will is altered, but not wholly diverted, is not a revocation, the mining lands passed as realty under the will, and the second delivery of the deed will not be allowed to take effect, by relation, from the time of the delivery in escrow.—Chadwick v. Tatem, 9 Mont. 354; 23 Pac. 729.

4. A testator, shortly before his death, wrote a letter to his lawyer, which fulfilled every requirement of the statute (Comp. Stat., p. 280, § 19, and p. 381, § 439) as to the execution and proof of an olographic will. The decedent in such letter announces his recent marriage and then writes: "What I want is that you should change my will so that she (his wife) will be entitled to all that belongs to her as my wife. I am in very poor health, and would like this attended as soon as convenient. I do not know what the laws are in Montana. I do not know what ought to be done, but you do." *Held*, that such will disclosed the animus testandi, and should be admitted to probate as a codicil to the will.—Barney v. Hayes, 11 Mont. 571; 29 Pac. 282.

III. PROBATE, ESTABLISHMENT, AND ANNULMENT, 5-29.

5. Under Rev. Stat., p. 195, § 13, requiring the notice of the hearing of a petition for probate of a will shall be published at least three times, upon three different days of publication, when published in a weekly newspaper, and § 16, providing that at the time of hearing the court must require proof that the notice has

been given, which being made, it must hear proof of the will, the court has no jurisdiction until these requirements are complied with; and where the notice of hearing is published only twice, in a weekly paper, an order admitting a will to probate and appointing an administrator with the will annexed, is void—Charlebois v. Bourdon, 6 Mont. 373; 12 Pac. 775.

6. Although under Rev. Stat., p. 192, § 1, the records, judgments and decrees of probate courts have the same force and effect as those of courts of general jurisdiction, yet, when an order of a probate court admitting a will to probate recites that notice of hearing proof of the will was published according to law, such order is not conclusive on that point when the records show that the notice was not published the number of times required by law.—Id.

7. A petition to set aside the probate of a will for the failure to serve citation on the heirs and next of kin is not a collateral proceeding on which the probate can not be attacked, but is a direct attack.—Id.

8. Under Comp. Stat., p. 280, §§ 20-22, which provide that in a will contest the petitioner may answer the contestant's grounds, and any issue of fact thus raised must, on request of either party in writing, be tried by a jury, the trial to be conducted in accordance with the provisions of the Civil Practice Act for the trial of issues of fact, it is error to sustain a demurrer to an answer which denies the contestant's grounds.—Barney v. Hayes, 11 Mont. 99; 27 Pac. 384.

9. A will which has been presented for probate and rejected, may be presented again together with a codicil found afterwards, referring to the will, as such codicil operates as a republication of the will.—Id.

10. Under Code Civ. Proc., pt. 3, tit. 12, c. 2, arts. 1, 2, one desiring to contest a will may file statements of opposition at any time prior to the hearing of proof of the will.—Raleigh v. District Court, 24 Mont. 306; 61 Pac. 991.

11. Where a contest of a will was dismissed because not stating a cause of action, such dismissal did not deprive contestant of the right to maintain a subsequent contest based on other grounds.—Id.

12. Civ. Code, § 1867, provides that no resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession; and § 1868 declares that, when succession is not claimed as provided in the preceding section, the district court must direct the attorney general to reduce the property to the possession of the state, and that the proceeds thereof must be deposited in the state treasury, to be paid to a non-resident alien whenever, within five years after such deposit, he shall prove he is entitled thereto. Code Civ. Proc., pt. 3, tit. 8, authorizes the attorney general to file an information on behalf of the state requiring all persons interested in the estate to appear and show cause why the same should not vest in the state. *Held*, that where a testator had no resident heirs, the state was entitled to file objections to the probate of the will before the expiration of five years from the testator's death; otherwise the right to contest would be barred by Code Civ. Proc., § 2366, making the probate of a will conclusive if not contested within one year.—State v. District Court, 25 Mont. 355; 65 Pac. 120.

13. Code Civ. Proc., § 589, providing that any person, before trial, might intervene in an action by filing, by leave of court, the grounds of the intervention, does not apply to the filing of grounds for contesting a will.—Id.

14. Civ. Code, § 1852, subd. 8, provides that, if an intestate leaves no heirs, his estate escheats to the state; and § 2329 authorizes any person interested to contest a will. *Held*, that where a testator dies without heirs, the state was entitled to contest a proposed will, since it was an interested party, within the meaning of the Code.—Id.

15. Grounds for contesting a will, which were filed before the date to which the hearing of the petition for probate had been postponed, were in time, though the time originally fixed by the court within which objections might be filed had expired.—Id.

16. Under Code Civ. Proc., §§ 1722, 1723, as amended by Laws 1899, p. 146, providing that an appeal may be taken from a judgment or order concerning the validity of a will within 60 days after it is made or entered or filed with the clerk, an appeal taken Jan. 5, 1900, from a judgment refusing revocation of the probate of a will entered on Apr. 8, 1899, will be dismissed.—In re Reilly's Estate, 26 Mont. 358; 67 Pac. 1121.

17. Under Code Civ. Proc., §§ 2320-2382, the court has power, on consent of all the parties interested, to enter a decree affirming a compromise of a contest of a will, and ascertaining the share to which the parties are respectively entitled.—In re Davis' Estate, 27 Mont. 490; 71 Pac. 757.

18. In a will contest, evidence that witness had, prior to the date of the trial, met one of the subscribing witnesses of the alleged will, who said that a certain person had given him money with which to leave the state, and that he was going to leave, and that the person who had advanced the money had contracted with contestants to buy whatever interest in certain property they acquired from the estate, was inadmissible, the absence of the subscribing witness having been already sufficiently accounted for.—Farleigh v. Kelley, 28 Mont. 421; 72 Pac. 756.

19. In a will contest, where contestants had alleged that petitioner and others had conspired to defraud them of their rights as heirs of deceased, evidence that petitioner's husband, who was acting as her agent with reference to the estate, had asked the clerk of the district court to write to one of the contestants, in answer to an inquiry as to the estate, that the property was not very valuable, and that petitioner had written a letter to the inquiring heir, stating that the estate had been settled and the property left to petitioner, was admissible, as tending to prove the charge of conspiracy.—Id.

20. In a will contest, where contestants alleged that petitioner and others conspired to defraud contestants of their rights as heirs of deceased, and, pursuant to such conspiracy, had forged the will sought to be probated, evidence that, before this will was offered for probate, petitioner had procured her appointment as administratrix of deceased's estate, falsely alleging that she was his only heir, and, while acting as such administratrix, had sold a large portion of the estate to her husband, and that contestants had instituted an action to have such proceedings and sale set aside, was admissible, under Code Civ. Proc., § 2340.—Id.

21. On probate of a will, where the subscribing witnesses are out of the state, evidence that they had made statements contradictory of the facts contained in the contesting clause, and evidence that the reputation of such subscribing witnesses for honesty and integrity is bad, was admissible, under Civ. Code., § 1723 and Code Civ. Proc., § 2343.—Id.

22. Under Code Civ. Proc., § 2340, contestants of a will have the burden of proof, and are entitled to open and close.—Id.

23. It being proved that a lost will seen in the possession of the testater, who was in the exercise of his mental faculties, the presumption is that he destroyed it animo revocandi, and the burden of proof is then upon the proponent to overcome such presumption.—In re Colbert's Estate, 31 Mont. 461; 78 Pac. 971.

24. Declarations of the testator are inadmissible, in conjunction with testimony of witnesses who had seen a lost will, to overcome the presumption of revocation from the fact that the will was last seen in his possession, when he was in possession of his mental faculties. —Id.

25. To overcome the presumption that the testator destroyed a lost will, the proof must be clear, satisfactory and convincing.—Id.

26. Evidence that one, who was alleged to be a witness to a lost will, but who denied the same, stated at the funeral of testator that he had the will in his pocket, did not tend to prove even remotely that he had it in his possession, no one ever having seen it in his possession so far as the testimony disclosed.—Id.

27. Under Code Civ. Proc., §§ 2340-2346, the proponent of a will must first make out a prima facie case; that is, make such proof as would entitle the will to probate in the absence of a contest. The contestant then attacks its validity and the proponent defends the same, and the contestant rebuts the testimony of proponent, who may surrebut any new testimony; but the contestant has the right to open and close.—Id.

28. The uncontradicted affidavits for new trial on the ground of newly discovered evidence in proceedings to establish a lost will showed diligence on the part of proponent, and that a newly discovered witness would testify that he was shown the will by testator, and was familiar with its contents, and after his death he was shown the will, and recognized it in the hands of a subscribing witness; such evidence of its existence being the essential evidence which proponent lacked on the trial. *Held*, that the court abused its discretion in not granting a new trial.—Id.

29. Under Code Civ. Proc., §§ 2366, 2844, a sucessful contest of a will by a minor on coming of age, after probate and distribution, operates only in favor of him, and not in favor of others who had lost their right of contest. —Spencer v. Spencer, 31 Mont. 631; 79 Pac. 320.

IV. CONSTRUCTION, 30-31.

30. The probate courts of Montana have no power or authority to entertain a petition involving the construction of a will.—Chadwick v. Chadwick, 6 Mont. 566; 13 Pac. 385.

31. Where executors are also made trustees under a will, the two capacities are distinct and separate, and the executors, having duly qualified as such, can not assume the rights and duties of trustees until the court has approved their accounts as executors, and ordered a distribution.—In re Higgins' Estate, 15 Mont. 474; 39 Pac. 506.

V. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES, 32-35.

32. As Laws 1876, p. 64, §§ 6, 7, provide that a devise of land shall be in lieu of dower, unless the widow elect within a year to take her dower instead, the widow can not obtain dower where she has not so elected.—Chadwick v. Tatem, 9 Mont. 354; 23 Pac. 729.

33. A residuary legatee, who objects to the payment of a separable, void item of a will, is not thereby precluded from claiming under such will.—In re Schmidt's Estate, 15 Mont. 117; 38 Pac. 547.

34. Under Laws 1876, p. 64, § 6, providing that every devise of lands, or any interest therein, by will, shall be a bar to the widow's claim of dower, unless otherwise expressed in the will, the widow, by accepting the provisions made for her by the will of her deceased husband, is estopped and barred from claiming dower in real estate of which he was seized of an estate of inheritance during coverture, and which he conveyed without her joining him in the conveyance thereof.—Spalding v. Hershfield, 15 Mont. 253; 39 Pac. 88.

35. A testator, after bequeating all his property to pay certain legacies, provided that under none of the provisions of the will should the share of his wife be less than $7,000, including two life policies amounting to $5,000, payable to her. *Held*, that the testator intended that his wife should be a preferred legatee in the sum of $2,000, so that the wife upon his death, would be worth the sum of $7,000,—$5,000 of her own by policies, and $2,000 from his estate. —In re Phillips' Estate, 18 Mont.311; 45 Pac. 222.

WITNESSES.

I. Attendance, Production of Documents, and Compensation, 1-3.

II. Competency, 4-14.

III. Examination, 15-51.

- A. Taking testimony in general, 15-22.
- B. Cross examination and re-examination, 23-47.
- C. Privilege of witness, 48-51.

IV. Credibility, Impeachment, Contradiction, and Corroboration, 52-85.

- A. In general, 52-56.
- B. Character and conduct of witness, 57-65.
- C. Interest and bias of witness, 66-68.
- D. Inconsistent statements by witness, 69-81.
- E. Contradiction and corroboration of witness, 82-85.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION, 1-3.

1. Under Rev. Stats., p. 481, § 423, providing that witnesses in criminal cases shall make out, under oath a bill of their fees, and file it with the clerk, a complaint for the recovery of fees failing to show compliance with this section is defective.—First Nat'l. Bank v. Custer, 7 Mont. 464; 17 Pac. 551.

2. The fact that the route usually traveled is inconvenient and unpleasant, as being without railroad facilities, does not entitle a witness to receive the excess of mileage occasioned by travelling the entire distance by rail on a much further route, as under Comp. Stats., p. 947, § 1082, relating to mileage of witnesses in criminal cases, the statement of a witness is not binding upon the clerk of the court, but he is empowered to issue his certificate for the mileage of the witness determined by the route usually travelled, although the commissioners may not have exercised the authority conferred upon them by the statute in establishing a table of distances.—State v. Ramsey, 11 Mont. 245; 28 Pac. 258.

3. Pol. Cod., § 4656, providing, in criminal cases, that the clerk must not issue subpoenas for more than six witnesses for each side ex-

cept on order of the court, is constitutional, and authorizes the court to refuse defendant an order for subpoenas for additional witnesses unless he discloses the materiality of their expected testimony.—State v. O'Brien, 18 Mont. 1; 44 Pac. 399.

II. COMPETENCY, 4-14.

4. The testimony of a witness is not admissible in behalf of a person jointly indicted with her husband where it would tend to influence the case against her husband.—Territory v. Paul, 2 Mont. 314.

5. The consent of the patient only is necessary to render competent the testimony of physicians touching matters of information acquired in attending such patients in their professional capacity and which were necessary for them to know to enable them to prescribe or act for the patient.—Territory v. Corbett, 3 Mont. 51.

6. Under § 445, Civ. Pr. Act, the common law rule as to the competency of a witness to testify notwithstanding his interest in the result of an action, is allowed to stand, where the adverse party is the representative of a deceased person, and the facts to be proven transpired during the life of such deceased person.—Shober v. Jack, 3 Mont. 351.

7. Rev. Stat., p. 229, § 648, providing that no person shall be allowed to testify where the adverse party, or the party for whose benefit the action is prosecuted or defended, is the representative of a deceased person, when the facts to be proven transpired before the death of such person, does not disqualify the wife of a deceased maker of a note from testifying, in an action on a note against the administrator, that a sum endorsed on the note as paid was paid before the death of the deceased.—Stewart v. Budd, 7 Mont. 573; 19 Pac. 221.

8. Where a person asks an opinion of a lawyer as to how an act can be legally done, though nothing is said about payment for the advice given, the relation of attorney and client exists between them to such an extent as to render the communication privileged.—Davis v. Morgan, 19 Mont. 141; 47 Pac. 793.

9. The fact that respondent in disbarment proceedings was enabled to defraud his client by reason of a corrupt scheme entered into by them to defraud the county, does not prevent the client from testifying as to such scheme.—State v. Cadwell, 16 Mont. 119; 40 Pac. 176.

10. In a criminal case a boy 15 years old, who states that the oath taken required him to tell what was so, and that what was so was the truth, and what was not so was falsehood, and that if he did not tell the truth he would be punished, is a competent witness.—State v. Cadotte, 17 Mont. 315; 42 Pac. 857.

11. Evidence of the contents of a lost deed, claimed to have been given by one as administrator, was properly excluded where there was no evidence that he was an administrator, or had authority to make the deed.—Gassert v. Noyes, 18 Mont. 216; 44 Pac. 959.

12. Information incidentally obtained by one while acting merely as a scrivener in drawing up a deed, though he is also an attorney, where advice has not been asked of him, is not privileged.—Smith v. Caldwell, 22 Mont. 331; 56 Pac. 590.

13. Any communication made to an attorney by a client seeking advice from him, either upon payment of compensation, or without it, touching the matter with reference to which the advice is sought, is privileged.—Id.

14. Under Code Civ. Proc., § 3163, where plaintiff on cross examination admitted that a certain physician had attended her and treated her for the injuries complained of, without detailing any of the conversation with him or telling of the character or extent of his treatment, it was proper to refuse to permit defendant to examine the physician as to plaintiff's condition at the time he attended her.—May v. Northern Pacific, 32 Mont. 522; 81 Pac. 328.

III. EXAMINATION, 15-51.

A. TAKING TESTIMONY IN GENERAL, 15-22.
B. CROSS EXAMINATION AND RE-EXAMINATION, 23-47.
C. PRIVILEGE OF WITNESS, 48-51.

A. TAKING TESTIMONY IN GENERAL, 15-22.

15. The following question is not leading: "State if, at any time, during the summer of 1872, you had any transaction relative to the sale of a cabin to the plaintiff; if so, state what such transaction was. —Ruff v. Rader, 2 Mont. 211.

16. Before a witness is allowed to draw and exhibit to the jury a map of a section of country to illustrate his testimony as to the reasonable and probable cost of transporting merchandise through the same, it should appear that he has some knowledge of the country and some means of knowing the cost of such transportation.—Story v. Maclay, 4 Mont. 464; 5 Pac. 326.

17. There is no error in excluding a question where the witness has already answered a similiar one.—Hunter v. Montana Central, 22 Mont. 525; 57 Pac. 140.

18. Code Civ. Proc., § 3375, provides that a witness is allowed to refresh his memory respecting a fact by anything written by himself or under his direction at the time when the fact occurred, or when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. *Held*, that a witness was properly allowed to refer to a memorandum of articles as shown in evidence by the sheriff's return, on which the witness, before the trial, had extended the unit and gross cost price obtained by taking the prices from his cost book and price lists kept by himself, and adding the freight and insurance apportioned by percentage.—Kipp v. Silverman, 25 Mont. 296; 64 Pac. 884.

19. In a prosecution for false pretenses, a question asked the person to whom the representations were made, as a witness,—whether he had not stated, and knew it to be a fact, that it had been represented to him prior to the time the representations by defendant were made that defendant was indebted to his brother,—was proper, as ambiguous and involving two interrogatories.—State v. Burrell, 27 Mont. 282; 70 Pac. 982.

20. It was error to strike out a voluntary statement made by defendant, not responsive to the question asked him, and irrelevant to the issues in the case.—Lisker v. O'Rourke, 28 Mont. 129; 72 Pac. 416, 755.

21. Where a question objected to and excluded had been previously answered, the refusal of the court to permit its repetition was not error.—Finlen v. Heinze, 28 Mont. 548; 73 Pac. 123.

22. A question asked in laying the foundation for the introduction of an account book, "whether or not this account book was kept in the regular course of business, and was made up at the time the items were purchased, or immediately thereafter," was merely prelimin-

ary, and within the sound discretion of the court to permit.—Hefferlin v. Karlman, 29 Mont. 139; 74 Pac. 201.

B. CROSS EXAMINATION AND RE-EXAMINATION, 23-47.

23. A defendant will not be permitted to make out his case by the cross examination of plaintiff's witnesses, where the examination in chief has not opened the door.—Fredericks v. Clark, 3 Mont, 258.

24. A witness who testified as to the amount of damage that results from the destruction of a certain thing, may be questioned in detail as to whether or not all conditions and circumstances which might affect the amount of such damage have been considered by him in stating his estimate.—Carron v. Wood, 10 Mont. 500; 26 Pac. 388.

25. In an action by a servant for personal injuries resulting from the incompetency of H, a co-servant, plaintiff called H as a witness stating that "the witness would refer to the time and place plaintiff fell, for the purpose of fixing the time and place of other events in connection with the case, and does not wish to make the witness his witness as to the acts he was doing at the immediate time of the fall." H then testified to facts connected with plaintiff's fall. *Held*, proper to allow H to be cross examined as to the entire case.—Jorgensen v. Butte M. C. Co., 13 Mont. 288; 34 Pac. 37.

26. Where several defendants are tried together for a crime, and each has separate counsel, it is error to limit the cross examination of the witnesses of the prosecution to one of the counsel for the defense.—State v. Davis, 13 Mont. 384; 34 Pac. 182.

27. Where plaintiff's direct examination in an action to recover possession of land and for the value of rents and profits related only to the stipulations of an agreement whereby certain lots were leased, questions as to plaintiff's information concerning the use which has been made of such lots were not proper cross examination.—McCormick v. Gliem, 13 Mont. 469; 34 Pac. 1016.

28. A defense of fraud and conspiracy is an affirmative one, which defendant is not entitled to establish on cross examination of plaintiff's witnesses.—Davis v. Morgan, 19 Mont. 141; 47 Pac. 798.

29. Where plaintiff was allowed to testify as to a matter on direct examination, it was prejudicial error to refuse to allow cross examination thereon, and then charge on the theory that the evidence was competent.—Mahoney v. Hardware Co., 19 Mont. 377; 48 Pac. 545.

30. A plaintiff suing for conversion of property, where his title is alleged to be fraudulent as against creditors, may be subjected to a rigid cross examination as to the bona fides of his ownership.—Pincus v. Reynolds, 19 Mont. 564; 49 Pac. 145.

31. It is not error to permit defendant to be cross examined as to whether he had not testified in a certain case as a mining expert, where he had stated on direct examination that he was not a mining expert.—Lawlor v. Kemper, 20 Mont. 13; 49 Pac. 398.

32. Where an officer of a company for which defendant, who was on trial under a criminal charge, had represented himself to be an agent, testified that defendant was not such agent at the time alleged, it was error to refuse to permit him to prove by such witness, on cross examination, that the company in question had, shortly before the time alleged, constituted as an agent a person who appeared to be one and the same person with defendant, acting under a different name.—State v. Dickinson, 21 Mont. 595; 55 Pac. 539.

33. On cross examination of a witness, a question whether he was not discharged from the army because of radical insanity and general imbecility is properly disallowed, since it does not tend to bring out the fact of his mental condition, but merely the opinion of others on that subject.—State v. Spotted Hawk, 22 Mont. 33; 55 Pac. 1026.

34. A witness for plaintiff (E. Gallick), who was in plaintiff's employ, testified that, on the day certain saloon property was sold and delivered to plaintiff, he suggested to plaintiff to put up "his" sign on the saloon to show his ownership, which was done. Afterwards an execution was levied on the property as belonging to the seller. There was evidence that after the levy, the sign was changed from "B" Gallick to "E" Gallick. *Held*, that it was proper, on cross examination, to ask the witness if he did not change the sign, both to contradict him and to show his interest.—Gallick v. Bordeaux, 22 Mont. 470; 56 Pac. 961.

35. Plaintiff, a purchaser of a saloon, who testified in chief that he put up his sign on the saloon immediately after the sale, may be cross examined as to whether he did not do so to defraud creditors of the seller.—Id.

36. On a trial for murder, it is permissible, on cross examination, to ask a witness to whom he paid rent, to identify him and test his credibility.—State v. Shadwell, 22 Mont. 559; 57 Pac. 281.

37. Where a witness for the state testified that the prosecuting witness had paid out money for drinks at a saloon before the alleged robbery was committed, it was competent on cross examination to show that the prosecuting witness had spent all his money before the robbery.—State v. McClellan, 23 Mont. 532; 59 Pac. 924.

38. Where the prosecuting witness testified on cross examination that he had been in jail, he may, on re-direct examination, explain the circumstances of his imprisonment.—Id.

39. Where, in an action on a note, defendants allege that the note is secured by a foreclosed mortgage, it is irregular to show such defense by cross examination of plaintiff's witnesses.—Brophy v. Downey, 26 Mont. 252; 67 Pac. 312.

40. Where, on cross examination of a witness, he is asked whether he had not at other times made statements inconsistent with his present testimony, it is not necessary that the times, places and persons present, be related to him; such facts being required only when a foundation is sought for impeachment.—State v. Burrell, 27 Mont. 282; 70 Pac. 982.

41. Where, on a prosecution for murder, a map of the room in which the affray took place was put in evidence by the state, and the accuracy of the map was disputed, it was error not to permit defendant to show, on cross examination of a witness who made the map, directions given to the witness by the county attorney as to its preparation.—State v. Tighe, 27 Mont. 327; 71 Pac. 3.

42. In an action to recover an alleged loan it appeared that plaintiff has been employed by defendant's firm, and had been paid a certain compensation, and that he had borrowed a certain sum of money from the firm, which he had afterwards repaid. Defendant sought to show by cross examination of plaintiff's wife that plaintiff's statements of the amount received by him for the labor was not true, and that plaintiff had secured $50 from defendant to send witness to Chicago, and at that time had no money. *Held*, improper cross examination.—Smith v. Shook, 30 Mont. 30; 75 Pac. 513.

43. Where a witness for defendant had testified that he had been in the penitentiary, and that he was then in jail, a question put to him on cross examination as to whether he was not in jail on a charge of holding up a saloon was not prejudicial, as not proper cross examination.—State v. Howard, 30 Mont. 518; 77 Pac. 50.

44. Where, on a prosecution for robbery, a witness on direct examination testified that he had been confined in the penitentiary, and that he had known defendant for about 15 months, and had observed his demeanor at the penitentiary, and that he thought defendant insane, questions put to him on cross examination for the purpose of showing that he was a member of the conspiracy which resulted in the robbery were improper, as exceeding the proper limits of cross examination.—Id.

45. Where a witness for defendant had testified that he had been in the penitentiary, and that he was then in jail, a question put to him on cross examination as to whether he was not in jail on a charge of holding up a saloon was not erroneous, as tending to degrade the witness.—Id.

46. Where certain witnesses for defendants in a prosecution for burglary testified that defendants resided with their mother in Centerville, it was not erroneous to allow them to be cross-examined as to whether or not defendants had been arrested in a house in Butte, or did not maintain a room there, as showing that they resided there instead of with their mother.—State v. Rodgers, 31 Mont. 1; 77 Pac. 293.

47. Where a notice filed by a party and testimony given by him are both before the court, it is not permissible to bring out, by a cross examination of the party, discrepancies between his testimony and the contents of the notice.—Norman v. Corbley, 32 Mont. 195; 79 Pac. 1059.

C. PRIVILEGE OF WITNESS, 48-51.

48. The provision of the bankrupt act that no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding does not prevent the introduction of evidence of incriminating circumstances obtained from sources other than the bankrupt, by reason of the fact that the knowledge of such sources was obtained from the bankrupt's testimony.—State v. Burrell, 27 Mont. 282; 70 Pac. 982.

49. Where a bankrupt, on examination before the referee, made no objection to testifying on the ground that his answers might incriminate him, he thereby waived his privilege, and any admissions made by him in such proceedings could be properly used on cross examination of defendant in a criminal proceeding against him.—Id.

50. Where defendant in a prosecution for false pretenses did not refuse to testify as to admissions made on his examination before a referee in bankruptcy, he waived his privilege to refuse to testify on the ground that his answers might incriminate him.—Id.

51. Where, in a prosecution for burglary a witness who was jointly indicted with defendant testified to having taken a fishing trip with defendant about the time of the burglary, questions on cross examination showing that the trip was for the purpose of committing robbery were improper, as tending to degrade and discredit the witness and defendant, though the witness answered in the negative.—State v. Rodgers, 31 Mont. 1; 77 Pac. 293.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION, 52-85.

A. In General, 52-56.
B. Character and Conduct of Witness, 57-65.
C. Interest and Bias of Witness, 66-68.
D. Inconsistent Statements by Witness, 69-81.
E. Contradiction and Corroboration of Witness, 82-85.

A. IN GENERAL, 52-56.

52. Where, in order to avoid a continuance for the purpose of taking depositions, a party admits that the witnesses would testify to the facts desired to be proved by them, he may reserve the right to impeach their testimony.—State v. Gibbs, 10 Mont. 212; 25 Pac. 289.

53. An instruction that if the testimony of a witness has been given under the influence of illwill towards a party, and any portion of it is untrue as to any material fact, it may be entirely disregarded, is erroneous, in failing to state that it must be knowingly and wilfully untrue, especially where there is nothing to show that the witness was actuated by illwill, but only that he was not friendly.—Bonnie v. Earll, 12 Mont. 239; 29 Pac. 882.

54. Under Code Civ. Proc., §§ 3377, 3380, authorizing a party to contradict his own witness by other evidence, and to ask him whether he had made other statements, the state, in a criminal prosecution, may cross examine its witness, where his testimony varies from what the county attorney had reason to believe it would be.—State v. Bloor, 20 Mont. 574; 52 Pac. 611.

55. Code Civ. Proc., § 3390, subd. 3, which provides that "a witness false in one part of his testimony is to be distrusted in others," requires the jury to distrust only a witness who wilfully swears falsely as to material matters.—Cameron v. Wentworth, 23 Mont. 70; 57 Pac. 648.

56. Code Civ. Proc., § 3390, subd. 3, requiring the jury to be instructed on all proper occasions that a witness false in one part of his testimony is to be disregarded in others, does not authorize such an instruction without limiting it to willful false statements as to material matters.—Ashley v. Telephone Co., 25 Mont. 286; 64 Pac. 765.

B. CHARACTER AND CONDUCT OF WITNESS, 57-65.

57. An impeaching witness in a criminal case may be cross examined the same as any other to discover the grounds and extent of his information.—Territory v. Paul, 2 Mont. 314.

58. Where defendant in a criminal case testified, it is proper, for the purpose of discrediting him, to ask him whether he has been convicted of a felony.—State v. Black, 15 Mont. 143; 38 Pac. 674.

59. It was proper to refuse to permit a witness to be asked, for the purpose of affecting her credibility, whether she was addicted to the morphine habit, unless it was intended to show that she was under the influence of the drug at the time the events happened about which she was testifying, or that her powers of recollection were impaired thereby.—State v. Gleim, 17 Mont. 17; 41 Pac. 998.

60. The prosecution has no right to examine defendant so as to elicit testimony reflecting on her moral character, where it was not proper

cross examination, and did not legitimately tend to impair her credibility.—Id.

61. It is improper to allow a witness on the part of the state to testify, over the objection of defendant, to the bad reputation of defendant and the good reputation of deceased, where such witness showed no more qualification to so testify than witnesses offered by the defendant whose evidence was excluded.—State v. Shafer, 22 Mont. 17; 55 Pac. 526.

62. On a trial for murder, defendant can prove that his general reputation for peacefulness was good, by witnesses who knew defendant, and lived in the community in which he lived, although they never heard defendant's reputation in that respect discussed.—Id.

63. The testimony of two witnesses to acts by accused constituting bribery is not impeached by that of six witneses from the localities where the two live, to the effect that they bore a bad reputation for truth, when the six are the political opponents of the two, and some of them had personal differences with the two, and others testified that they had a good opinion of the two until they testified to the bribery.—In re Wellcome, 23 Mont. 450; 59 Pac. 445.

64. Under Pen. Code, § 2078 and Code Civ. Proc., § 3379, providing that, when accused testifies in his own behalf he is subject to the same rules of impeachment as any other witness, the state can, after defendant has fully testified, impeach his testimony by showing that his general reputation for truth is bad.—State v. Schnepel, 23 Mont. 523; 59 Pac. 927.

65. Plaintiff, for the purpose of affecting the credibility of defendant's witness, may show that he was the active agent in procuring a person to negotiate with the judge on a former trial for a corrupt decision for defendant.—Finlen v. Heinze, 32 Mont. 354; 80 Pac. 918.

C. INTEREST AND BIAS OF WITNESS, 66-68.

66. Defendant's counsel, for the purpose of showing prejudice on the part of a state's witness, deceased's widow, against defendant, asked her if she had not said she would commit suicide if defendant was acquitted. *Held*, properly excluded, as it was immaterial whether or not she made the statement, especially as she had just admitted that she had ill feeling towards defendant.—State v. Jackson, 9 Mont. 508; 24 Pac. 213.

67. That the principal witness in disbarment proceedings against the accused was a brother lawyer, and secured his evidence in a reprehensible maner, by acting as a detective, and apparently entering into a criminal plan with accused, in order to expose him, does not, of itself, render his testimony incredible.—In re Wellcome, 23 Mont. 450; 59 Pac. 445.

68. Defendants in a criminal case, the evidence tending to show that a witness for the state, an ex-convict, is friendly to the prosecution and hostile to defendants, and that he was visited in the penitentiary by prosecuting witness and taken into his employ, should be allowed to ask him on cross examination questions showing his relations to prosecuting witness and his animus in the case.—State v. Broadbent, 27 Mont. 342; 71 Pac. 1.

D. INCONSISTENT STATEMENTS BY WITNESS, 69-81.

69. On a trial for murder it is not error to exclude evidence taken before the coroner, offered by defendant to impeach the state's witnesses, when such evidence was not identified in any way, nor presented to the witnesses sought to be impeached, to enable them to identify it, nor was it shown that, if admitted, it would have contradicted any witness in any material matter.—State v. Pugh, 16 Mont. 343; 40 Pac. 861.

70. Where defendant, on a trial for murder, relies on self defense for acquittal, it is competent to attack his credibility by proving statements by him out of court as to the self defense contrary to those made by him as a witness on a trial.—State v. Cadotte, 17 Mont. 315; 42 Pac. 857.

71. In a criminal case, in order to impeach a witness by statements in her testimony at the coroner's inquest, which was taken down in writing and signed by the witnesses, it is necessary, as required by Cod. Civ. Proc., § 3380, that the writing be shown the witness before being interrogated as to whether she made such statements.—State v. O'Brien, 18 Mont. 1; 44 Pac. 399.

72. Where, for the purpose of impeaching a witness, letters purporting to be written by him are introduced, it is both competent and material that he should be allowed to explain the circumstances under which the letters were written.—Kennelly v. Savage, 18 Mont. 119; 44 Pac. 400.

73. Without a contrary showing it will be presumed that the sworn and subscribed testimony of a witness given before a coroner's jury is all of his testimony given at that time, and hence he may be contradicted by it.—Mulville v. Pacific Mutual, 19 Mont. 95; 47 Pac. 650.

74. Under Code Civ. Proc., § 3380, a sufficient foundation is laid for the impeachment of a witness by asking him whether he did not, in a certain conversation, at a certain place, make statements to which his attention is then called. —State v. Spotted Hawk, 22 Mont. 33; 55 Pac. 1026.

75. Under Code Civ. Proc., § 3380, a witness having denied making statements at a coroner's inquest, the state was properly allowed to call another witness in rebuttal, who was present when such statement was claimed to have been made, and asked him whether the former witness made a certain statement just after he finished his testimony before the coroner.—State v. Hurst, 23 Mont. 484; 59 Pac. 911.

76. Where defendant has, as a witness, denied his guilt, he may, for the purpose of impeachment, be asked on cross examination if he did not make statements to the contrary.—State v. Broadbent, 27 Mont. 342; 71 Pac. 1.

77. Where defendant has, as a witness, denied his guilt, and on cross examination has denied making statements to the contrary, and stated that others, though made, were made under inducements, and were false, the person to whom they were alleged to have been made may, for the purpose of impeachment, on rebuttal, contradict him.—Id.

78. To the extent that testimony is admissible to impeach one defendant, testifying for himself and his co-defendant, his co-defendant is subject to be affected thereby.—Id.

79. The exclusion of impeaching evidence was not error where the offer of proof did not fix the time when the alleged conversation occurred, and no foundation was laid therefor in the examination of the witness sought to be impeached, as required by Code Civ. Proc., § 3380.—Tague v. John Caplice, Co., 28 Mont. 51; 72 Pac. 297.

80. A party can not impeach an opposing witness by introducing evidence contradictory of testimony elicited from him for the first time on cross examination.—Bullard v. Smith, 28 Mont. 387; 72 Pac. 761.

81. Under Code Civ. Proc., §§ 3379, 3380,

testimony of a witness that he had heard another witness state in a conversation that he had made a contract with plaintiff's brother for certain lumber was competent to impeach such witness's testimony that he had contracted with plaintiff for such lumber.—Michener v. Fransham, 29 Mont. 240; 74 Pac. 448.

E. CONTRADICTION AND CORROBORATION OF WITNESS, 82-85.

82. A certificate of the war department showing that a witness was discharged from the army because of mental imbecility is incompetent to discredit his testimony, being an ex parte statement by a person not shown to be qualified to pass on the matter.—State v. Spotted Hawk, 22 Mont. 33; 55 Pac. 1026.

83. It was not error to allow the state to ask defendant's witness a question on cross examination for the purpose of laying a foundation for his impeachment which was not germane to his direct testimony, since the state could have recalled the witness at any time for such purpose.—State v. Hurst, 23 Mont. 484; 59 Pac. 911.

84. Where the defendant's own testimony in itself, and without the aid of the testimony of the alleged accomplice, tends to connect defendant with the commission of the crime, such testimony is in law a sufficient corroboration of the alleged accomplice.—State v. Fisher, 23 Mont. 540; 59 Pac. 919.

85. Where plaintiff alleges a wrongful seizure of his goods in his agent's possession on an execution against his agent as owner thereof, letters of plaintiff ordering goods to be shipped and billed to the agent, with duplicate bills to himself, are not admissible in evidence, since such letters are at most extrajudicial declarations, consistent with plaintiff's statement under oath.—Kipp v. Silverman, 25 Mont. 296; 64 Pac. 884.

WORK AND LABOR.

1. In an action for work done for defendants in digging a well, where the complaint contains a quantum meruit count, it is error for the court to take the case from the jury and dismiss the suit, on the theory that the suit was on a contract under which plaintiffs were to be paid if they found water, and otherwise not.—Littrell v. Wilcox, 9 Mont. 97; 22 Pac. 503.

2. Where no commission is fixed in a contract for services for obtaining a purchaser for a mine, there may be a recovery on a quantum meruit.—Nyhart v. Pennington, 20 Mont. 159; 50 Pac. 413.

3. A plaintiff in assumpsit to recover an unpaid balance alleged that his assignor had "performed certain labor for and on behalf of defendant, and furnished to employees of defendant, at defendant's special instance and request," certain board and lodging. *Held*, that as defendant had not agreed to pay any specific sum, but simply to pay the amount of the account whenever ascertained, the complaint as to labor was insufficient in not stating that it was furnished at defendant's request, the clause in the complaint as to the board not being applicable to the clause as to the labor, and Code Civ. Proc., §§ 740, 778, providing that pleadings shall be liberally construed, not requiring the reading into pleading of an allegation which had been omitted therefrom.—Conrad v. Great Northern, 24 Mont. 178; 61 Pac. 1.

4. Civ. Code, § 2004, provides that a partial performance of an indivisible obligation extinguishes a corresponding proportion thereof if the benefit of such performance is voluntarily retained by the creditor, but not otherwise, and that, if such partial performance is of such a nature that the creditor can not avoid retaining it without injuring his property, his retention thereof is not presumed to be voluntary. *Held*, that where plaintiffs agreed with defendant for a certain sum to put a heating plant into a building, defendant having contracted to put it in, and plaintiffs abandoned the work without cause after a part of the plant had been put in, there being no severance of the contract nor apportionment of the consideration, they might not recover on a quantum meruit for the value of the work done and materials furnished.—Riddell v. Ventilating Co., 27 Mont. 44; 69 Pac. 241.

5. That after the action was commenced plaintiffs finished the work for the owner, who charged the work to defendant, was of no moment.—Id.

6. Where plaintiffs contracted in writing to haul and distribute along defendant's railroad 40,000 ties, for which plaintiffs were to be paid on the 15th of each month, and defendant failed to make payment for hauling as required, plaintiffs were entitled to refuse to make further deliveries, and sue at once on a quantum meruit for ties delivered.—Cook v. Railroad Co., 28 Mont. 509; 73 Pac. 131.

7. Where, in a suit on a quantum meruit for hauling ties, defendant claimed that the ties were delivered under an express contract which plaintiffs had not performed, and plaintiffs by replication admitted the making of such contract, but alleged that defendant had broken the same and that it was subsequently agreed that plaintiffs should receive extra pay for hauling ties an extra distance, evidence as to the number of ties hauled beyond the limit was not objectionable on the ground that the only contract pleaded in the complaint was the written contract referred to in the answer.—Id.

8. Where, in an action on a quantum meruit for hauling ties, defendant set up damages for delay and interruption of track laying, etc., particularly averring the year, month and days on which the delays occurred, questions asked in support of such counterclaim, not referring to the dates specified, were properly excluded.—Id.

9. Where suit was brought on a quantum meruit for ties delivered under a written contract which defendant had broken, evidence that plaintiffs had not hauled all of the ties required by such written contract was properly excluded.—Id.

10. Where, in an action to recover the wages of a watchman appointed to guard a certain railroad camp, the evidence would have warranted a finding that defendant's vice president and general manager had never agreed to pay for the watchman, and there was nothing to show how many days the watchman worked, etc., whether the amount sued for was a reasonable and proper allowance for his services was for the jury, and it was therefore error for the court to charge that if the jury believed the plaintiffs' evidence their verdict should be for plaintiffs in the amount sued for, and if they did not believe plaintiffs' evidence they should find for defendant.—Id.

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